Pick v Boro Funeral Serv. Inc.
2020 NY Slip Op 32783(U)
August 14, 2020
Supreme Court, Kings County
Docket Number: 511227/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73
--X
CHAVA PICK and MEIR ZEV PICK,

Plaintiffs,

-against-

BORO FUNERAL SERVICE INC. and JOSEPH A. BRIZZI & SONS INC.,

Defendants.
--X

Index No.: 511227/2018
Motion Date: 8-3-20
Mot. Seq. No.: 1

DECISION/ORDER

The following papers numbered 1 to 3 were read on this motion:

Papers:	**Numbered:**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits/Memo of Law	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law	3
Other	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, the defendant, JOSEPH A. BRIZZI & SONS INC. moves pursuant to CPLR § 3212 for an order awarding it summary judgment dismissing plaintiff's complaint insofar as asserted against it.

Background:

The plaintiffs commenced this lawsuit claiming that Chava Pick suffered personal injuries on December 29, 2017, when she slipped and fell on ice on the public sidewalk in front of the premises located at 3911 Fort Hamilton Parkway, Brooklyn, New York ("the premises"). The premises are owned by defendant JOSEPH A. BRIZZI & SONS INC. ("Brizzi & Sons") and were leased to defendant, BORO FUNERAL SERVICE INC. Plaintiffs contend that the ice formed on the sidewalk as a result of splashing water that came from a pail filled with water that had been placed on the sidewalk to permit the attendees of a funeral service to wash their hands

after exiting the service. Apparently, pursuant to Jewish custom, an attendee of a funeral service where the decedent is present is supposed to wash his or her hands after exiting a funeral service. BORO FUNERAL SERVICE INC. was in charge of the funeral service that day.

In support of the motion, plaintiff submitted, *inter alia*, the deposition transcripts of Chava Pick, the witnesses produced by the two defendants, and a surveillance videotape of the happening of the accident.

Plaintiff Chava Pick's Deposition:

Chava Pick testified that her accident occurred at around 10:30 AM, a cold and clear day, with below freezing temperatures. It did not rain or snow that day and the roads were dry. Ms. Pick attended a funeral service at the Brizzi & Sons funeral home that morning and recalled that when she exited her car and walked into the funeral home, there was no ice on the sidewalk. Further, she did not see the pail filled with water upon entering the funeral home. The funeral service lasted approximately 30-40 minutes.

When the funeral service ended, she exited the Brizzi & Sons funeral home and walked to get her car. She drove her car to the front of the funeral home and double parked in order to get her mother. After she helped her mother get into the car, she went to look for water to wash her hands. At this point, she observed a pail of water that had been placed outside on the sidewalk in front of 3911 Fort Hamilton Parkway and saw someone washing his hands by the pail. The pail was situated on the sidewalk close to the curb. As she walked towards the pail by the curb, she fell to the ground. She "walked next to the curb because the sidewalk was full of people." Her right foot slid off the sidewalk into the street. Plaintiff further testified that prior to the fall, she saw what she thought was water on the sidewalk, and that it was "rolling off the sidewalk" and

"it went from the garbage can and rolled off the curb into the street." "It was water, a wet mark," she said. She estimated the size of the spill to be 1/2 to a full "square of the sidewalk."

The Surveillance Videotape:

The surveillance videotape of the moment the plaintiff fell depicts that the fall happened right next to the garbage pail of water placed near the curb in front of 3911 Fort Hamilton Avenue. It shows that the person present at the pail was spilling water onto the sidewalk and curb as he washed his hands and the plaintiff slipped on or near the curb with its metal surface.

Deposition of Boro Funeral Service, Inc.:

Lionel Folger, the President of Boro Funeral Services, Inc., testified on its behalf. Mr. Folger testified that pursuant to Jewish custom, an attendee of a funeral service where the body of the deceased is present is supposed to wash his or her hands after leaving the building. The funeral service that took place on the morning of the accident took place at the Brizzi & Sons chapel, which is located next door to 3911 Fort Hamilton Parkway. Mr. Folger did not make any arrangements prior to the funeral service to provide water so that the attendees could wash their hands. After the funeral service ended, some of the attendees complained and insisted that he provide water so they could wash their hands. Initially, he tried to persuade the funeral attendees to come into the premises that Boro Funeral Services leased from Brizzi & Sons, which is located next door at 3911 Fort Hamilton Parkway, in order to wash their hands. Apparently, some of the attendees objected to this. Mr. Folger then went into the premises Boro Funeral leased from Brizzi & Sons, grabbed a garbage pail, removed the bag, filled the pail up with water, and wheeled the pail out to the sidewalk in front of 3911 Fort Hamilton Parkway. He placed the pail near the curb. He testified that he had used the pail once or twice before for hand washing but did not do so on any regular basis.

Deposition of Brizzi & Sons:

Dina Brizzi, the Corporate Secretary and one of the two full time employees of Brizzi & Sons, was produced to testify on behalf of Brizzi & Sons. She testified that Brizzi & Sons is not a Jewish funeral home but does permit defendant Boro Funeral to use its chapel three or four times a year for funeral services. Boro Funeral was the only one that had Jewish services at Brizzi & Sons. Boro Funeral conducts most of its funeral services at synagogues and grave sites. On those occasions when they used Brizzi & Son's chapel, the only thing Brizzi & Sons had to furnish was a divider to separate the men from the women.

While Ms. Brizzi was aware of the handwashing custom, she never discussed with Boro Funeral arrangements such handwashing at the Brizzi & Sons chapel, nor did she ever see Boro Funeral arrange for such. Ms. Brizzi was the only Brizzi & Sons employee present on the date of the accident, and she was in her office that morning. She had no responsibility with respect to the funeral except to perhaps open and close the doors, and to make sure that all of the attendees of the service left the premises after the service was over. She had never seen Boro Funeral put a bucket or any other receptacle filled with water out on the sidewalk after any service. In fact, when she was called to come out after the plaintiff had fallen, she did not see the bucket there. She confirmed that it was very cold that day and that it was dry and that there had not been any snow or rain. She maintained that it was the responsibility of Boro Funeral to maintain the sidewalk in front of their leased Premises, including shoveling and sanding for snow and ice but that she would sometimes clear snow if it occurred on the Sabbath.

The Lease:

The Lease between Brizzi & Sons, Inc. and Boro Funeral Service, Inc. with respect to the premises located at 3911 Fort Hamilton Parkway provides, in pertinent part, as follows "[t]he

Tenant will not permit conditions to exist in the Unit/Store Front that are unhealthy or unsanitary. The Tenant's [sic] will neither permit the Tenant's health of [sic] safety nor that of any other persons living or working in the Building to be endangered by any conditions in the Unit/Store Front, regardless of whether such conditions in the Unit/Store Front require repair or are a matter of cleanliness of maintenance." The Lease further provides that the "Landlord is not responsible for loss, expenses or damages to any person or property, unless due to Landlord's negligence. Tenant must pay for damages suffered and spent by Landlord relating to any claim arising from any act of neglect of Tenant.

Discussion:

A defendant moving for summary judgment in a slip-and-fall case bears the initial burden of making a prima facie showing that it neither created nor possessed actual or constructive notice of the alleged hazardous condition (*see Spano v. Apogee Retail NY, LLC*, 164 A.D.3d 1495, 1496, 84 N.Y.S.3d 203, 204, *leave to appeal denied,* 32 N.Y.3d 919, 123 N.E.3d 87; *Mandarano v. PND, LLC,* 157 A.D.3d 664, 665, 66 N.Y.S.3d 631; *Amendola v. City of New York,* 89 A.D.3d 775, 775, 932 N.Y.S.2d 172). These principles apply regardless of whether the accident occurs on a public sidewalk. While Administrative Code of the City of New York § 7–210(a) and (b) imposes a duty upon property owners to maintain the sidewalk adjacent to their property, and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition, including the negligent failure to remove snow and ice (*see Kabir v. Budhu,* 143 A.D.3d 772, 773, 40 N.Y.S.3d 136; *Gyokchyan v. City of New York,* 106 A.D.3d 780, 781, 965 N.Y.S.2d 521), the Code does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable (*see Gyokchyan v. City of New York,* 106 A.D.3d at 781, 965 N.Y.S.2d

521; *Martinez v. Khaimov,* 74 A.D.3d 1031, 1033, 906 N.Y.S.2d 274). Where a defendant in a slip-and-fall case demonstrates that it neither created nor possessed actual or constructive notice of the alleged hazardous condition that caused the accident, the defendant demonstrates its freedom from negligence and its prima facie entitlement to summary judgment.

Here, Brizzi & Sons, through the submission of the deposition testimony of Ms. Brizzi, made a prima facie showing that defendant Brizzi & Sons neither created nor had actual notice of the alleged dangerous condition that caused the accident. With respect to the issue of constructive notice, it is well settled that to constitute constructive notice, a condition must be visible and apparent for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *Birnbaum v. New York Racing Assn., Inc.,* 57 A.D.3d 598, 598, 869 N.Y.S.2d 222; *Bykofsky v. Waldbaum's Supermarkets,* 210 A.D.2d 280, 281, 619 N.Y.S.2d 760). Here, while the ice that caused plaintiff's accident may have been visible and apparent, the record demonstrates that the ice could not have been present for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it. The record demonstrates that the pail of water, which plaintiff claims caused the ice to form on the sidewalk, was first placed out on the sidewalk after the funeral had ended and shortly before plaintiff's accident occurred. For the above reasons, defendant Brizzi & Sons demonstrated a prima facie case of entitlement to summary judgment. Plaintiff failed to raise a triable issue of fact.

Plaintiff's contention that there are triable issues of fact as to whether Brizzi & Son was negligent in failing to prevent Boro Funeral from placing the pair of water on the sidewalk is without merit. While it is true that property owners "have a duty to control the conduct of third

persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v. Christie,* 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1, 518 N.E.2d 896, citing *De Ryss v. New York Cent. R.R. Co.,* 275 N.Y. 85, 9 N.E.2d 788; *see Cavaretta v. George,* 265 A.D.2d 801, 802, 695 N.Y.S.2d 836; *Mangione v. Dimino,* 39 A.D.2d 128, 129–130, 332 N.Y.S.2d 683; *see also Huyler v. Rose,* 88 A.D.2d 755, 451 N.Y.S.2d 478, *appeal dismissed* 57 N.Y.2d 777), the accident did not occur on Brizzi & Sons' premises. By all accounts, the accident occurred on the public sidewalk and/or the curb.

The court has considered plaintiff's remaining arguments in opposition to the motion and find them to be without merit.

For all of the above reasons, it is hereby

ORDERED that Brizzi & Sons Inc. motion pursuant to CPLR § 3212 for an order awarding it summary judgment dismissing plaintiff's complaint insofar as asserted against it is **GRANTED.**

This constitutes the decision and order of the Court.

Dated: August 14, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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