

Palmieri v National Amusements, Inc.

2020 NY Slip Op 30032(U)

January 7, 2020

Supreme Court, Suffolk County

Docket Number: 10463-2015

Judge: David T. Reilly

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

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 10463-2015

DAVID PALMIERI and LYNN PALMIERI,

Plaintiffs,

-against-

**NATIONAL AMUSEMENTS, INC. d/b/a ISLAND 16:
CINEMA DE LUX and FBB HOLTSVILLE
AMUSEMENT CENTER, LLC,**

Defendants.

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SUBMITTED: 07/17/19
MOTION SEQ. NO.: 3
MOTION: MG

Upon the reading and filing of the following papers in this matter: (1) Defendant National Amusements, Inc. d/b/a Island 16:Cinema De Lux's Notice of Motion dated February 16, 2019 and supporting papers; (2) Plaintiff's Affirmation in Opposition dated June 25, 2019 and supporting documents; and (3) Defendant's Reply Affirmation dated July 2, 2019 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that defendant National Amusements, Inc. d/b/a Island 16:Cinema De Lux's (National Amusements) application for an Order granting it summary judgment dismissing the complaint against it, pursuant to Civil Practice Law and Rules 3212, is granted.

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiff when he slipped and fell on March 5, 2015 at approximately 6:15 p.m. while traversing over a patch of ice and snow located in "the area between the islands separating the roadway adjacent to

(sic) theater from the handicapped parking spots” (see Plaintiff’s Bill of Particulars, 2-4). Plaintiff commenced this action with the filing of a summons and complaint on or about June 3, 2015. Issue was joined by the moving defendant FBB Holtsville Amusement Center, LLC (the Amusement Center) on or about March 21, 2016.

According to the testimony given at his examination before trial, the plaintiff left his place of employment on the day of the accident in mid-afternoon to watch a movie at the Island 16 movie theater in Holtsville, New York. Plaintiff testified that from the time he left for work around 7:00 a.m. until approximately 7:00 p.m. he observed no snow falling and temperatures below freezing throughout the day. Upon arrival at the movie theater, the plaintiff parked in a marked stall and observed packed snow and ice in the parking lot and mounds of snow around the median separating the parking lot from the theater. Plaintiff stated that after parking his vehicle he began to walk towards the theater and went around the median to the theater entrance.

After the movie was over, the plaintiff exited the theater and walked towards a crosswalk separating the sidewalk of the theater and the parking lot. He noticed a mound of snow that blocked a portion of the median leading to the parking lot. The plaintiff walked towards handicapped parking stalls by the median in an attempt to return to his vehicle by a different route he took when entering the theater because there was ice on the ground. The plaintiff attempted to cross over the median area which was covered by two feet of packed snow. Plaintiff slipped and fell when he placed his foot onto the parking lot surface from the snow mound. After the accident the plaintiff went to his vehicle and left the movie theater.

Joseph Ferrara (Ferrara) testified on behalf of the Amusement Center. He was a co-owner of O&M Maintenance of Long Island (O&M), the snow plow contractor who performed snow removal services at the Amusement Center. Ferrara testified that he was present at the movie theater on the day of the accident on several occasions. From a “snow log” maintained by O&M, Ferrara testified that at 7:30 a.m. on March 5, 2015 there was wet snow falling in the area of the theater and that the temperature was thirty-two degrees. The log book indicates that five employees were present at the theater during the day performing snow removal services until 7:45 p.m. that evening. In terms of snow plow operations Ferrara testified that clearing the areas around the handicapped parking stalls was a priority and that the “cut-throughs” in the parking lot would have been shoveled on the date of the accident.

National Amusements now moves for summary judgment on the grounds that the “storm in progress” doctrine requires dismissal of the complaint against it, inasmuch as meteorological records indicate that approximately six inches of snow fell on the date of the accident and, specifically, that snow was falling at the time of the plaintiff’s accident. In addition, National Amusements argues that there was a “superceding cause” of the plaintiff’s accident as the plaintiff’s unforeseeable act of traversing over a mound of piled snow destroyed any causal connection between the defendant’s purported negligence and the plaintiff’s accident. Finally, National Amusements maintains that, pursuant to the lease with the Amusement Center as the owner of the property, it was the Amusements Center’s responsibility to remove snow and ice from the common areas covered by the

lease, including the parking lot and walkways. National Amusements submits in support of the motion a copy of the pleadings, meteorological records, a copy of the lease between the defendants, the deposition transcript of the plaintiff and marked photographs of the accident site.

Plaintiff has submitted opposition to the motion and maintains that National Amusements has failed to set forth sufficient evidence to support their contention that the “storm in progress” doctrine precludes recovery by the plaintiff against National Amusements. In addition, plaintiff contends that the parking lot snow clearing was done in a negligent manner such that the application for summary judgment must be denied. Plaintiff submits a copy of his motion for reargument of this Court’s January 4, 2019 decision and Order granting the Amusement Center’s motion for summary judgment and the deposition transcript of Ferrara.

It is well-settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence 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, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]). “In determining a motion for summary judgment dismissing a complaint, all of the evidence must be viewed in the light most favorable to the opponent of the motion, and all reasonable inferences must be resolved in that party’s favor” (*Santelises v Town of Huntington*, 124 AD3d 863, 865, 2 NYS3d 574 [2d Dept 2015]).

To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Owners and

occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (*Blatt v L'Pogee, Inc.*, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). This nondelegable duty includes the duty to provide the public with a safe means of ingress and egress (see *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

“In slip-and-fall cases involving snow and ice, a property owner is not liable unless he or she created the defect, or had actual or constructive notice of its existence” (*Gil v Manufacturers Hanover Trust Co.*, 39 AD3d 703, 704, 833 NYS2d 634 [2d Dept 2007]; see *Powell v Cedar Manor Mut. Hous. Corp.*, 45 AD3d 749, 844 NYS2d 890 [2d Dept 2007]). A tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair (see *Sarisohn v 341 Commack Rd., Inc.*, supra). In order for liability to be determined against a tenant it must also be established that it did not have actual or constructive notice of the allegedly defective condition (see *Id.*).

Although National Amusements maintains that it need not establish the lack of actual or constructive notice in order to establish its entitlement to summary judgment, it fails to advance any caselaw for the Court’s consideration of this proposition. Additionally, National Amusements contends that the “storm in progress” doctrine obviates the necessity of showing lack of constructive notice in this case.

Under the storm in progress rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm or for a reasonable period of time thereafter (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 32 NYS3d 568 [2016]; *Talamas v Metropolitan Transp. Auth.*, 120 AD3d 1333, 993 NYS2d 102 [2d Dept 2014]; *Popovits v New York City Hous. Auth.*, 115 AD3d 657, 658, 981 NYS2d 562 [2d Dept 2014]). The determination of what constitutes a reasonable time may be decided on a motion for summary judgment, based upon the circumstances of the case (see *Valentine v City of New York*, 57 NY2d 932, 457 NYS2d 24 [1982]; *Dumela-Felix v FGP W. St., LLC*, 135 AD3d 809, 22 NYS3d 896 [2d Dept 2016]).

The Court finds that, unlike Amusement Center, National Amusements did not engage in any snow removal activity which may have exacerbated the allegedly defective condition around the area of the plaintiff’s fall. Therefore, it cannot be said that the “storm in progress” exception applies to National Amusements. Because there was a “storm in progress,” which plaintiff refers to himself as a “heavy snowfall,” National Amusement’s common-law duty to remove the allegedly dangerous or defective condition had not arisen at the time of plaintiff’s fall because the storm had not stopped

for a reasonable time.

Accordingly, National Amusement's motion for summary judgment is granted.

This constitutes the decision and Order of the Court.

Dated: January 7, 2020
Riverhead, New York



DAVID T. REILLY, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION