Takhalov v Quality & Ruskin Apts. Corp.
2019 NY Slip Op 33794(U)
November 1, 2019
Supreme Court, Queens County
Docket Number: 713126/17
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

ARKADIY TAKHALOV,

Plaintiff,

-against-

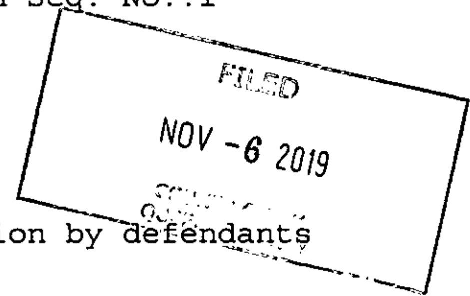
QUALITY & RUSKIN APARTMENTS CORP. and ARGO REAL ESTATE LLC,

Defendants.

Index No.: 713126/17

Motion Date: 9/18/19

Motion Seq. No.:1



The following numbered papers read on this motion by defendants for summary judgment dismissing the complaint

	PAPERS E-FILE NUMBERED
Notice of Motion-Affidavits-Exhibits..........	14 - 32
Answering Affidavits-Exhibits.................	34 - 35
Replying Affidavits...........................	36 - 37

Upon the foregoing papers it is ordered that this motion is determined as follows.

The plaintiff was allegedly injured on December 11, 2014 at approximately 8:10 a.m. when he slipped and fell on ice on exterior stairs as he was leaving his home at the building complex located at 105-24 67th Ave., Forest Hills, NY.

The defendants move for summary judgment dismissing the complaint contending that the storm in progress rule applied, that they did not have notice of the icy condition which allegedly caused plaintiff's fall nor did they have sufficient time prior to the accident to discover and remedy the condition.

A defendant moving for summary judgment in an action based upon a slip-and-fall on snow and ice has the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition (see Brandimarte

v Liat Holding Corp. 158 AD3d 664, 665 [2018]; Talamas v Metropolitan Transp. Auth., 120 AD3d 1333, 1334 [2014]). This burden may be satisfied by presenting evidence to demonstrate that there was a storm in progress when the injured plaintiff allegedly slipped and fell (see Brandimarte v Liat Holding Corp., supra; Smith v Christ's First Presbyt. Church of Hempstead, 93 AD3d 839, 839-840 [2012]; Meyers v Big Six Towers, Inc., 85 AD3d 877 [2011]; Sfakianos v Big Six Towers, Inc., 46 AD3d 665 [2007]). Under the 'storm in progress' rule, a property owner will not be held liable for accidents occurring as a result of the accumulation of snow and ice on its premises until a sufficient period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm (see Solazzo v New York City Tr. Auth., 6 NY3d 734 [2005]; Dumela-Felix v FGP W. St., LLC, 135 AD3d 809, 810 [2016]; McCurdy v KYMA Holdings, LLC, 109 AD3d 799, 799-800 [2013]; Smith v Christ's First Presbyt. Church of Hempstead, 93 AD3d at 840; Weller v Paul, 91 AD3d 945, 947 [2012]). A temporary lull or break in the storm at the time of the accident would not necessarily establish a reasonable opportunity to clear away the hazard Fenner v 1011 Route 109 Corp., 122 AD3d 669, 670 [2014]).

In support of the motion defendants submitted the deposition testimony of their resident superintendent, Mr. Jawornicki and the plaintiff and the affidavit of Howard Altschule defendants' expert meteorologists' affidavit Curriculum Vitae and the certified Climatologic Data upon which he based his opinion.

Mr. Altschule asserts that the certified climatologic data he reviewed revealed that there was no snow or ice present on the ground prior to the onset of a "powerful winter storm" that moved slowly up the coast and affected the subject area. It began on December 9, 2014 with short lulls and ended at about 12:00 p.m. on December 11, 2014. He further set forth the amount of precipitation, ground and air temperatures and total accumulation at various times on those three days. In addition, he reported that at the National Weather Service in Upton, N.Y. issued two "Special Weather Statements" first one at 12:26 a.m. on December 11, 2014 and a second one at 7:00 a.m. warning that light to moderate snow will continue to move across the area with light accumulations and warned that "black ice" can be expected to develop this morning due to sub-freezing temperatures together with residual moisture and new snowfall. Based upon his analyses of the data, he opined that since there was no ice or snow present on the ground prior to the onset of this storm, the "clear" ice on which plaintiff slipped and fell was the result of the winter storm which was still in progress at the time of

plaintiff's fall.

Plaintiff testified that he resided at the property and exited via the rear entrance of the building at about 8:10 a.m. on December 11, 2014 and there was no rain or snow falling at the time. He testified that he was attempting to descend the exterior stairs and when he stepped on the first step his foot slipped and he fell down the entire six steps. After he fell he saw that there was a sheet of "clear" ice on all the steps, which he testified he did not see at any time before he fell. He further testified that no other condition of the stairs contributed to or caused his fall.

Mr. Jawornicki testified in relevant part as follows. He is the superintendent for the entire twelve building complex covering two blocks which includes 105-24 67th Ave. Although he resides at the complex, he does not reside in the same building as the plaintiff. He also testified that there are four handymen, and six porters employed at the complex. One porter is assigned for every two buildings and work 5 days/week from 8:00 a.m. through 5:00 p.m. and sometimes work overtime. However, there is a porter present seven days a week. Porters are responsible for, inter alia, snow and ice removal. He further testified that when it snows they begin snow removal immediately in view of the large area of the complex. He testified that on the morning of December 11, 2014 at about 8:00 a.m. he received a call from his secretary, who also lived in the plaintiff's building, informing him that as she was leaving the building she observed a person sitting on the last step of the exterior stairs and asked that someone be sent to see what happened. He sent Mr. Yaskolkowski, who was employed as a mason at the premises.

Here, the defendants established, prima facie, their entitlement to summary judgment as a matter of law by demonstrating that the clear ice that allegedly caused the plaintiff to fall developed as a result of precipitation that fell during a winter storm that began on December 9, 2014 and was still ongoing at the time of the plaintiff's fall despite a lull in the storm (see Sherman v New York State Thruway Auth., 27 NY3d 1019, 1021 [2016]), that the defendants did not create or have actual or constructive notice of the existence of the clear ice nor did they have a sufficient time to discover and remedy the condition (see Wei Wen Xie v Ye Jiang Yong, 111 AD3d 617, 618-619 [2013]; Smith v Christ's First Presbyt. Church of Hempstead, supra; Espinell v Dickson, 57 AD3d 252 [2008]; see also Yannotti v Four Bros. Homes at Heartland Condominium I, 24 AD3d 659, 660 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact.

Initially, the climatological analysis report of Thomas M. Else, plaintiff's alleged expert Meteorologist, was not considered since it was not submitted in admissible form (see Grasso v Angerami, 79 NY2d 813 [1991]; Brandimarte v Liat Holding Corp. supra at 665; Wei Wen Xie v Ye Jiang Yong, supra) and certification did not cure this defect (see CPLR 2106; see also Washington v Mendoza, 57 AD3d 972 [2008].

Plaintiff concedes that there was a storm which started at some point on December 9, 2014 and continued through December 10, 2014 into the early morning hours of December 11, 2014 as a result of which ice formed on the subject stairs between 2:15 - 4:00 a.m. on December 11, 2014. Plaintiff, relying on Powell v MLG Hillside Assoc., 290 AD2d 345, 345-346 (2002) contends, however, that the "storm in progress" defense is not applicable where, as here, only trace amounts of non-accumulating snow fell after 4:00 a.m. on December 11, 2014. Plaintiff further asserts that under the circumstances the defendant had a duty to discover and remedy the condition and issues of fact exist as to whether the resident superintendent should have taken steps to discover and remedy the icy condition which arose during the night between.

Counsel's argument is without merit. The court in Powell stated that "Of course, if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied [emphasis added](Powell v MLG Hillside Assoc., supra). In this case, however, the storm had not passed and there was merely a lull (see Zima v North Colonie Cent. School Dist., 225 AD2d 993 [1996]; Micheler v Gush, 256 AD2d 1051, 1052[1998]). "Even a temporary lull or break in the storm at the time of the accident would not necessarily establish a reasonable opportunity to clear away the hazard" (Powell v MLG Hillside Assoc., at 345 citing Krutz v Betz Funeral Home, 236 AD2d 704 [1997], lv denied 90 NY2d 803 [1997]).

Accordingly, defendants' motion is granted and the complaint is dismissed.

Dated: ~~October~~ Nov / , 2019
D#60

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J.S.C.

FILED
NOV -6 2019
COUNTY CLERK
QUEENS COUNTY