Payano v Gonzalez
2019 NY Slip Op 34487(U)
September 25, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-614224
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 17-614224
CAL. No. 19-00223OT

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 4-10-19
ADJ. DATE 7-17-19
Mot. Seq. # 001 - MD

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MARIA PAYANO,

Plaintiff,

- against -

ALEXANDER GONZALEZ,

Defendant.

---X

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by the defendant, dated March 4, 2019; Answering Affidavits and supporting papers by the plaintiff, dated April 16, 2019; Replying Affidavits and supporting papers by the defendant, dated July 16, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Alexander Gonzalez for summary judgment dismissing the complaint against him is denied.

This action was commenced by plaintiff Maria Payano to recover damages for injuries she allegedly sustained on February 14, 2017, when she slipped and fell on ice at a premises known as 64 Glenmore Avenue, Brentwood, New York. It is undisputed that defendant Alexander Gonzalez was the owner of the subject premises.

Alexander Gonzalez now moves for summary judgment in his favor, arguing that he did not create the alleged icy condition or have notice thereof. In support of his motion he submits, among other things, transcripts of the parties' deposition testimony, transcripts of the deposition testimony of two nonparty witnesses, and four photographs.

Plaintiff testified that at approximately 6:00 p.m. on the date in question, she traveled with her 11-year-old daughter to the subject location to retrieve some personal property. She stated that it was very cold out and that it had snowed at some time in the recent past, but she could not recall when. Plaintiff indicated that when they arrived at the subject premises, she parked her motor vehicle in front of the house, and began walking along a concrete area leading to one of the house's entrances. Upon questioning, plaintiff denied that she or her daughter had any difficulty walking from her vehicle to the house, denied sensing any slippery condition, and could not remember if any snow or ice was present. She testified that they entered the house, spent approximately one hour inside, then exited the same entrance. Plaintiff indicated that it was now dark out and there was no artificial light illuminating the subject area. Plaintiff stated that her daughter, who was walking a few steps ahead of her on the concrete area "[a]bout two or three steps" outside the door, fell to the ground first, breaking her cellular phone. She indicated that her daughter called out for her, at which time she, too, slipped and fell backward onto the concrete. Plaintiff testified that while she was on the ground, she felt the area beneath her with her hand and discovered that she "was on top of . . . dry ice." Upon questioning, she described the ice as "black and shiny."

Defendant testified that he, his wife, and his wife's sisters performed snow shoveling at the subject premises until March 31, 2012, when defendant sustained an injury which prevented him from helping. Following his injury, he would spread salt when needed. He stated that if the snowfall was particularly heavy, he might hire someone to shovel the snow, rather than leave the task to his wife. Upon questioning, defendant could not recall when it had last snowed, or when he had last visited the subject premises, prior to plaintiff's incident. Defendant further testified that he did not become aware that plaintiff had alleged she slipped on ice at the subject premises until after this action was filed.

Nonparty Elaine Emeterio testified that plaintiff was at the subject premises for "about 15 minutes" before leaving. She stated that "[a]bout four minutes" after plaintiff and her daughter walked out of the house, plaintiff's daughter knocked on the door. Ms. Emeterio indicated that plaintiff's daughter said her mother had fallen, and that her sister, Elizabeth Gonzalez, went outside to check on plaintiff. Ms. Emeterio testified that her sister "helped [plaintiff] get up and . . . brought her back inside," where she stayed for approximately 10 minutes, until Edwin Boissard arrived and transported her to the hospital. Ms. Emeterio indicated that plaintiff never informed her that her alleged fall was caused by ice or snow.

Nonparty Elizabeth Gonzalez testified that she was present at the subject premises at the time of plaintiff's alleged accident. She stated that plaintiff was inside the house for only "maybe 10 to 15 minutes" before departing, and that there was no snow on the ground at the time. She further stated that after she was told that plaintiff had fallen, she went outside and inspected the subject walkway. Ms. Gonzalez indicated that she saw no ice, snow, puddles of water, salt, or sand in the area.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the

moving party produces the requisite evidence, the burden then shifts to the nonmoving party 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]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Yeung v Selfhelp (KIV) Assoc., L.P.***, 170 AD3d 653, 653, 95 NYS3d 312 [2d Dept 2019], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (***Torre v Aspen Knolls Estates Home Owners Assn., Inc.***, 150 AD3d 789, 790, 54 NYS3d 84 [2d Dept 2017]). On a motion for summary judgment, "the question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case" (***Riviere v City of New York***, 127 AD3d 720, 720-721, 7 NYS3d 219 [2d Dept 2015]). To meet his or her prima facie burden on the issue of lack of constructive notice, "the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (***Rong Wen Wu v Arniotes***, 149 AD3d 786, 787, 50 NYS3d 563 [2d Dept 2017]).

Here, defendant fails to establish a prima facie case of entitlement to summary judgment in his favor (*see* ***Branciforte v 2248 Thirty First St., LLC***, 171 AD3d 1003, 98 NYS3d 626 [2d Dept 2019]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Defendant adduced no evidence demonstrating when the concrete area where plaintiff allegedly slipped and fell was last inspected before the accident (*see* ***Butts v SJF, LLC***, 171 AD3d 688, 97 NYS3d 219 [2d Dept 2019]; ***Rong Wen Wu v Arniotes***, *supra*). The Court, therefore, need not review plaintiff's submissions in opposition (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the motion by defendant Alexander Gonzalez for summary judgment dismissing the complaint against him is denied.

Dated: Sept 25, 2019
Riverhead, New York

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**