

Vancour v Morris Mgt.
2019 NY Slip Op 34575(U)
May 29, 2019
Supreme Court, Onondaga County
Docket Number: Index No. 2017EF958
Judge: James P. Murphy
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NYSCEF DOC. NO. 82

RECEIVED NYSCEF: 05/29/2019

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

ALBERT VANCOUR,

Plaintiff,

DECISION

vs.

**Index No. 2017EF958
RJI No. 33-17-2801**

**MORRIS MANAGEMENT DBA- TOWNHOUSE EAST
APARTMENTS,**

Defendant.

APPEARANCES:

**NICHOLS LAW OFFICES, PLLC
By: Craig K. Nichols, Esq.
Attorney for Plaintiff
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Dewitt, NY 13214**

**SMITH, SOVIK, KENDRICK & SUGNET, P.C.
By: Kristen M. Benson, Esq.
Attorneys for Defendant
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MURPHY, J.

Before the Court is the Notice of Motion of Defendant Morris Management DBA-Townhouse East Apartments ("Morris Management" or "Defendant") dated January 7, 2019, seeking summary judgment dismissing the Complaint of Plaintiff Albert Van Cour ("Van Cour" or "Plaintiff") in its entirety.

By way of background, this action was commenced by the electronic filing of a Summons and Complaint on March 6, 2017. The Complaint alleges that on March 26, 2014, Plaintiff was injured when he fell upon Defendant's property located at 128 West Pleasant Street in the Town

of Manlius as a result of the negligence of Defendant. Plaintiff claims that Defendant failed to abate and/or remove ice hazards, slipping hazards and was otherwise improperly and negligently maintaining the sidewalk and parking lot. *See*, Affirmation of Kristen M. Benson dated January 7, 2019, Exhibit A, Summons and Complaint.

J It is undisputed that, on the morning of the incident, Plaintiff was walking to the end of the parking lot beyond the maintenance shop to drop off trash at a dumpster behind another townhouse. *See*, Benson Aff., Exhibit G, Deposition Transcript of Albert Van Cour, pp. 111-114. On his way, he allegedly told Mr. Ladd, a maintenance supervisor for Morris Management, at the maintenance shop, that he felt the sidewalk needed to be cleared and salted. *Id.*, pp. 127-128. It is also undisputed that Mr. Ladd and two other co-workers had in fact sanded and salted at Townhouse East between the hours of 7:30 a.m. and 9:00 a.m. *See*, Benson Aff., Exhibit K, P Weather and Snow Removal Sheets for March 26, 2014. Plaintiff then proceeded and threw his trash away without incident. On his way back to the townhouse, Plaintiff stopped at Building H to talk to a maintenance employee and, as he left Building H intending to cross West Pleasant Street to get to his building, Plaintiff alleges that he fell in the parking lot near West Pleasant Street. *See*, Benson Aff., Van Cour Tr., pp. 130-140; *see also*, Exhibit F, 50-h Deposition Transcript of Albert Van Cour, pp. 62-66.

M To establish a prima facie entitlement to summary judgment dismissing a complaint, a property owner bears the burden of demonstrating that it maintained the premises in a reasonably safe condition, and that it neither created nor had actual or constructive notice of the allegedly dangerous condition. *See*, *Mulligan v. R&D Properties of New York Inc.*, 162 A.D.3d 1301 (3d Dept. 2018). However, a defendant can also demonstrate "entitlement to judgment as a matter of

law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation." *See, Ash v. City of New York*, 109 A.D.3d 854 (2d Dept. 2013); *see also, Dixon v. Superior Discounts and Custom Muffler*, 118 A.D.3d 1487 (4th Dept. 2014). Here, Plaintiff testified at a N.Y. General Municipal Law 50-h hearing:

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- Q What about the lighting conditions, was the sun out?
A It was light outside. The sun wasn't out, but it was bright enough out to see where you were going.
Q All right. And you could see clearly the ground and the area that you were walking?
A Yes.

See, Van Cour Tr., p. 68. He further stated:

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- Q Okay. So tell me how the fall happened.
A I was starting back over to my apartment, I lost my footing and down I went, face first.
Q All right. And do you know what caused you to lose your footing?
A No, I don't. I still haven't figured that out.

Id., p. 69. In explaining his fall, Plaintiff stated:

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- A My left crutch went one way. The right crutch went that way, and I went (descriptive sound).
Q So both crutches went out away from you --
A Yes.

Id., pp. 69-70.

Based upon Plaintiff's own testimony, the Court finds that Defendant has established that Plaintiff cannot identify the cause of his fall as alleged in his Complaint without engaging in speculation. *See, Dixon, supra; see also, Mulligan, supra.* Plaintiff fails to identify ice or snow as the cause of his fall. To now claim on this motion that it was ice or snow that he slipped on in light of his own sworn testimony is at best speculative. Accordingly, the Court grants Defendant's motion to dismiss Plaintiff's Complaint.¹

¹Likewise, Defendant's motion to dismiss based upon the fact it did not have actual or constructive knowledge of a defective condition is granted in light of the fact that Plaintiff cannot identify the cause of his fall. Simply put, Defendant cannot have actual or constructive notice of a defect that cannot be identified.

Notwithstanding the Court's finding as set forth above, the Court further considers Defendant's other ground for dismissal, namely that there was a snowstorm in progress. Defendant argues that on the morning in question, a snowstorm was in progress when Plaintiff fell and, thus, Defendant asserts that it cannot be liable to Plaintiff based upon established New York law. In opposition, Plaintiff contends that the snowstorm had stopped by 7:30 a.m. and that by 9:30 a.m., at the time he fell, it was not snowing. Plaintiff, therefore, argues that there is a question of fact as to whether there was a storm in progress, and whether the delay after the cessation of the storm activity was a reasonable time period for Defendant to remove the snow and ice.

It is well established in New York that a landlord has no duty to remove snow and ice during a storm. *See, Williams v. Geneva B. Scruggs Community Health Care Center, Inc.*, 255 A.D.2d 982 (4th Dept. 1998); *see also, Siegel v. Molino*, 236 A.D.2d 879 (4th Dept. 1997), where the Court reversed the lower court and granted defendant's motion for summary judgment.

The Fourth Department stated:

Defendant established his entitlement to summary judgment by submitting proof that, at the time plaintiff fell, freezing drizzle was falling and a glaze of ice from that drizzle had formed on his sidewalk.

Id. The Court further noted that "a landowner is not responsible for a failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm." *Id.*

In *Drake v. Prudential Insurance Company, Inc.*, 153 A.D.2d 924 (2d Dept. 1989), the Second Department granted defendant's motion for summary judgment dismissing the plaintiff's complaint that alleged injuries sustained as a result from falling on ice and snow. The Court

noted that the facts showed that the accident which formed the basis of the action occurred at 7:30 a.m., in January, 1987, "after 1 1/2 to 2 inches of snow had fallen overnight." *Id.* The Court found that the defendant established as a matter of law that "ice and snow had not remained on the parking lot for an unreasonable length of time" *Id.*

J Here, in support, Defendant submits the Affidavit of its expert meteorologist, Howard Altschule, sworn to on January 4, 2019, who states that on the morning of March 26, 2014, a storm system caused continuous snowfall during two distinct intervals: the first in the early morning between 12:15 a.m. and 2:37 a.m.; and the second between 6:34 a.m. and 11:24 a.m. See, Altschule Aff., ¶¶ 15-16. Defendant submits the Incident Report in support which states that the accident occurred at 9:30 a.m., and based upon this, Defendant's expert opined that Plaintiff's fall occurred during the second bout of snow. *Id.*, ¶ 17. Defendant's daily snow removal records P show that on the morning of March 26, 2014, one to three inches of snow accumulation fell at Townhouse East, and that Mr. Ladd and two co-employees each were involved with morning snow removal and salting tasks which were completed between 7:30 a.m. and 9:00 a.m. on the morning of the incident, 30 minutes before Plaintiff fell.

M In opposition, Plaintiff submits the Affidavit of his expert meteorologist, Wayne Mahar, sworn to on March 11, 2019. Based on Mr. Mahar's review of various official weather records, Mr. Mahar states that the weather conditions on the day before the slip and fall, March 25, 2014, were "quiet and dry until light snow began around 11:15 p.m." See, Mahar Aff., ¶ 13. He further states that "total accumulation for March 25, 2014 11:15 PM through the time of the slip and fall at approximately 9:30 AM on March 26, 2014 was estimated to be near 1 inch total." (emphasis added). *Id.*, ¶ 14.

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Initially, the Court finds that Defendant has clearly met its burden in establishing that there was a snowstorm in progress, thereby shifting the burden to Plaintiff to establish that a reasonable time had elapsed for Defendant to remove the snow. Here, Mr. Mahar's opinions pertaining to the total accumulation of snow from 11:15 p.m. on the night before Plaintiff's incident, to approximately 9:30 a.m. on March 26, 2014, fails to sufficiently rebut Defendant's submissions that a snowstorm was in progress. In other words, Mr. Mahar's report is consistent with Mr. Altschule's opinion that the weather conditions consisted of light snowfall up to and prior to Plaintiff's fall. Mr. Mahar fails to render any opinion that there was a cessation of the storm, or that there was any reasonable time period which had elapsed after the snow began around 11:15 p.m. on the night before, which would have allowed Defendant to remove any snow and/or ice. *See, Siegel, supra.*

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With respect to Mr. Mahar's opinion that on the morning of the incident there was "significant runoff from surrounding snowbanks as well as simply melting of snow and snow/slush on ground surfaces . . .," which "should have been visible to building maintenance . . .," is purely speculative, is not supported by the evidence and, therefore, is insufficient to create a question of fact. *See, Mahar Aff.*, ¶ 16. Plaintiff did not testify that he fell in any such area.

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Accordingly, based upon all of the foregoing, the Court finds that Defendant has met its burden showing that a snowstorm was in progress and consequently, the Court grants Defendant's motion to dismiss the Complaint in its entirety. Finally, in light of all the above, the Court does not reach the remaining contention of Defendant that Plaintiff failed to plead that Morris Management, as a management company that contracted with a non-party property owner to provide maintenance services, owed a duty to Plaintiff.

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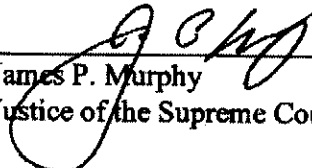
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The above constitutes the Decision of the Court. Defendant's attorney shall electronically file a proposed Order to the Court attaching a copy of this Decision thereto, on notice to Plaintiff's attorney, within fifteen (15) days of the date of this Decision.

Dated: May 29, 2019

J

ENTER



James P. Murphy
Justice of the Supreme Court

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