Jimenez v Crawford
2019 NY Slip Op 33830(U)
December 16, 2019
Supreme Court, Suffolk County
Docket Number: 16-7676
Judge: David T. Reilly

SHORT FORM ORDER

COPY

INDEX No. 16-7676
CAL. No. 18-01999OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 3-15-19
ADJ. DATE 7-10-19
Mot. Seq. # 001 - MG; CASEDISP

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JAVIER JIMENEZ,

Plaintiff,

- against -

PETER A. CRAWFORD and HELEN L. CRAWFORD,

Defendants.

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Upon the following papers numbered 1 to 64 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 55 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 56 - 62 ; Replying Affidavits and supporting papers 63 - 64 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff Javier Jimenez commenced this action to recover for personal injuries he allegedly sustained as a result of a slip-and-fall accident that occurred during his employ as a delivery person for nonparty Paraco Gas on February 28, 2015. The accident allegedly occurred when plaintiff slipped and fell on snow and ice outside of the home owned by defendants Peter Crawford and Helen Crawford. Plaintiff alleges that defendants were negligent in, among other things, failing to maintain the subject premises in a reasonably safe condition.

Defendants now move for summary judgment dismissing the complaint. They argue that, among other things, they had no duty either to keep the street in front of the subject premises free from snow or ice, or to keep their yard free from snow or ice. They also contend that the allegedly dangerous condition was open and obvious, and not inherently dangerous, and that defendants had no notice of the allegedly

dangerous condition. In support of their motion, defendants submit, *inter alia*, the deposition testimony of the parties and of Vasilios Petratos, and a copy of the employee incident report. In opposition, plaintiff argues that defendants have failed to eliminate triable issues of fact as to whether they created or had constructive or actual notice of the allegedly dangerous condition, and that his purported admission in the employee incident report is inaccurate.

According to plaintiff's deposition testimony, the accident occurred as he was walking across defendants' front yard to his parked vehicle after delivering gas to the subject premises. Plaintiff allegedly walked across the front yard to the gate located on the left side of the front of the subject premises to access defendants' gas tanks before the accident occurred. He testified that there was no sidewalk from the street to that particular gate. The front yard allegedly was completely covered with snow at the time of the incident. Plaintiff testified that he slipped and fell approximately 15 feet from the curb. In the errata sheet attached to the transcript of plaintiff's deposition testimony, plaintiff states that the accident occurred approximately 10 or 15 feet away from the curb, and explains that his testimony was incorrectly translated. Plaintiff testified that he returned to Paraco Gas' office, located in Bay Shore, New York, where he completed an employee incident report on the date of the incident.

Mr. Crawford testified that prior to the accident, there was a snowfall of at least eight inches, which occurred during the first week of February of 2015. He stated that he did not recall another snowfall taking place prior to the accident. He testified that he never cleared any of the snow between the roadway and the gate located to the left of his home between the first snowfall of February and the date of the accident. He then clarified that he always would clear the snow around the opening swing of the gate. According to Mr. Crawford's testimony, the Town of Brookhaven plowed snow from the roadway to the area adjacent to the curb. Mr. Crawford testified that the snow pile was at least 24 inches in height, and that it extended at least three or four feet into the roadway and approximately at least one foot into the grassy area adjacent to the curb.

According to Mr. Crawford's testimony, he did not have a contract with any particular gas provider at the time of the incident. Paraco Gas allegedly never provided him with any written guidelines about what was expected of homeowners before a delivery was made. Mr. Crawford stated that prior to the incident, he did not recall who last called Paraco Gas for a delivery, or when such a call was made. An exact delivery date allegedly was never provided to him before a delivery was made. Mr. Crawford testified that he was not aware that a gas delivery was going to take place on the date of the accident.

Mrs. Crawford stated that there was approximately one foot of snow accumulated on the front lawn on the date of the accident. She testified that there were no walkway leading from the front of her home to the gate located on the left side of the front of subject premises. She further testified that access to this particular gate from the home required traversing the grassy lawn in front of the house. According to her testimony, Mrs. Crawford never received any written notices from Paraco Gas regarding creating a clear path. She allegedly never saw plaintiff at the subject premises on the date of the incident.

Vasilios Petratos testified that he worked as Paraco Gas' regional transportation manger of Long Island at the time of the incident. Petratos clarified that he was plaintiff's supervisor on the date of the accident. Petratos stated that customers were required to sign an agreement before opening an account with Paraco Gas, and that it was the customer's responsibility to clear a path for the delivery person to access a gas tank for delivery. According to Petratos' testimony, in the case that an impediment to delivery existed, including snow or ice, the delivery driver may chose not to complete the delivery at that time, and either the delivery department would contact the customer by phone, or a written notice would be sent to the customer.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Liability for a dangerous condition on real property ordinarily must be predicated on ownership, occupancy, control, or special use of the property (*see* ***Arshinov v GR 10-40, LLC***, 176 AD3d 1019, 108 NYS3d 892 [2d Dept 2019]; ***Dalpiaz v McGuire***, 176 AD3d 779, 107 NYS3d 890 [2d Dept 2019]; ***Reeves v Welcome Parking Ltd. Liab. Co.***, 175 AD3d 633, 107 NYS3d 371 [2d Dept 2019]). A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Pilgrim v Avenue D Realty Co.***, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]; ***Chang v Marmon Enters., Inc.***, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]). A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the allegedly dangerous condition, and that it did not have actual or constructive notice of its existence (*see* ***Pilgrim v Avenue D Realty Co.***, *supra*; ***Barron v Eastern Athletic, Inc.***, 150 AD3d 654, 53 NYS3d 689 [2d Dept 2017]; ***Torre v Aspen Knolls Estates Home Owners Assn., Inc.***, 150 AD3d 789, 54 NYS3d 84 [2d Dept 2017]). A defendant has constructive notice of a dangerous condition on its premises when the condition is visible and apparent, and has existed for a sufficient length of time to afford it a reasonable opportunity to discovery and correct the dangerous condition (*see* ***Fortune v Western Beef, Inc.***, ___ AD3d ___, 2019 NY Slip Op 08656 [2d Dept 2019]; ***Williams v Island Trees Union Free Sch. Dist.***, ___ AD3d ___, 2019 NY Slip Op 08443 [2d Dept 2019]; ***Gani v Avenue R Sephardic Congregation***, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (*see* ***Coelho v S & A***

Neocronon, Inc., ___ AD3d ___, 2019 NY Slip Op 08652 [2d Dept 2019]; ***Falco-Averett v Wal-Mart Stores, Inc.***, 174 AD3d 506, 101 NYS3d 642 [2d Dept 2019]; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]).

However, there is no duty to protect or to warn against an open or obvious condition on the property that is not inherently dangerous as a matter of law (*see* ***Robbins v 237 Ave. X, LLC***, ___ AD3d ___, 2019 NY Slip Op 08237 [2d Dept 2019]; ***Sarab v BJ's Wholesale Club***, 174 AD3d 933, 103 NYS3d 307 [2d Dept 2019], *lv denied* ___ NY2d ___, 2019 NY Slip Op 84850 [2019];***Cerrato v Jacobs***, 173 AD3d 1134, 103 NYS3d 557 [2d Dept 2019]). A condition is open and obvious where it is readily observable by those employing the reasonable use of their senses, based on the circumstances at the time of the accident (*see* ***Robbins v 237 Ave. X, LLC***, *supra*; ***Ochoa-Hoenes v Finkelstein***, 172 AD3d 1080, 101 NYS3d 81 [2d Dept 2019]; ***Davidoff v First Dev. Corp.***, 148 AD3d 773, 48 NYS3d 755 [2d Dept 2017]). The question of whether a condition is open and obvious generally is a question for the fact finder to resolve (*see* ***Robbins v 237 Ave. X, LLC***, *supra*; ***Davidoff v First Dev. Corp.***, *supra*; ***Simon v Comsewogue Sch. Dist.***, 143 AD3d 695, 39 NYS3d 180 [2d Dept 2016]). Proof that a dangerous condition is open and obvious does not preclude a finding of negligence, but is relevant to the issue of the plaintiff's comparative negligence (*see* ***Karpel v National Grid Generation, LLC***, 174 AD3d 695, 106 NYS3d 99 [2d Dept 2019]; ***Kastin v Ohr Moshe Torah Inst., Inc.***, 170 AD3d 697, 95 NYS3d 292 [2d Dept 2019]; ***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]). Accordingly, a defendant moving for summary judgment must establish, prima facie, that the alleged condition was open and obvious, and not inherently dangerous to be entitled to summary judgment dismissing the claim sounding in premises liability (*see* ***Karpel v National Grid Generation, LLC***, *supra*; ***Erario v Wen Shirley, LLC***, 169 AD3d 770, 91 NYS3d 899 [2d Dept 2019]; ***Crosby v Southport, LLC***, *supra*).

Contrary to defendants' contention, they failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint based on the location of accident. Defendants failed to eliminate triable issues of fact as to whether they owned, operated, maintained, or controlled the area of the subject premises where plaintiff fell (*see* ***Cohen-Kieck v Metropolitan Transp. Authority***, 137 AD3d 1193, 28 NYS3d 446 [2d Dept 2016]; ***Riccardi v County of Suffolk***, 110 AD3d 864, 972 NYS2d 718 [2d Dept 2013]). While defendants may use plaintiff's admission in the employee incident report that the accident occurred in the street (*see* ***Benedikt v Certified Lbr.***, 60 AD3d 798, 875 NYS2d 526 [2d Dept 2009]; ***Pittman v S. P. Lenox Realty, LLC***, 49 AD3d 621, 855 NYS2d 182 [2d Dept 2008]; ***Rosenblatt v Venizelos***, 49 AD3d 519, 853 NYS2d 578 [2d Dept 2008]), the relative weight to be accorded to the admission in light of plaintiff's counsel subsequent explanation included in his affirmation in opposition, and plaintiff's deposition testimony is to be determined by the fact finder (*see* ***Wein v Robinson***, 92 AD3d 578, 939 NYS2d 364 [1st Dept 2012]; ***Fravezzi v Koritz***, 295 AD2d 290, 744 NYS2d 669 [1st Dept 2012]; ***Imamkhodjaev v Kartvelishvili***, 44 AD3d 619, 843 NYS2d 160 [2d Dept 2007]). Notably, plaintiff disputes the accuracy of the purported admission in the employee incident report in his opposition papers (*see* ***Wein v Robinson***, *supra*; ***Imamkhodjaev v Kartvelishvili***, *supra*).

Nonetheless, defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint. Even assuming *arguendo* that the accident occurred in the location of the

subject premises indicated by plaintiff's deposition testimony, defendants demonstrated, prima facie, that they did not owe a duty to plaintiff to shovel or to otherwise remedy the snow or ice condition on the grassy lawn, which was not designed to be a passageway (*see* ***Grosskopf v Beechwood Org.***, *supra*; ***Belo-Osagie v Starrett City Ass'n***, 41 AD3d 521, 836 NYS2d 441 [2d Dept 2007]; ***Corbisiero v Hecht***, 17 AD3d 396, 792 361 [2d Dept 2005]; ***Wesolowski v Wesolowski***, 306 AD2d 402, 760 NYS2d 886 [2d Dept 2003]). Moreover, defendants demonstrated that plaintiff elected to traverse the grassy lawn which was covered by snow. A worker who "confronts the ordinary and obvious hazards of his [or her] employment, and has at his [or her] disposal the time to enable him [or her] to proceed safely . . . may not hold others responsible if he [or she] elects to perform his [or her] job so incautiously as to injure himself [or herself]" (***Ochoa-Hoenes v Finkelstein***, *supra*, quoting ***Abbadessa v Ulrik Holding***, 244 AD2d 517, 518, 664 NYS2d 620 [2d Dept 1997]; *see* ***Sepulveda-Vega v Bancorp.***, 119 AD3d 850 989 NYS2d 371 [2d Dept 2014]; ***Wagner v Wody***, 98 AD3d 965, 951 NYS2d 59 [2d Dept 2012]). Deliveries allegedly could be postponed where impediments to delivery existed, including snow or ice. Further, defendants demonstrated, prima facie, that the snow and ice condition was open and obvious, and not inherently dangerous (*see* ***Grosskopf v Beechwood Org.***, 166 AD3d 860, 88 NYS3d 561 [2d Dept 2018]; ***Verdejo v New York City Housing Authority***, 105 AD3d 450, 963 NYS2d 78 [1st Dept 2013]; ***Green v Grenadier Realty Corp.***, 23 AD3d 346, 804 NYS2d 97 [2d Dept 2005]; ***Garcia v New York City Hous. Auth.***, 234 AD2d 102, 650 NYS2d 715 [1st Dept 1996]).

In opposition, plaintiff's failed to raise a triable issues of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). The Court did not consider plaintiff's new theory of recovery, raised for the first time in opposition to defendants' motion based on an alleged breach of Mr. Crawford's agreement with Paraco Gas, which was not pleaded in his complaint or set forth in his bill of particulars (*see* ***Mazurek v Schoppmann***, 159 AD3d 814, 69 NYS3d 834 [2d Dept 2018]; ***Medina v Sears, Roebuck and Co.***, 41 AD3d 798, 839 NYS2d 162 [2d Dept 2007]; ***Rumyacheva v City of New York***, 36 AD3d 790, 828 NYS2d 223 [2d Dept 2007]; ***Nikitin v Lexandra***, 24 AD3d 522, 806 NYS2d 239 [2d Dept 2005]). While modern practice permits a plaintiff to successfully oppose a summary judgment motion by relying on an unpleaded cause of action which is supported by plaintiff's submissions, here, plaintiff's protracted delay in presenting the new theory of liability warrants rejection of this new claim (*see* ***Sacino v Warwick Valley Cent. School Dist.***, 138 AD3d 717, 29 NYS3d 57 [2d Dept 2016]; ***Medina v Sears, Roebuck and Co.***, *supra*; ***Yousefi v Rudeth Realty, LLC***, 61 AD3d 677, 877 NYS2d 132 [2d Dept 2009]). However, even if such a claim was properly before the Court, plaintiff failed to raise a triable issue of fact as to whether plaintiff was a party to that agreement (*see* ***Reeves v Welcome Parking Ltd. Liab. Co.***, *supra*; ***Espeleta v Synergy Resources, Inc.***, 172 AD3d 1320, 98 NYS3d 896 [2d Dept 2019]; ***Cayetano v Port Auth. of N.Y. & N.J.***, 165 AD3d 1223, 87 NYS3d 106 [2d Dept 2018]).

Accordingly, the motion by defendants for summary judgment is granted.

Dated: December 16, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION