Telesco v Smith
2020 NY Slip Op 34919(U)
August 11, 2020
Supreme Court, Ulster County
Docket Number: Index No. EF2018-2609
Judge: Richard Mott

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

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NICHOLAS TELESCO and CAROLINE TELESCO,

Plaintiffs,

DECISION/ORDER

-against-

Index No. EF2018-2609
R.J.I. No. 55-19-1867
Richard Mott, J.S.C.

MATTHEW SMITH and LINDA SMITH,

Defendants.

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Motion Return Date: July 21, 2020

APPEARANCES:

Plaintiffs: George A. Kohl 2nd, Esq.
Finkelstein And Partners
1279 Rt 300
Newburgh, NY 12551

Defendants: Kimberly Hunt Lee, Esq.
McCabe & Mack, LLP
63 Washington Street
Poughkeepsie, NY 12601

Mott, J.

Defendants move for summary judgment dismissing the complaint in this action to recover for personal injuries based upon premises liability. Plaintiffs[1] oppose.

Background

On February 7, 2018 at approximately 12:10 PM, Plaintiff Nicholas Telesco (Plaintiff), a commercial tenant of a building owned/managed by Defendants, slipped and fell near a gutter downspout, while walking to the bathroom on a 3 to 4-foot wide concrete

[1] Plaintiff Caroline Telesco claim is for loss of consortium only.

apron-walkway adjacent to the building. That day snow flurries began at 8:00 AM and it was still flurrying when Plaintiff fell.

Parties' Contentions

Defendants claim, *inter alia*,[2] that they are not liable for Plaintiff's fall on snow/ice as there was a storm in progress and they had no actual or constructive notice of an icy condition. They maintain that Defendant Matthew Smith (Defendant), who was responsible for sanding and salting, did not see ice upon his daily visit to the premises the day prior to the accident and that Plaintiff, who accessed the bathroom regularly, had made no such complaint. Further, Defendant states he would have applied sand or salt had he seen ice. Thus, Defendants insist that Plaintiffs' claim that ice pre-existed the storm is speculative. In addition, they note that Plaintiff, at his deposition, was unable to describe the ice's dimensions and had not seen ice there before.

In support, they cite the affidavit of meteorologist Alicia C. Wasula (Wasula) that .63-inches of freezing rain fell on February 4-5th followed by below-freezing temperatures persisting until the accident and there was a 1.5-2.5-inch snow accumulation when Plaintiff fell. She opines that same created slippery conditions on untreated/undisturbed surfaces. Further, Defendants invoke Plaintiffs' meteorologist's failure to opine as to whether ice formed by melt/refreezing and that such argument is insufficient to raise a triable issue of fact.

Plaintiffs claim that there are issues of fact as to whether Defendants had actual and/or constructive notice of a dangerous gutter condition that created the ice upon which

[2] The parties' competing expert contentions as to whether the gutter placement constitutes a property maintenance code violation is not included, as same are not dispositive.

Plaintiff fell before the storm. Plaintiff cites his deposition that he transited the snow-covered untrodden apron without difficulty or incident until he reached the gutter, whereupon he slipped and fell on ice that he observed at the gutter downspout and under the snow, after falling. He insists that Defendants had constructive, if not actual notice, by reason of the weather conditions the day before, Defendant's knowledge that the gutter drained into a ¾ inch seam in the apron, as depicted in photographs, and prior advice from an insurance company that the gutter discharge be buried. Moreover, Plaintiffs cite Defendant's deposition that he does not recall when he last salted the area before the accident, state the time he was at the premises the day before or specifically whether he inspected the apron. Plaintiffs maintain the evidence is sufficient from which to infer that gutter discharge predictably melted and refroze.

In support, they proffer the report of meteorologist Steven Roberts (Roberts), opining that the day before the accident .6 inches of snow fell on existing trace ice/snow (less than ½-inch), temperatures reached 33 degrees between 4:00 and 5:00 PM, before again dropping below freezing, and that trace ice/snow was present on undisturbed/ outdoor surfaces when snowfall commenced on the accident date.

Discussion

To prevail on a motion for summary judgment, the moving party must establish *prima facie* entitlement to judgment as a matter of law "by adducing sufficient competent evidence to show that there are no issues of material fact." *Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]. "Only when the movant bears this burden and the nonmoving party fails to demonstrate the existence of any material issue of fact will the motion be properly

granted." *Staunton v Brooks*, 129 AD3d 1371 [3d Dept. 2015], citing *Lacasse v Sorbello*, 121 AD3d 1241, 1241 [3d Dept. 2014].

Premises Liability

In a premises liability negligence action, defendant has the initial burden of establishing that it "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition". *Cietek v Bountiful Bread of Stuyvesant Plaza, Inc.*, 74 AD3d 1628, 1629 [3d Dept 2010]. Such liability, however, does not ordinarily attach where injuries are caused by the natural accumulation of ice or snow while a storm is in progress, *Marrone v Verona*, 237 AD2d 805 [3d Dept 1997] and a landowner's duty to employ reasonable measures to remedy such condition does not commence until a reasonable time after the storm ends. *Wheeler v Grande'Vie Sr. Living Community,* 31 AD3d 992 [3d Dept 2006]. Thus, to impose premises liability,

> "there must be evidence that the defendant knew or, in the exercise of reasonable care, should have known that icy conditions existed and nonetheless failed to exercise due care to correct the situation within a reasonable time after the cessation of the storm *or temperature fluctuations* which created the dangerous condition." *Wimbush v City of Albany,* 285 AD2d 706, 706 [3d Dept 2001] (internal quotations omitted) (dismissal merited where no precipitation fell during the three days preceding the accident/storm).

Further, a general awareness that snow or ice might accumulate is insufficient to constitute notice of a particular condition, *Stoddard v G.E. Plastics Corp*., 11 AD3d 862, 863 [3d Dept 2004]; *Smith v Smith*, 289 AD2d 919, 921 [3d Dept 2001]; see also, *Convertini v Stewart's Ice Cream Co. Inc.,* 295 AD2d 782, 784 [3d Dept 2002] (conclusory unsubstantiated assertion that the ice looked like it had been there for several days insufficient to establish it pre-existed the sleet and freezing rain). Notwithstanding, a defendant's actual notice of a

recurrent dangerous condition is sufficient to establish constructive notice thereof. *Sampaiolopes v Lopes*, 172 AD3d 1128 [2d Dept 2019] (issue of fact as to whether defendant had actual notice of an alleged recurrent ice formation due to leaky gutter, rendering him chargeable with constructive notice of each such occurrence).

Here, although Defendants have met their initial burden establishing a storm in progress at the time of the accident upon Wasula's affidavit, Plaintiffs have raised a triable issue of fact in rebuttal as to whether the ice pre-existed the storm and Defendant had constructive notice thereof, thereby creating an unnatural danger and/or exacerbating the storm hazard. *Mondello v DiStefano*, 16 AD3d 637, 639 [2d Dept 2005] (plaintiff's submission, including photographs of gutter outfall and effect on adjoining pavement, raised triable issues of fact as to whether defendant had actual knowledge of a recurrent dangerous condition sufficient to establish constructive notice thereof). Unlike *Mosquera v Orin*, 48 AD3d 935 [3d Dept 2008] (assertion that ice pre-existed storm not supported by evidence that plaintiff observed any frozen puddles), here Plaintiff observed the ice upon which he fell. Moreover, the contention that it pre-existed the storm is corroborated by the location of his fall, photographs depicting the normal path of gutter runoff into the apron seam, meteorological evidence that there was precipitation and above-freezing temperatures the day before the accident and, where concededly, there was trace snow/ice on the ground before the storm. The fact that Roberts did not opine as to whether there was a melt/refreeze does not alter the result. Further, Wasula fails to address the weather conditions the day prior to the accident, except that they were fairly quiet with below freezing temperatures, contrary to Roberts' report. Finally, Wasula states that freezing rain did not commence until two hours after Plaintiff fell. *De Ordio v Golembieski*, 269 AD2d 861,

862 [4th Dept 2000] (issue of fact whether ice on stairs resulted from freezing rain or whether the lack of gutters contributed to the icy condition). Thus, viewing the evidence in the light most favorable to Plaintiffs, *Spicer v Estate of Ondek*, 60 AD3d 1234, 1235 [3d Dept 2009] triable issues of fact exist as to whether the ice upon which Plaintiff fell pre-existed the storm and Defendants had constructive notice thereof. *Boyko v Limowski*, 223 AD2d 962, 964 [3d Dept 1996] (defendant failed to establish as a matter of law that he lacked constructive notice where there was evidence ice pre-existed the accident by 3 hours).

Accordingly, the motion is denied and any remaining contentions are rendered academic. **A telephone conference is scheduled for August 27, 2020 at 10:00AM which is to be initiated by Plaintiffs' counsel.**

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
August 11, 2020

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Statement of Material Facts, Memorandum of Law and Affirmation of Kimberly Hunt Lee, Esq., dated May 28, 2020 with Exhibits A-K, L1-L2 and M-1-M2.
2. Opposition Affirmation, Response to Statement of Material Facts and Counter-Statement of Material Fact and Memorandum of Law of George A. Kohl 2nd, Esq., dated June 29, 2020, with Exhibits A-D;
3. Reply Memorandum of Law of Kimberly Hunt-Lee, Esq., dated July 7, 2020.