Berger v Schwartz
2019 NY Slip Op 32289(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 151691/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ERIC BERGER

INDEX NO. 151691/16

MOT. DATE

- v -

MOT. SEQ. NO. 002

CAROLYN SCHWARTZ and SETH SCHWARTZ

The following papers were read on this motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).
Replying Affidavits NYSCEF DOC No(s).

This is a personal injury action arising from a slip and fall on ice. Defendants now move for summary judgment. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The motion is decided as follows.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff's accident occurred on January 5, 2014 at approximately 11:30am on the stairs in front of 3 Brookview Lane, Rye, NY (the "premises"). The premises are owned by the defendants. At the time of his accident, plaintiff testified at his deposition that he had left the house which he had been a guest at to retrieve a newspaper. After plaintiff left through the front door, he slipped and fell on ice which accumulated on the top step. When asked how he knew ice caused him to fall, plaintiff testified:

Dated: 7/31/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Q At the point in time when your left foot slid out from under you did you -- did you know it was, as a result of an accumulation of ice at that point in time?

A The only way I can answer this is by saying the only reason my foot would have slipped out from under me is if there was something slippery under me, and in the winter I would have to assume that was ice, if it was twenty-eight-something degrees out.

Q Okay. Well, do you -- do you know for certain what caused your foot to slip out was an accumulation of ice?

A Yes.

Q Okay. And how do you know that?

A There was no oil on the staircase. The staircase itself is -- is made of irregular slate and gives good traction, and so if I slipped on something in the winter, it would have been an accumulation of ice. I'm very agile -- or I was very agile.

Q Okay. So at any point before your accident did you inspect the step where your accident occurred where your foot slipped?

A No.

Q Okay. Did you ever observe with your eyes -- or did you ever see an accumulation of ice on that step?

A Afterwards?

Q Afterwards.

A Not after the accident.

Q Okay.

A Weeks or even months after the accident.

Q Okay.

A When I was recovering.

Q Okay. But either immediately before or immediately after did you ever -- did you ever observe an accumulation of ice which would lead you to believe that that's what you slipped on?

A Immediately before I was reaching for the railing, and immediately after I was flat on my back on the pavement. No, I did not inspect anything.

The top step was covered by an overhang, which plaintiff argues was in a defective condition, thereby causing the ice condition on the top step. Plaintiff hadn't entered or exited the house from the front door prior to his accident that weekend and testified that he rarely used the steps leading to the front door.

According to his bill of particulars, plaintiff alleges that defendants were negligent in their ownership, etc., of the premises by, *inter alia*, allowing and permitting "an accumulation of ice to remain on the [] stairs, so as to prevent safe passage over and along the same by pedestrians."

Meanwhile, Carolyn Schwartz testified at her deposition that she thought plaintiff told her he tripped and fell and that he had never said to her that he slipped on ice. Further, when Carolyn went outside the house after plaintiff's accident, she did not observe any ice on the stairs. Carolyn also testified that she had a contract with a non-party company to perform snow removal at the premises. Carolyn has provided a copy of an invoice for such work, which shows that the nonparty did not perform any snow/ice removal at the premises on January 4 or January 5, 2014.

Seth Schwartz was not living at the house at the time of plaintiff's accident.

Parties' arguments

In support of their motion, defendants argue that plaintiff cannot establish the existence of a dangerous condition which caused him to fall, and that even if he could establish an accumulation of ice on the stairs, there was a storm in progress and their duty to remove snow and ice had not yet commenced. Defendants have provided to the court the affidavit of John R. Scala, a certified consulting meteorologist.

In his affidavit, Scala maintains that based upon local climatological data, "that precipitation in the form of light freezing rain, mixing with sleet at times, was occurring in the vicinity of 3 Brook View Lane, Rye, New York, beginning in the morning at approximately 10:00 am and continuing into the afternoon, including at 12:00 PM on January 5, 2014." Scala further states that "Doppler radar imagery showed the precipitation was light and intermittent when it began at 9:52 AM on January 5, 2014 in the vicinity of 3 Brook View Lane. The radar data also confirmed the precipitation became steady by late morning."

Finally, defendants maintain that they have established they did not cause or create plaintiff's accident through the non-party snow removal contractor's invoice.

In turn, plaintiff maintains that his testimony is sufficient to demonstrate the existence of an icy condition on the stairs. Plaintiff argues that whether a storm was in progress is irrelevant, because the property "was in a state of disrepair" and it is undisputed that the stairs were not cleared of snow and ice. Plaintiff claims that the wooden overhang was in a rotten, deteriorated condition and that water from it dripped onto the steps below thereby causing ice to form. Finally, plaintiff's counsel questions Carolyn's credibility, regarding her testimony concerning the overhang. Specifically, plaintiff points to an email Carolyn forwarded to him with an estimate by a non-party contractor to perform certain work at the premises.

Discussion

Defendants' motion is granted for the reasons that follow. Plaintiff's testimony that ice accumulated on the steps is mere speculation. He freely admits that he only supposes he slipped due to ice because it couldn't have been oil as it was cold on the date of his accident. This testimony is insufficient to permit a factfinder to conclude that an ice condition existed on the steps on the date of his accident. Plaintiff never observed ice on the steps after his accident. Meanwhile, Carolyn testified that plaintiff told her he tripped and that she did not observe any defective or dangerous condition, including ice, on the stairs. On these facts, defendants are entitled to summary judgment dismissing the complaint. Relatedly, plaintiff cannot demonstrate actual or constructive notice of a defective condition.

Finally, defendants have established that a storm was in progress at the time of plaintiff's accident (see i.e. *Pipero v. New York City Transit Authority*, 69 AD3d 493 [1st Dept 2010] citing *Pippo v. City of New York*, 43 AD3d 303 [1st Dept 2007] ["[I]t is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in pro-

gress, and does not commence until a reasonable time after the storm has ended."]). In turn, plaintiff has failed to raise a triable issue of fact (*Pippo* at 304). Plaintiff's claim that the ice on the top stair was caused by water dripping from the overhang is speculative, since his claims on not based upon any admissible evidence (see i.e. *Autieri v. Longi*, 164 AD3d 1410 [1st Dept 2018]). In any event, the storm in progress rule applies since there is no testimony that water purportedly dripping from the overhang was not a natural product of the weather condition Scala's affidavit establishes (see i.e. *Fisher v. Kasten,* 124 AD3d 714 [2d Dept 2018]). Plaintiff has otherwise not provided any testimony about the condition of the front steps on the date of the accident or the days leading up to it. As defense counsel correctly contends, plaintiff's arguments about the purported work proposal is a red herring.

Accordingly, defendants' motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that defendants' motion for summary judgment is granted and plaintiff's complaint is severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 7/31/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.