

Ruland v 130 FG, LLC
2019 NY Slip Op 32774(U)
September 17, 2019
Supreme Court, New York County
Docket Number: 158908/2015
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

ROY RULAND,

Plaintiff,

- v -

130 FG, LLC,

Defendant.

-----X

130 FG, LLC

Plaintiff,

-against-

SAWA ENTERPRISES, INC, TOMOHIRO SATO, MAMAN
GROUP LLC

Defendant.

-----X

INDEX NO. 158908/2015

MOTION DATE 11/14/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595022/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for JUDGMENT - SUMMARY

In this action for personal injury, plaintiff claims that while walking with Frank Papa on January 24, 2015, he was caused to slip and fall on snow and ice on the sidewalk in front of 302 East 45th Street (subject premises), a property owned by defendant 130 FG, LLC. Plaintiff claims that they were walking slowly and looking down at the sidewalk when he suddenly "went down to the ground". According to plaintiff, it had snowed that day, but there was no sign of clearing in front of the subject premises. He says that the sidewalk was covered with a light layer, maybe one inch, of fresh snow. Mr. Papa testified that he saw plaintiff's feet come out from under him and saw plaintiff land hard on his left hip. Mr. Papa went to assist plaintiff and

saw that plaintiffs rolling on the ground had uncovered a part of the sidewalk, which was all covered in ice under the snow. Both plaintiff and Mr. Papa stated that it was “obvious that the ice had been there for some time because people’s foot prints were in the ice”. They testified that “the condition was somewhat clear and shiny but had lots of spots where it was dirty or walked on as well”.

Plaintiff testified that the area where he fell was regularly full of ice and that people on that sidewalk were forced to constantly walk on and compact the snow there, because defendant never cleared the sidewalk.

Plaintiff moves for summary judgment. In support of the motion, he submitted four affidavits from “witnesses” claiming to show that defendant is responsible for his injuries. Plaintiff submits the affidavit of Mr. Papa, who was an eyewitness to the incident. Also submitted is the affidavit of Maria Corredor, who is a witness as to notice and the conditions on the subject sidewalk in the week prior and the date of the accident. In addition, the affidavits of James Miley and Edward Yuresko are submitted as a witnesses as to notice and the conditions on the subject sidewalk in the week prior and the date of the accident.

Plaintiff asserts that all of the witnesses state that the subject sidewalk was constantly dangerous long after other buildings in the area had cleared their sidewalks. According to plaintiff they further state that the sidewalk in front of the subject building was full of ice for more than five days and up to a week before plaintiff fell. However, plaintiff’s co-worker, James Miley stated that “it was lightly snowing on the morning of the January 25, 2015”, the date and time that plaintiff fell.

The witnesses further state that there was no sand, gravel, or salt that was put down in front of the subject premises to prevent people from falling prior to plaintiffs fall. The witnesses testify that they had ever seen defendant place salt or sand in front of the subject premises.

Defendant also moves for summary judgment asserting that the “incontrovertible and certified weather reports from LaGuardia Airport and Central Park” demonstrate that a snow and ice storm was occurring and in progress at the time of plaintiff’s fall. Specifically, the report establishes that on the day of the accident, January 24, 2015, it was snowing from 2:00 a.m. until 11 a.m.

Defendant presents evidence that Tropical Storm Lola descended upon New York City on January 23, 2015 and continued to the early morning hours of January 24, 2015. This storm, according to report initially carried with it rain, before changing over to freezing rain and then snow as the storm progressed through New York City.

Defendant submits weather reports which establishes that during the period from January 1, 2015 through January 23, 2015, the only instance of snow before Tropical Storm Lola was the period of January 7, 201 through January 11, 2015. Defendant argues that the records fail to show any further snow or ice on the ground until the early morning hours of January 24, 2015, where the certified records detail that approximately 4.1 inch of snow and ice fell. Defendant states that during Tropical Storm Lola, light rain, freezing rain and/or sleet and snow fell. Prior to Tropical Storm Lola, the last recorded snow event occurred on January 9, 2015, when 1.9 inches of snow was recorded. Defendant concludes that it is entitled to summary judgment because there was an ongoing storm at the time of plaintiff’s fall and thus, it had no duty to clear the sidewalk of ice and snow at that time. Defendant asserts that even assuming that the storm

had finished earlier that morning the NYC Snow Removal Law specifically sets the parameters for when sidewalks must be cleared after snow stops falling.

Defendant also opines that given plaintiff's accident occurred at 7:45 a.m. either the snow and ice needed to be cleared by 11:00 a.m. (if the storm ended before 6:59 a.m.) or between 11:00 (if the storm ended before 6:59 a.m.), (if the storm ended after 7:00 a.m. but before 7:45 a.m.), or sometime after 11:45 a.m. (measuring from the cessation of the storm).

Defendant argues that in this matter, it is certainly not reasonable, nor is it expected, to require that a property owner engage the services of a janitorial watchdog to remedy any weather-related condition that arises during the night. For that reason, defendant asserts that the government established what they consider a fair and reasonable time frame by which a weather-related condition should be abated.

Defendant finally states that plaintiffs fall occurred due to a storm in progress and that, at the time of its occurrence, the defendant was under no legal obligation to commence remediation procedures because either the storm was still ongoing or a reasonable time after the cessation of the storm had not yet passed.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). The party moving for summary judgment must make a showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Winegrad v. New York Univ. Med. Ctr.* M NY2d 851 (1985). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Smalls v. AJI Indus. Inc.*, 37 AD3d 324 (2007). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce in

evidentiary form sufficient to establish the existence of material issues of fact that require a trial for resolution". *Giuffrida v. Citibank Corp.*, 100 NY2d 81 (2003).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v. Stop & Shop, Inc.*, 65 NY2d 625 (1985). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders Inc., v. Ceppos*, 46 NY2d 500 (1978).

Summary judgment in a snow or ice case is proper where a defendant demonstrates, through climatological data and expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident. (*Massey v. Newburgh TV. Realty, Inc.*, 84 AD3d 564 (2011)).

For plaintiff to defeat defendant's summary judgment motion premised upon the "storm in progress" defense and support its claim that it was not precipitation from the ongoing storm which caused plaintiff's fall, plaintiff has the burden of producing admissible evidence that the ice which caused plaintiff's slip and fall existed prior to the storm in progress, and that defendant had actual or constructive notice of the hazard. *Pacelli v. Pinsley*, 267AD2d 706 (1999); *Spicer v. Estate of Ondek*, 60 AD3d 1234 (2009).

In the case at bar, plaintiff has failed to submit any proof in the form of a sworn statement from a meteorologist, weather bureau or records from any expert that there was no storm in progress at the time of his fall. Plaintiff submitted only his affidavit and that of his friend who

stated that there was no storm. The other affidavits submitted by plaintiff from persons who were notice witnesses did not address this issue.

Defendant, however, submitted certified weather reports from LaGuardia Airport and Central Park showing that a snow and ice storm was occurring and in progress at the time of plaintiff's fall. Defendant also submits weather reports establishing that that the last recorded snow event occurred on January 9, 2015 when plaintiff's fall occurred on January 23, 2015.

Here there is no credible conflicting evidence of the condition of the sidewalk at the time of plaintiff's fall. The evidence shows that plaintiff's fall occurred during the snowstorm. Even when viewing the evidence in the light most favorable to plaintiff, there are no factual issues to be decided by this Court. Thus, defendant's motion for summary judgment is granted and plaintiff's cross-motion is denied.

This is the decision and order of the Court.

HON. W. FRANC PERRY, III
J.S.C.



W. FRANC PERRY, J.S.C.

9/17/2019

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: