Martinez v Fiorino
2020 NY Slip Op 34871(U)
April 30, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2018-50508
Judge: Christi J. Acker
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To commence the 30-day statutory time period 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 DUTCHESS

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FRANCIS MARTINEZ and IRMA MARTINEZ,

Plaintiffs,

-against-

TIMOTHY FIORINO, KENNETH LASHWAY and CITY OF POUGHKEEPSIE,

Defendants.

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DECISION AND ORDER

Index No.: 2018-50508

ACKER, J.S.C.

The following papers numbered 1-43 were considered in connection with the following motions: (1) motion of Defendant City of Poughkeepsie (hereinafter "Defendant City") for an Order pursuant to CPLR 3212, granting summary judgment in favor of said Defendant and (2) motion of Defendant Timothy Fiorino (hereinafter "Defendant Fiorino") for an Order pursuant to CPLR 3212, granting said Defendant summary judgment and dismissing all claims (including cross-claims) against him:

Defendant City's Motion

Notice of Motion-Affirmation of Jocelyn Kelly, Esq.-Exhibits A-J 1-12
Affirmation in Opposition of Steven M. Melley, Esq.-Exhibits A-F 13-19
Reply Affirmation of Jocelyn Kelly, Esq 20

Defendant Fiorino's Motion

Notice of Motion-Affirmation of Deborah A. Summers, Esq.-Exhibits A-I..... 21-31
Affirmation in Opposition of Steven M. Melley, Esq.-Exhibits A-F 32-38
Reply Affirmation of Deborah A. Summers, Esq-Exhibits J-M..... 39-43

This action was commenced by Plaintiffs Francis Martinez and Irma Martinez (hereinafter "Plaintiff" and "Plaintiff Irma" individually or "Plaintiffs" collectively) on or about March 1, 2018. It is alleged that on December 12, 2016, Plaintiff was injured when he slipped and fell on black ice on the sidewalk abutting 14 Vernon Terrace ("the property") which is located in the City of Poughkeepsie. Defendant Fiorino owns the property abutting the area of the sidewalk on which Plaintiff fell and Defendant City owns the subject sidewalk.[1]

On a motion for summary judgment, the proponent "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012]. "Issue finding, rather than issue determination, is the court's function on a motion for summary judgment." *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v.*

[1] Defendant Kenneth Lashway, who was Defendant Fiorino's tenant at the time of the accident and was allegedly responsible for snow removal on the subject sidewalk, has not appeared in this action.

Command Sec. Corp., 144 AD3d 731, 733 [2d Dept. 2016].

Discussion

On December 12, 2016, at approximately 10:30 pm, Plaintiffs and their children were returning to their home at 16 Vernon Terrace, after visiting with relatives. Plaintiff parked their vehicle across the street from their residence. In order to get to their home, they crossed the street and walked onto the sidewalk adjacent to 14 Vernon Terrace where it intersected with the property's driveway. After walking approximately five feet on the sidewalk, Plaintiff slipped and fell on black ice. Plaintiff testified that there was no snow on the sidewalk where he fell, and he did not see any salt or sand.

Defendant City and Defendant Fiorino both move for summary judgment. Defendant City argues that it did not have prior written notice of the condition that allegedly caused Plaintiff's fall and that no exceptions to the prior written notice law are applicable herein. In support of its motion, Defendant City submits, *inter alia*, the Pleadings, Plaintiffs' Bill of Particulars, the 50-h and deposition transcripts of the Plaintiff, the deposition transcript of Chris Ghent (on behalf of Defendant City) and the affidavit of Diane Rose, an employee of Defendant City's Department of Public Works ("Rose Affidavit").

"A municipality that has enacted a prior written notice provision 'may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies' [citations omitted]." *Seegers v. Vill. of Mineola*, 161 AD3d 910 [2d Dept. 2018]. Further, the "'prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made

by the plaintiff in the pleadings.' [citation omitted]." *Loghry v. Vill. of Scarsdale*, 149 AD3d 714, 715 [2d Dept. 2017]. In the instant matter, Plaintiffs' Verified Bill of Particulars alleges, *inter alia*, that Defendant City failed to maintain the subject sidewalk, failed to remove ice from said sidewalk, created a condition of a low uneven area in the sidewalk allowing for the puddling of water, created a sidewalk that did not drain away snow melt and failed to remove snow piles from the sides of the sidewalk from prior snowfalls. As such, in order "to establish its prima facie entitlement to judgment as a matter of law, the defendant [City] was required to demonstrate, prima facie, both that it did not have prior written notice of the alleged defect, and that it did not create the alleged defect." *Id*. Said Defendant has failed to do so.

Although Defendant City has established that it lacked prior written notice of the alleged defect,[2] it failed to demonstrate, *prima facie*, that it did not create the alleged condition. Defendant City states, without citation to record evidence, that there is no proof that Defendant City created the condition involved in Plaintiff's accident. However, as the party moving for summary judgment, Defendant City is required to demonstrate its *prima facie* entitlement to judgment as a matter of law. "As a general rule, a party meets this burden by affirmatively demonstrating the merits of its claim or defense, not by pointing to gaps in the opponent's proof." *Cox v. Consol. Edison, Inc.*, 125 AD3d 923, 924 [2d Dept. 2015].

Here, Defendant City argues that there is no evidence that the condition complained of, "if any" is found to exist, developed as a result of an affirmative act by said Defendant. Notably absent from the City's papers is evidence in support of this assertion. Indeed, in a case cited by Defendant City in support of its motion, the Second Department held that although the mere

[2] Plaintiffs do not contest this in their opposition.

failure to remove all snow or ice from a sidewalk is an act of omission, rather than an affirmative act of negligence, "a municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous icy condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement." *Larenas v. Inc. Vill. of Garden City*, 143 AD3d 777, 778 [2d Dept. 2016].

Thus, in order to establish its *prima facie* case, Defendant City was required to put forth some evidence regarding its snow removal in the area at or around the time of the accident. Moreover, given Plaintiffs' allegations that the construction of the sidewalk contributed to the creation of the icing condition, said Defendant was required to present evidence demonstrating what, if any work Defendant City had done on this area of the sidewalk. Having failed to do so, Defendant City does not establish its *prima facie* case as to its alleged creation of the subject condition, regardless of the sufficiency of the papers submitted in opposition. *Larenas*, *supra* at 779; *see also Seegers*, *supra* (Village demonstrated that it did not receive notice of the ice condition, but it failed to demonstrate prima facie that it did not create the ice condition that allegedly caused Plaintiff to fall); *Eisenberg v. Town of Clarkstown*, 172 AD3d 683, 684 [2d Dept. 2019] (A municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous ice condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement.); *Kabia v. Town of Yorktown*, 175 AD3d 1395, 1396, [2d Dept. 2019] (defendants established only that they did not have prior written notice of the ice condition, and made no attempt to refute the plaintiff's allegations that the defendants had affirmatively created the alleged ice condition). As a result, Defendant City's motion for summary judgment is denied.

Defendant Fiorino also moves for summary judgment. Said Defendant asserts that he is not liable to Plaintiffs because the applicable City ordinance does not impose tort liability upon abutting landowners for failure to remove snow and ice from sidewalks. Defendant Fiorino further argues that he did not create the alleged dangerous condition and did not cause the condition by special use of the sidewalk. Defendant Fiorino relies upon the same deposition transcripts submitted by Defendant City, as well as Plaintiffs' Bill of Particulars responsive to his demands.

It is well settled that, in general, "liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner." *Hausser v. Giunta*, 88 NY2d 449, 452–53 [1996]. "An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty." *Hevia v. Smithtown Auto Body of Long Island, Ltd.*, 91 AD3d 822, 822–23 [2d Dept. 2012].

Defendant Fiorino contends that he is not liable to Plaintiffs because Section 15-11 of the City of Poughkeepsie Code does not impose liability upon abutting landowners for injuries caused by a violation of their duty to remove snow and ice from the sidewalks. "In order for a statute, ordinance or municipal charter to impose tort liability upon an abutting owner for injuries caused by his or her negligence, the language thereof must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty he will be liable to

those who are injured." *Conlon v. Vill. of Pleasantville*, 146 AD2d 736, 737 [2d Dept. 1989]. A review of the subject ordinance establishes that although abutting owners are required to remove snow and ice from the sidewalks in front of their property, it does not make those who breach this duty liable to individuals who are injured. Without such language, Defendant Fiorino has established his *prima facie* entitlement to summary judgment on this ground. *Lagawo, supra*. As Plaintiffs have failed to raise a triable issue of fact in opposition on this issue,[3] Defendant Fiorino is entitled to summary judgment.

Defendant Fiorino has also established, *prima facie,* that he did not create the icy condition at issue herein.[4] It is uncontested that Defendant Fiorino lived in Massachusetts at the time of the accident and was not present at the property at or around the time of the accident. According to Defendant Fiorino, Defendant Lashway, his tenant on the day of the accident, was responsible for removing snow and ice from the subject sidewalk. Defendant Fiorino testified that after learning of the accident, he spoke to Lashway, who reported that he had shoveled the sidewalk the day of the accident.[5] Defendant Fiorino also testified that Mr. Lashway told him that he had treated the ice in the early evening.

In opposition, Plaintiffs rely primarily on the report of their expert, Alden P. Gaudreau,

[3] Although Plaintiffs attempt to argue that Defendant Fiorino owns the subject sidewalk, the evidence submitted by both Defendant City and Fiorino establish that Defendant City owns the sidewalk on which Plaintiff fell.
[4] There is no allegation in Plaintiffs' Bill of Particulars that Defendant Fiorino caused the alleged condition through a special use of the sidewalk. Although Plaintiffs argue generally in opposition that Defendant Fiorino "obviously" made special use of the sidewalk to serve his tenant, this is insufficient to raise an issue of fact that Defendant Fiorino caused the alleged dangerous condition to occur because of some special use. *See Rodriguez v. City of Yonkers*, 106 AD3d 802, 803 [2d Dept. 2013].
[5] Notably, there is no direct testimony from Defendant Lashway in the record. However, in opposition, Plaintiffs do not object to this testimony and, in fact, include this testimony in their recitation of facts. Moreover, Plaintiff testified that there was snow on both sides of the sidewalk, but none on the sidewalk in the area where the accident occurred.

P.E. ("Gaudreau").[6] Based upon his review of the testimony, weather reports, photographs and a site visit, Gaudreau concludes that the ice which caused Plaintiff's fall formed sometime after the snow event that occurred during the early morning hours on the day of the accident. Above freezing temperatures then melted the snow on the ground adjacent to the sidewalk, which drained onto the sidewalk. Thereafter, prior to the accident, below freezing temperatures froze the snow melt on the surface of the sidewalk and created a large area of ice.

Based upon these findings, Gaudreau concludes that Defendant Fiorino, or his tenant, did not follow good and accepted maintenance practices. He asserts they should have (1) cleared all the snow that had fallen; (2) applied salt or similar ice melting product after shoveling the snow; (3) applied an abrasive salt or sand to provide a slip resistant surface; and (4) monitored the sidewalk to mitigate any ice conditions that formed after the shoveling. As noted by Defendant Fiorino's counsel in reply, Gaudreau's report identifies a number of things that Defendant Fiorino or his tenant should have done,[7] but does not identify anything that they did to create the icy condition. The expert's report makes clear that the "condition" was created by melting snow adjacent to the sidewalk, which drained onto the sidewalk and re-froze the night of Plaintiff's accident.

Notably, Fiorino can be held liable only if he or Lashway undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous. *Bi Chan Lin v. Po Ying Yam*, 62 AD3d 740, 741 [2d Dept. 2009]. In opposition, Plaintiffs failed to raise a

[6] Counsel for Defendant Fiorino asks the Court to disregard Plaintiffs' expert report as it was not exchanged prior to the motion, in contravention of this Court's Order. Although Plaintiffs clearly failed to comply with the Court's directives, as discussed below, Plaintiffs expert does not raise a triable issue of fact sufficient to warrant the denial of Defendant Fiorino's motion. Therefore the Court's consideration of the report is not prejudicial to said Defendant.

[7] As Defendant Fiorino had no duty to Plaintiff to maintain the sidewalk or to remove snow or ice (*see Conlon, supra*), the conclusions of Plaintiff's expert do not raise an issue of fact on this issue.

triable issue of fact as to whether Lashway made the condition more hazardous than if he had done nothing. "Evidence that melting snow on the defendants' property on the sides of the defendants' driveway may have run off onto the sidewalk does not indicate that the defendants made the naturally-occurring conditions more hazardous." *Bi Chan Lin*, *supra* at 741.

Having failed to raise an issue of fact that Defendant Fiorino created the condition at issue, said Defendant is entitled to summary judgment dismissing the Complaint. Defendant Fiorino submitted evidence demonstrating that the accident occurred on a public sidewalk and that he did not create the defect, make special use of the sidewalk, or violate any statute or ordinance charging him with a duty to maintain the sidewalk and making him liable for injuries caused by a breach of that duty. *Lagawo v. Myers*, 149 AD3d 1056, 1057 [2d Dept. 2017].

The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Therefore, it is hereby

ORDERED that Defendant City's motion is DENIED; and it is further

ORDERED that Defendant Fiorino's motion is GRANTED in its entirety and the Complaint and all cross claims are dismissed in their entirety; and it is further

ORDERED that the trial in this matter is scheduled for jury selection on **December 7, 2020**, with testimony to commence **December 8, 2020**; and it is further

ORDERED that the remaining parties shall appear for a virtual settlement conference via Skype on **May 15, 2020** at 11:00 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
April 30, 2020

CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF