Prystupa v Crowne Plaza Resort & Golf Club
2019 NY Slip Op 34592(U)
March 28, 2019
Supreme Court, Westchester County
Docket Number: Index No. 54609/2017
Judge: Lawrence H. Ecker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

KRYSTYNA PRYSTUPA and PETER PRYSTUPA,

Plaintiffs,

-against-

CROWNE PLAZA RESORT & GOLF CLUB, INTERCONTINENTAL HOTELS GROUP RESOURCES, INC. and LAKE PLACID VACATION CORPORATION,

Defendants.

----------X

Index No. 54609/2017

DECISION/ORDER

Motion Date: 2/20/19
Motion Seq. 1[1]

ECKER, J.

The following papers were read on the motion of CROWNE PLAZA RESORT & GOLF CLUB, INTERCONTINENTAL HOTELS GROUP RESOURCES, INC. and LAKE PLACID VACATION CORPORATION INC. ("defendants"), made pursuant to CPLR 3212, for an order dismissing the complaint, as against KRYSTYNA PRYSTUPA and PETER PRYSTUPA ("plaintiffs"):

PAPERS
Notice of Motion, Affirmation and Exhibits A-H
Affirmation in Opposition and Exhibits A-G[2]
Reply Affirmation

Upon the foregoing papers, the court determines as follows:

Plaintiffs allege that plaintiff Krystyna Prystupa sustained injuries to her shoulder following a fall she took on the property owned and operated by defendants at Lake Placid, New York, at or about 1:32 p.m. on January 24, 2017. Plaintiffs allege that there was snow

---

[1]By decision dated January 10, 2019 (Lefkowitz, J.) [Mot. Seq. 2], the Note of Issue in this matter was striken. [NYSCEF No. 50].

[2] Court rules direct the parties to submit working copies to chambers; plaintiff is to use numbered (external) exhibit tabs.

and maybe ice conditions that should have been cleared on the walkway where she fell. In contrast, defendants allege that there was a "storm in progress" and that, therefore, they cannot be held liable for the condition of the walkway at the time of the incident.

In support of the motion, defendants submit the Local Climatological Data/Hourly Observations for the date in question, showing temperatures below freezing from the early morning hours through the time of plaintiff's fall. [NYSCEF No. 28]. The report also shows precipitation falling during the relevant time period, albeit in minimal amounts of snow and rain. Relying on this data, defendants now move for summary judgment dismissing the complaint, in essence, based on their "storm in progress" defense.

In opposition, plaintiff submits the expert affidavit of George Wright, Certified Consulting Meteorologist. [NYSCEF No. 57]. The expert opines, based upon his examination of the climatological data and the litigation documents, that the condition of the ground where plaintiff slipped and fell "was formed by the repeated melting and refreeze that occurred during the January 19-23, 2017 period and the freezing rain that occurred prior to 7:30 a.m. on the day of the accident."

In addition, he opines that:

> "No measurable snowfall, i.e., only trace amounts of snow fell between approximately 11:00 a.m. and the time of Plaintiff's incident. A trace of snowfall is defined by the NWS [National Weather Service] as less than one-tenth of an inch (.1-in.) and is considered to be unmeasurable.
>
> The ice Plaintiff slipped and fell upon formed prior to 7:30 a.m. on the day of the incident, was present on the subject sidewalk for more than six (6) hours prior to the time she fell and was therefore a long-standing condition." [NYSCEF No. 57].

Notably, defendants do not contest these findings in their reply, arguing instead that they are excused from liability because the storm was tapering down, citing *Rand v Cornell Univ.*, 91 AD3d 542 [1st Dept 2013]. Defendants further assert that plaintiff is speculating as to what caused her to slip, in that she did not categorically identify the cause of her fall as ice.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.,* 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party

opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh,* 22 NY3d 470, 475 [2013]; *Nash v Port Washington Union Free School District,* 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC,* 63 AD3d 895 [2d Dept 2009]. Every available inference must be drawn in the non-moving party's favor. *De Lourdes Torres v Jones,* 26 NY3d 742, 763 [2016].

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Failure to make such *prima facie* "showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Pullman v Silverman*, 28 NY3d 1060 [2016]; *Winegrad v New York University Medical Center, supra.* Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented, even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman v City of New York, supra*; *Alvarez v Prospect Hosp.*, *supra.*

Under the storm in progress rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate 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. *Casey-Bernstein v Leach & Powers, LLC.,* 2019 N.Y. Slip Op. 01557 [2d Dept 2019]; *De Chica v Saldana*, 153 AD3d 782, 782 [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. *Casey-Bernstein v Leach & Powers, LLC. supra*; *Valentine v City of New York*, 57 NY2d 932 [1982]. However, 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. *Casey-Bernstein v Leach & Powers, LLC. supra.*

Here, the defendants failed to establish *prima facie* entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by demonstrating that there was a storm in progress at the time of the plaintiff's accident, or that they did not have a reasonable opportunity after the cessation of the storm to remedy the allegedly dangerous condition. The court has reviewed defendants' weather data, Krystyna's deposition, the deposition of defendants' principal Arthur Lussi, and the sworn affidavit and report of plaintiffs' expert. Based on the facts presented, and applying the legal principles cited above, the court finds that issues of fact exist as to the prevailing weather conditions, and the actions taken by defendants to reasonably maintain the property, and the cause of plaintiff's slip and fall.

Of note, to discredit plaintiff's version of the facts at this juncture simply because she could not say, for certain, that it was ice that she slipped on is inappropriate, particularly given the fact that snow that accumulated on and near the sidewalk could have melted and refroze, and a jury could conclude that defendants had a reasonable time to ameliorate the snow and ice condition. *Morris v Home Depot, USA,* 152 AD3d 669 [2d Dept 2017]; *Braun v Weissman*, 68 AD3d 615 [2d Dept 2009]. Hence, the court finds that is unable to grant summary judgment to defendants upon this record, and that resolution of these issues requires consideration by the trier of fact.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants CROWNE PLAZA RESORT & GOLF CLUB, INTERCONTINENTAL HOTELS GROUP RESOURCES, INC. and LAKE PLACID VACATION CORPORATION, made pursuant to CPLR 3212, for summary judgment dismissal of the complaint, as against plaintiffs KRYSTYNA PRYSTUPA and PETER PRYSTUPA, is denied; and it is further

ORDERED that the parties shall appear (as previously scheduled in the Compliance Conference Part Order dated March 7, 2019), in the Compliance Conference Part, Room 800, at 9:30 a.m. on April 4, 2019.

The foregoing constitutes the Decision/Order of the Court.

Dated: White Plains, New York
March 28, 2019

ENTER,

LAWRENCE H. ECKER, J.S.C.

Appearances

All parties appearing via NYSCEF