Machado v 1199 Hous. Corp.
2020 NY Slip Op 30054(U)
January 7, 2020
Supreme Court, New York County
Docket Number: 157418/2013
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 17EFM

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MARIA SOCCORO MACHADO,

Plaintiff,

- v -

1199 HOUSING CORPORATION,

Defendant.

INDEX NO. 157418/2013

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. SHLOMO S. HAGLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70
were read on this motion to/for JUDGMENT - SUMMARY.

In motion sequence number 003, defendant 1199 Housing Corporation ("1199") moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff Maria Soccoro Machado's ("Machado") verified complaint (the "Complaint").

BACKGROUND

This action arises out of an injury suffered by Machado after a snow storm.

On February 6, 2013 at 7:38 a.m., Machado, a tenant at the East River Landing, located at 2120 First Avenue, New York, New York (the "Property"), slipped and fell, suffering an injury. Machado alleges that she fell as a result of ice and snow accumulation on the sidewalk of the Property. Machado further alleges that 1199 was negligent in the removal of the snow, which created a hazardous condition causing Machado's injury. There were no witnesses to Machado's fall.

It is undisputed that the storm continued until it stopped overnight between February 5, 2013 and February 6, 2013, and that the 1199 maintenance staff commenced snow removal efforts on February 5, 2013, until 1:00 a.m. on February 6, 2013.

On August 14, 2013, Machado commenced the instant action against 1199 asserting two causes of action for negligence. On December 6, 2018, 1199 subsequently moved for summary judgment dismissing the Complaint.

DISCUSSION

1199 argues that summary judgment dismissing the Complaint is proper because 1199 cannot be liable for Machado's injury pursuant to New York City Administrative Code § 16-123(a) (the "Storm in Progress Doctrine"). 1199 contends that it is shielded from liability under the Storm in Progress Doctrine because it is undisputed that: (1) the storm did not stop until the late evening of February 5 or early morning of February 6 and (2) that Machado fell at approximately 7:40 a.m. in the morning on February 6, 2013.

"A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, prima facie, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition" (*Pankratov v 2935 OP, LLC*, 160 AD3d 757, 758 [2d Dept 2018]). "This burden may be established by presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell" (*id.* [internal quotation marks and citations omitted]).

Under the Storm in Progress Doctrine "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" (*id.* [internal quotation marks and citations omitted]).

Under New York law, "building owners have four hours after a snowfall stops to remove snow and ice from abutting sidewalks, excluding the hours between 9:00 p.m. and 7:00 a.m." (*Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300 [1st Dept 2008] ["Accordingly, summary judgment was properly granted because accepting plaintiff's testimony that snowfall had ceased, defendant had until 11:00 a.m. at the earliest to complete snow removal, if the snow had stopped falling by 7:00 a.m."]).

Machado testified during her deposition that the storm ended sometime during the middle of the night and that it was no longer snowing when she left her apartment the morning of February 6, 2013 (Albertson Affirmation, Exhibit "D", 40:11, 40:23-25). Pursuant to the East River Landing incident report, Machado was injured at 7:38 a.m. on February 6, 2013 (*id.*, Exhibit "I").

Viewing Machado's testimony in the most favorable light, even if the snowfall ended at 7:00 a.m. the morning of February 6, 2013, 1199 had until 11:00 a.m. to complete snow removal and cannot be liable for Machado's injury, which occurred at 7:38 a.m., under the Storm in Progress Doctrine. 1199 has made a prima facie showing that Machado fell within the snow removal period granted by the Storm in Progress Doctrine based on documentary evidence and Machado's own testimony.

Machado's opposition fails to address the Storm in Progress Doctrine, except to state that regardless of the doctrine, 1199 is liable because it created the hazardous condition that caused Machado's injury through its negligent snow removal. Machado contends that there is a triable

issue of fact as to whether 1199's snow removal efforts caused or exacerbated a hazardous condition resulting in Machado's injury.

The cases cited by Machado are inapposite to the instant action.

In *Greenberg v. Woolworth*, the court granted judgment to the plaintiff on the basis that the owner of property created a hazardous condition by leaving a "ridged, rough and hacked patch of ice", and not properly removing it allowing it to freeze. Such condition was also corroborated by the testimony of police officers (*Greenberg v Woolworth Co.*, 18 Misc2d 141, 143, 144 [Sup Ct NY County 1959] *affd* 10 AD2d 567 [1st Dept 1960]).

In *Glick v. City of New York*, the snowfall occurred 10 days prior to the accident and thus, does not involve the application of the Storm in Progress Doctrine (*Glick v City of New York*, 139 AD2d 402, 403 [1st Dept 1988]).

In contrast, Machado testified that she could not recall if there was ice or snow in the area that she fell or whether the path was slippery before she fell (Albertson Affirmation, Exhibit "D", at 39:19-40:5, 44:2-6, 43:20-25). Furthermore, she testified that she saw a patch of ice after she fell, but she could not recall the size (*id.* at 67:8-68:22). None of the other deposed individuals witnessed Machado fall.

When Security Officer Zaid Ketchen ("Ketchen") responded to the incident, he testified that he observed snow and ice on the ground in the area where Machado fell (*id.*, Exhibit "M", 35:9-35:11). Rafael Calderon Jr. ("Calderon"), a member of the maintenance staff, testified that on February 6, 2013, when he arrived at the Property for work, he saw ice, water, rain, and sleet all over the grounds of the premises (*id.*, Exhibit "E", 14:24-15:6).

The testimony from Calderon and Ketchen confirms that there was snow and ice present on the premises, which is not uncommon after a storm, but is insufficient to establish that 1199's snow removal efforts increased the hazard posed by the snow.

It is well established that "[a]bsent a statute to the contrary, one who attempts to remove snow from a sidewalk is not subject to liability simply because he or she failed to remove all of the snow (*Joseph v. Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [1st Dept 2007]). "However, one may be held liable if his or her snow removal efforts made the sidewalk more dangerous, i.e., increased the hazard posed by the snow" (*id.*).

Machado attempts to raise a triable issue of fact as to whether 1199's snow removal efforts created or exacerbated a hazardous condition, but there is simply no evidence that a hazardous condition was created or exacerbated by 1199. Consequently, summary judgment dismissing the Complaint should be granted (*id.* at 464 ["Plaintiff's claim that defendant's snow removal efforts made the condition of the sidewalk more hazardous is unsupported by any evidence, constitutes rank speculation and is insufficient to defeat defendant's motion for summary judgment"]).

Moreover, the assertion by Machado that 1199 had notice of the alleged hazardous condition is defeated by the Storm in Progress Doctrine as it is well established that "[a] landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and does not commence until a reasonable time after the storm has ended (*Rosario v Prana Nine Prop., LLC*, 143 AD3d 409, 410 [1st Dept 2016]).

Finally, this Court rejects the affidavit of Joel L. Krinsky ("Krinsky"), Machado's purported expert on snow removal. Krinsky alleges that he is qualified as an expert based on his experience as a property manager.

It is well established that "[t]he removal of snow and ice is not a subject 'calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror'" (*Nevins v Great Atl. & Pac. Tea Co.*, 164 AD2d 807, 808–09 [1st Dept 1990] [internal citation omitted]).

"Absent an inability or incompetence of jurors to comprehend the issues and evaluate the evidence, the opinions of experts which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper" (*id.* [internal quotation marks and citations omitted]). Furthermore, acceptance of the expert report would effectively usurp the function of the fact finder by allowing the expert to determine the ultimate issue in the case (*id.*).

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/7/2020
DATE

SHLOMO S. HAGLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE