

**Dorsey v Stillman Mgt. Inc.**

2019 NY Slip Op 33360(U)

September 26, 2019

Supreme Court, New York County

Docket Number: 650804/2016

Judge: David Benjamin Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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DARLENE DORSEY,

Plaintiff,

- v -

STILLMAN MANAGEMENT INC., 82-90 CARYL AVENUE
OWNERS CORP, SKYWORX CONTRACTING INC

Defendant.

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INDEX NO. 650804/2016
MOTION DATE 03/18/2019
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY

Defendants' Stillman Management Inc. and 82-90 Caryl Avenue Owners Corp. motion for summary judgment is granted. The following facts are not in dispute. Plaintiff lives at 90 Caryl Avenue, Yonkers, New York. She has lived there for 22 years. Both plaintiff and her mother have served on the Co-Op board. Plaintiff lives on the first floor of the building and has a window view of the sidewalk abutting her building. At the time of the incident, there was scaffolding that had been erected in October of 2015 above the sidewalk, abutting her building.

On January 21, 2016, a winter storm produced about 20.5 inches of snow in Yonkers. The precipitation had stopped that day. Following the storm, the building superintendent cleared the sidewalk with a snow blower and applied salt around the sidewalk of 90 Caryl Avenue. Over the next six days there was no precipitation. For several days following the snow storm, the weather was above freezing during the day and below freezing at night. On January 27th, there was no precipitation, and the temperature remained above freezing until 7:30pm. Any meltwater would have frozen by 9:30pm on January 27th, 2016. On January 28th, plaintiff was walking her

dog around 8:00am. She was looking down when she slipped and fell, on what she called, a clear patch of ice on the sidewalk abutting 90 Caryl Avenue. Plaintiff did not see the patch of ice until she was on the ground.

The location in which plaintiff fell was right outside of the entrance to her building. Prior to plaintiff's fall, there had been no complaints about ice, snow removal, or water dripping from the scaffold. It is uncontested that no one had knowledge of a previous fall on this sidewalk. Between the snow storm on January 21, 2016 and plaintiff's fall, plaintiff walked on this sidewalk multiple times.

Defendants argue that summary judgment should be granted because they did not cause or create the ice upon which plaintiff slipped, nor did they have any actual or constructive notice of the condition. Defendants further argue they did not create the condition because they had removed the snow with a snow blower and salted the area following the snow storm, and there was no precipitation before plaintiffs fall following the snow storm. Defendants argue they could not have had actual or constructive notice by relying on the deposition of plaintiff in which she states that she did not see the ice as she was looking down, and the ice only became visible once she was on the ground. Defendants support their argument that they lacked actual or constructive notice through the affidavit of superintendent Burgos, in which he stated that he received no complaints about snow removal or ice the week after the snow fell and his testimony that he plowed and salted the sidewalk regularly, including this instance. Plaintiff argues that there is a triable issue of fact whether defendants had notice of the condition on the sidewalk as plaintiff claims that she saw water dripping from the scaffolding in the location of the accident on several occasions. Plaintiff also included the affidavit and report of meteorologist George Wright to further her theory that meltwater fell from the scaffold to create a patch of ice on the sidewalk. In

support of the claim that water fell from the scaffolding, plaintiff submitted a photograph of the sidewalk where she fell showing a wet area underneath the scaffolding.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). The moving party must establish a prima facie case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party (*Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). The proponent of a summary judgment motion makes a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its prima facie entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

For a defendant to establish a prima facie case for an icy condition, it must establish it neither caused, “created nor had actual or constructive notice of the alleged hazardous icy condition” (*Keita v City of New York*, 129 AD3d 409, 410 [1st Dept 2015]; *Pena v City of New York*, 161 AD3d 522, 522 [1st Dept 2018]; *Spinoccia v Fairfield Bellmore Ave., LLC*, 95 AD3d 993 [2d Dept 2012]). A general awareness of dangerous condition that may be present in the general area is not necessarily legally sufficient to charge defendant with constructive notice of the actual spot where a plaintiff falls (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Defendants have met their burden of establishing a *prima facie* basis that they did not create a dangerous condition. Plaintiff, herself stated at her deposition that Superintendent Burgos removed the snow after the storm on January 21, 2016, and recalled salt being applied. Similarly, it is undisputed that after the snow was removed on January 21, 2016 there was no more precipitation. Superintendent Burgos testified that he regularly inspected the sidewalk for icy conditions, and plows, shovels, salts, and sands the sidewalk as necessary. In his 26 years of being superintendent at the property in question nobody had ever fallen. In his affidavit, he states that there was never a recurring ice condition on the sidewalk.

Similarly, defendants have met their burden of proving that they did not have actual or constructive notice of an icy condition. In addition to the testimony that defendants have no knowledge of anyone having previously ever fallen on the sidewalk, Superintendent Burgos also stated in his affidavit that he had never, including following the snow storm and prior to plaintiff's fall, received any complaints about snow or ice removal on the sidewalk abutting the premises. Indeed, plaintiff admitted in her deposition that neither she, nor anyone she knew ever complained about the snow removal practices, nor does she know of anyone else who ever fell from ice or snow. Thus, defendant has established a *prima facie* basis for summary judgment and the burden shifts to plaintiff to raise a genuine issue of fact.

Plaintiff fails to raise a triable issue of fact. First, plaintiff fails to raise any issue as to notice as she admitted that prior to her actual falling, she never saw ice at that location. Failure of a plaintiff to see the ice upon which it slips, can establish a lack of notice to defendant (*Tompa v 767 Fifth Partners, LLC*, 113 AD3d 466 [1st Dept 2014][ the hazardous condition was not "visible and apparent" so as to enable defendant's employees to discover it and take remedial measures]; *Slates v New York City Housing Authority*, 79 AD3d435, 13 [1st Dept 2010]; *Killeen*

*v Our Lady of Mercy Medical Center*, 35 AD3d 205 [1st Dept 2006]). Here, plaintiff testified that although she was looking down, she did not see the ice that she slipped on until after her fall.

Plaintiff tries to create an issue of fact, by stating for the first time in an affidavit submitted in opposition to this motion, “that she saw water falling from the scaffolding several times in the five (5) to six (6) days immediately prior to the accident. However, said statement does not create an issue of fact. First, contrary to counsel’s arguments plaintiff does not state that she saw water falling from the scaffolding in the location of the accident on other occasions. Rather, plaintiff makes a general statement that she observed water fell from the scaffolding on other occasions. The statement contains no reference to the location of where the water was falling, and certainly no statement that water was falling at the location of her accident on other occasions. Moreover, even if the water did fall near the location of the plaintiff’s accident, there is still no evidence that ice ever formed in that location. General awareness that water can turn to ice is legally insufficient to constitute constructive notice of a condition that causes plaintiff to fall, especially if ice had never formed like that in the area of the accident before (*Yery Suh v Fleet Bank, N.A.*, 16 AD3d 276 [1st Dept 2005]; *Carricato v Jefferson Valley Mall Ltd. Partnership*, 749 NYS2d 575, 576 [2d Dept. 2002]; *see also Gordon*, 67 NY2d at 838)). Furthermore, during the entire week after the storm there were no complaints about water falling and causing icy conditions, or any icy conditions under the scaffolding, that would have put defendants on notice. The report of the meteorologist is without consequence as there is no evidence that defendant created, knew or should have known about any meltwater, or the ice slipped on plaintiff.

Plaintiff’s attempts to categorize the scaffolding as defective and the cause of water accumulating that ultimately froze and led to plaintiff’s fall also fails. Plaintiff has not included

an expert affidavit opining as to how the scaffolding might have been defective or created a dangerous condition. Even if an expert's affidavit had been included, merely allowing water to drip off a scaffold does not violate any accepted industry standards or practices and thus fails to show a defect creating a dangerous condition (*McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010]). Similarly, while a defendant may be charged with constructive notice of a hazardous condition if it is proven that there was a recurring condition of which the defendant has actual notice, the fact that water drips down from a scaffold does not establish a recurring icy condition on the ground, especially in light of Superintendent Burgos affidavit that there was no recurring ice problem on the sidewalk before (*Roman v Met Paca II Associates L.P.*, 85 AD3d 509 [1st Dept 2011]).

For the same reason, plaintiff's attempt to analogize this action to *Mondello v DiStefano* (16 AD3d 637 [2d Dept 2005]) fails. In *Mondello*, the Court found that the proof submitted raised triable issues of fact whether defendant had actual knowledge of a recurrent dangerous condition and therefore could be charged with constructive notice of each specific reoccurrence of that condition (*id.* at 639). Here, defendants have established their *prima faice* burden that they did not have constructive knowledge. None of the proof, including the undated photograph that merely shows a wet area (and not ice) in the location of plaintiff's accident, raises an issue of material fact in dispute. Accordingly, it is

ORDERED that defendants' Stillman Management Inc. and 82-90 Caryl Avenue Owners Corp. motion to dismiss is granted.

ORDERED that plaintiff may proceed on its previously ordered trial on damages as against defendant Skyworx Contracting Inc. forthwith before the Court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

9/26/2019  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

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|-----------------------|---|---------------------------------|--|------------------------------------|
| CHECK ONE:            | <input checked="" type="checkbox"/> CASE DISPOSED   | <input type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input checked="" type="checkbox"/> GRANTED         |                                 | <input type="checkbox"/> GRANTED IN PART       |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER               |                                 | <input type="checkbox"/> SUBMIT ORDER          |                                    |
|                       | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN |                                 | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

**HON. DAVID B. COHEN  
J.S.C.**