Paulk v Viera
2020 NY Slip Op 34922(U)
February 7, 2020
Supreme Court, Orange County
Docket Number: Index No. EF010640-2018
Judge: Catherine M. Bartlett

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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TAMESHA PAULK,

Plaintiff,

-against-

GLADYS VIERA and SANTOS VIERA,

Defendants.

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To commence the 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.

Index No. EF010640-2018
Motion Date: January 30, 2020

The following papers numbered 1 to 6 were read on the Defendants' motion for summary judgment:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition - Affidavit - Expert Affidavit / Exhibits 3-5

Reply Affirmation 6

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff Tamesha Paulk commenced this action against defendants Gladys and Santos Viera to recover for personal injuries arising out of a slip and fall on "black ice" that occurred on February 5, 2018 at 7:30 a.m. in the Defendants' home in Beacon, New York. Defendants move for summary judgment on the ground that they lacked notice of this condition. Plaintiff contends that Defendants failed to established *prima facie* entitlement to judgment as a matter of law, and in any event, that Plaintiff has demonstrated the existence of a triable issue of fact

whether Defendants created the condition in that it was the product of melting and refreezing snow piled adjacent to the driveway.

A. Defendants' Evidence

Plaintiff was employed as a personal care assistant for defendant Gladys Viera (who was suffering from dementia) commencing in October of 2017. She worked seven days a week, from 7:00 a.m. to 1:00 p.m.

On the morning of February 5, 2018, the weather was cold, but above freezing, and there was no precipitation. Plaintiff was running late for work because she had had to wait for the babysitter. Her mother drove her to the Viera home and dropped her off in the driveway at about 7:30 a.m. There was snow on the grass at the side of the driveway, but Plaintiff observed no snow or ice on the driveway itself. Indeed, Plaintiff could not recall ever having observed snowy or icy conditions in the driveway at the Viera's. Plaintiff exited her mother's car, took one step back, slipped and fell.

Plaintiff testified:

Q Describe as best you remember it the, what you saw that you understood caused you to fall.

A I seen it was like dried up ice but it looked like it was, like, melted but then it started to dry – not dry, freeze, ice, like I felt it under me, when I was getting up I felt it icy under my hands, to see what I had fell on.

Q Were you able to see the ice when you were standing up or did you have to go to touch it to realize it was there?

A I had to go touch it.

Q Did you observe how large the patch of ice was on the driveway?

A No.

Q Did you see any ice on the driveway other than the spot where you fell?

A No, I wasn't looking, no. I was just trying to walk.

Q I'm sorry?

A Walking careful.

Q Between where you fell and when you went into the house was there any additional slippery condition?

A Not that I remember.

Bethzaida Catalano is the Defendants' daughter. Both of her parents are disabled and incapable of testifying. From December 2017 to February 2018, Ms. Catalano was at her parents' home three to four days a week to assist them. She testified:

Q When snow and ice is removed from your parents' driveway, would snow accumulate on the grassy parts adjacent to your parents' driveway?

A Yes.

Q When the temperature would rise above 30 degrees from time to time, would that snow melt and water run back into the driveway, which would then refreeze at night when the temperature would drop below 37 degrees?

A Are you asking if that happens?

Q I'm asking if you noticed that happening at the house at any point in time?

A No.

Marilyn Ricottilli, another of the Defendants' daughters, resided up the block from her parents, was their primary caretaker and was at their home nearly every day. She testified:

Q ...During the 2017 to 2018 winter season did you ever specifically ask somebody to check the driveway for ice?

A I would do it. I wouldn't have to go and ask anybody. Like you don't understand. I was there almost all the time, especially if the weather was bad....

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Q Was there a system in place for inspecting for melt and refreeze or was it just if we saw it we took care of it?

A If we saw it we took care of it, be we saw it and took care of it all the time. My husband and I would take care of my father-in-law's, my house, my father's. My cousin is right there. My aunt lives next door. We take care of the driveways and the sidewalks.

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Q ...Did anybody ever inspect that area of the driveway next to the grassy area for melt and refreeze from the snow that accumulated in that grassy area that would melt when the temperature rose above 32 degrees and then freeze when the temperature dropped below 32 degrees? Did anybody inspect for that?

A I'm going to answer your question. If the snow – the only place that used to freeze at my father's house would be over here in the road. Usually over here is where there's a puddle. Let me tell you, as a kid we used to go ice skating right there. In the driveway, no....

B. Plaintiff's Evidence

In opposition to Defendants' motion, Plaintiff proffered an affidavit contradicting her deposition testimony.

Plaintiff had testified:

Q Were you in a hurry when you were getting out of your mother's vehicle?

A Yes.

Q And you were in a hurry because you were half an hour late for work or something else?

A Because I was late for work.

Her affidavit states to the contrary: "While I was late for work that morning, I had called my employer to advise that I would be late, and was not rushing as I exited my mother's vehicle."

As noted hereinabove, Plaintiff had also testified that she never saw ice in Defendants' driveway and had to go touch the ice she purportedly slipped on before she even realized it was there. Her affidavit states to the contrary: "I opened the door and placed both feet on the driveway. I saw what appeared to be wet pavement or ice in my direct path to the house..." Plaintiff explains that her affidavit is consistent with prior unsworn statements, but those statements too are contradictory. In what appears to be an employee accident report she stated "I seen the ground was wet," but in a patient medical history she stated "I seen some ice." In what appears to be an insurance statement, the critical word was left out and inserted illegibly: "I observed there was [illegible insertion] on the patient's driveway."

Plaintiff also proffered an expert meteorological affidavit and report. The expert purports to have gleaned meteorological data from a number of cited sources, and to have summarized the data in his report, but none of the meteorological records are annexed to his submission. He asserts *inter alia* that 2.5 inches of snow/sleet fell on February 2, 2018; that .70 inches of rain and .1 inch of snow/sleet "+ ice" fell on February 4; that melting and refreezing processes occurred on February 1, 2, 3, 4 and 5; that the last time new ice formed prior to the accident was at about 11:50 p.m. on February 4; and that the air temperature rose above freezing from about 2:33 a.m. through 8:09 a.m. on February 5. The expert opines that "[a]t 7:30 a.m. on February 5, 2018, the sky was mostly cloudy, the air temperature was 34 degrees Fahrenheit, and approximately 1.5" of pre-existing snow/ice, and areas of old melt refreeze ice, were present on exposed, untreated and undisturbed surfaces."

C. Legal Analysis

1. The Standard Governing Summary Judgment Motions

"The proponent of a summary judgment motion 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 University Medical Center,* 64 NY2d 851, 853 (1985). "[T]he 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." *Foster v. Herbert Slepoy Corp.,* 76 AD3d 210, 214 (2d Dept. 2010) (citing *Alvarez v. Prospect Hospital,* 68 NY2d 320, 325, and *Winegrad v. New York University Medical Center, supra*). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York University Medical Center, supra.* If, on the other hand, the movant establishes *prima facie* entitlement to summary judgment, the opponent, to defeat the motion, "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980).

2. Defendants' Initial Burden Of Proof

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice of its existence." *Lauture v. Board of Managers,* 172 AD3d 1351, 1352 (2d Dept. 2019); *Bader v. River Edge at Hastings Owners Corp.,* 159 AD3d 780 (2d Dept.), *lv. denied* 31 NY3d 913 (2018); *Haberman v. Meyer,* 120 AD3d 1301 (2d Dept. 2014); *Cuillo v. Fairfield Property Services, L.P.,* 112 AD3d 777, 778 (2d Dept. 2013).

Thus, a defendant moving for summary judgment in a slip-and-fall case establishes *prima facie* entitlement to judgment as a matter of law by demonstrating that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *See, e.g., Lauture v. Board of Managers, supra*; *Haberman v. Meyer, supra*; *Ferro v. 43 Bronx River Road*, 139 AD3d 897 (2d Dept. 2016); *Levine v. G.F. Holding, Inc.*, 139 AD3d 910, 912 (2d Dept. 2016); *Hall v. Staples Office Superstore East, Inc.*, 135 AD3d 706 (2d Dept. 2016); *Cuillo v. Fairfield Property Services, L.P., supra*; *Paduano v. 686 Forest Avenue, LLC*, 119 AD3d 845 (2d Dept. 2014); *Rudloff v. Woodland Pond Condominium Ass'n*, 109 AD3d 810, 812 (2d Dept. 2013).

3. Defendants Established *Prima Facie* That They Lacked Notice Of The Ice On Which Plaintiff Purportedly Slipped And Fell

There is no evidence that Defendants had actual notice of the invisible black ice on which Plaintiff purportedly slipped and fell, and Plaintiff does not claim otherwise.

A property owner may be found to have had constructive notice of a hazardous condition if it was visible and apparent and existed for a sufficient length of time prior to the accident to permit the owner to discover and remedy it. *See, Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 (1986); *Ferro v. 43 Bronx River Road, supra.*

A property owner may satisfy his initial burden of proof on the issue of constructive notice in various ways, depending on the circumstances of the case. While the owner may offer evidence as to when the situs of the accident was last cleaned or inspected relative to the time of the plaintiff's fall, such evidence is not required where, as here, the plaintiff's own testimony demonstrates that the condition was invisible and not discoverable upon reasonable inspection.

In *Lauture v. Board of Managers, supra*, the Second Department held that the defendant's evidence of general inspection practices was insufficient to demonstrate entitlement to summary judgment on the issue of constructive notice, but *only* because "the conditions were visible and apparent." *Id.*, 172 AD3d at 1352. Conversely, in *Voss v. D & C Parking,* 299 AD2d 346 (2d Dept. 2002), where the hazardous icy condition was invisible, the Second Department held:

> In support of its motion for summary judgment, the defendant...established, as a matter of law, that it did not...have actual or constructive notice of the condition. The plaintiff's fall occurred in the early morning. There were no visible ice patches in the parking lot, and the plaintiff did not see the ice patch on which she slipped because it was covered with mud. This evidence was sufficient to establish [defendant's] prima facie entitlement to judgment as a matter of law.

Id., 299 AD2d at 346. *See also, Gershfeld v. Marine Park Funeral Home, Inc.*, 62 AD3d 833, 834 (2d Dept. 2009) (no actual or constructive notice where plaintiff testified that "the ice was clear and not visible until it was touched"); *Carricato v. Jefferson Valley Mall Ltd. Partnership,* 299 AD2d 444, 445 (2d Dept. 2002) (no constructive notice where "plaintiff's deposition established that the ice patch was not visible and apparent even to her as she stepped on it"); *Tompa v. 767 Fifth Partners, LLC,* 113 AD3d 466 (1st Dept.), *lv. denied* 24 NY3d 903 (2014) ("the record establishes that the hazard was not 'visible and apparent' so as to enable defendant's employees to discover it"); *Lillie v. Wilmorite, Inc.*, 92 AD3d 1221, 1222 (4th Dept. 2012) ("Defendant met its initial burden of demonstrating that it had neither actual notice of the icy condition in question nor constructive notice thereof, inasmuch as the patch of black ice was not 'visible and apparent'"); *Mullaney v. Royalty Properties, LLC,* 81 AD3d 1312 (4th Dept. 2011) ("Defendant met its initial burden of establishing as a matter of law that it lacked constructive notice of the icy condition by submitting plaintiff's deposition testimony that the black ice was not visible").

Here, Plaintiff's own testimony established that her accident occurred early in the morning; that she observed no snow or ice on Defendants' driveway; and that she could not see the ice on which she purportedly slipped standing up, but had to go down and touch it just to realize it was there. This testimony incontrovertibly establishes that this black ice was not "visible and apparent," and further, that it could not have been discovered upon reasonable inspection, since a homeowner cannot reasonably be required to bend down and touch his driveway to discover the existence of an icy patch which cannot be seen standing up. Under the authority cited above, Defendants established *prima facie* that they lacked notice of the icy condition on which Plaintiff purportedly slipped and fell.

That is not all. Although Plaintiff arrived in Defendants' driveway for work every morning, seven days a week, from October 2017 through the date of the accident, she could not recall *ever* having observed snowy or icy conditions in the driveway. In *Haberman v. Meyer, supra,* 120 AD3d 1301 (2d Dept. 2014), the Second Department wrote:

> The plaintiff, a home health aide caring for the defendants' decedent, allegedly sustained serious injuries when he slipped on a patch of black ice in the decedent's carport on his way to dispose of a bag of recyclables.
> .....
> Here, the defendants met their prima facie burden by submitting the deposition testimony of the plaintiff, in which he stated, inter alia, that he had been working for the defendants' decedent at the premises five days a week for three months prior to the accident...had taken the same path along the side of the car in the covered carport to throw out the recyclables at least 10 times during that three-month period, did not notice any ice or snow or accumulation of water in that area of the carport during that period or on the day of the accident, and that he did not see the ice on which he slipped , which he described as being clear, until after he fell. Thus, the defendants demonstrated, prima facie, that they neither created nor had actual or constructive notice of the ice that allegedly caused the plaintiff to fall [cit.om.].

Id., 120 AD3d at 1301-02.

For this reason too, then, Defendants established *prima facie* that they lacked notice of the icy condition on which Plaintiff purportedly slipped and fell.

4. Plaintiff Failed To Demonstrate The Existence Of A Triable Issue Of Fact On The Element Of Notice

Evidently realizing that her deposition testimony was fatal on the issue of notice, Plaintiff in opposition to Defendants' motion proffered an affidavit wherein she avers that when she opened the door and stepped out of the car, "[she] saw what appeared to be wet pavement or ice in my direct path to the house." Inasmuch as this averment flatly contradicts Plaintiff's unequivocal deposition testimony, it presents only "a feigned factual issue designed to defeat the defendants' motion." *See, Kaplan v. DePetro,* 51 AD3d 730, 731 (2d Dept. 2008). *See also, Makaron v. Luna Park Housing Corp.,* 25 AD3d 770, 770-771 (2d Dept. 2006).

Plaintiff also proffered a meteorologist's expert affidavit purporting to show *inter alia* that after a series of melting / refreezing cycles, new ice last formed at about 11:50 p.m. on February 4, 2018, seven hours and forty minutes prior to her accident. As a preliminary matter, since the meteorological records on which the expert purportedly relied were not submitted with his affidavit, the expert's opinion lacks an adequate foundation and thus fails to establish when the icy condition at issue here came into existence. *See, Werny v. Roberts Plywood Co.,* 40 AD3d 977, 978 (2d Dept. 2007); *Martin v. RP Associates,* 37 AD3d 1017, 1019 (3d Dept. 2007). In any event, the meteorological evidence does not alter the fact that the icy condition in question was not "visible and apparent." The Court takes judicial notice that sunrise in Beacon, New York occurred shortly after 7:00 a.m. on February 5, 2018, leaving a window of less than

one half hour to discover and remedy an invisible patch of black ice before Plaintiff's accident occurred.

In view of the foregoing, the Court finds that Plaintiff produced no competent evidence that the icy condition that purportedly caused Plaintiff's slip and fall was visible and apparent could have been discovered upon reasonable inspection, and thus failed to demonstrate the existence of any genuine issue of material fact on the element of constructive notice.

5. Defendants Established *Prima Facie* That They Did Not Create The Condition That Purportedly Caused Plaintiff's Accident

Plaintiff contends that Defendants created the condition that caused her accident by piling snow on the grassy area adjacent to the driveway, and allowing snowmelt to flow on a recurring basis onto the driveway and refreeze in the area where Plaintiff slipped and fell. Defendants established *prima facie* that this did not occur, and indeed never occurred.

First, as noted, Plaintiff was in Defendants' driveway every single morning, at about the time of day she slipped and fell, during the months leading up to the date of the accident, and could not recall *ever* having observed snowy or icy conditions in the driveway. Second, Bethzaida Catalano, who had grown up in Defendants' home and frequently visited to care for her disabled parents, never noticed snowmelt running from the grassy area and refreezing on the driveway. Third, Marilyn Ricottilli, who like her sister had grown up in Defendants' home and frequently visited to care for them, testified that water never pooled and froze on the driveway but only out on the road.

As the Second Department observed in *Bader v. River Edge at Hastings Owners Corp., supra,* 159 AD3d 780 (2d Dept.), such a "long-term lack of knowledge" of any prior snowmelt

flowing from the grassy area onto the driveway and refreezing "by definition and necessity, ruled out any conditions that might be recurring." *See, id.* at 782 (plaintiff traversed area of her accident six times per week and never noticed any accumulation of ice, and property manager's statement that "water did not pond in the parking lot during the 38 years he worked at the property necessarily addresses and excludes any recurring condition in the same lot"). *See also, Haberman v. Meyer, supra*; *Tompa v. 767 Fifth Partners, LLC, supra,* 113 AD3d 466, 467 (1st Dept. 2014) ("nothing in the record establishes that water from the fountains was routinely deposited on the plaza to support her claim that [creation of icy condition] was a recurring condition").

In view of the foregoing, Defendants established *prima facie* that they did not create the icy condition that purportedly caused Plaintiff's accident.

6. Plaintiff Failed To Demonstrate The Existence Of A Triable Issue Of Fact Whether Defendants Created The Condition That Purportedly Caused Her Accident

Once again, Plaintiff contends that Defendants created the condition that caused her accident by piling snow on the grassy area adjacent to the driveway, and allowing snowmelt to flow on a recurring basis onto the driveway and refreeze in the area where Plaintiff slipped and fell. To raise an issue of fact, the Plaintiff must "offer a basis from which it could be reasonably inferred that defendant's snow-removal efforts 'created or heightened' the alleged hazardous condition." *See, Rivas v. NYCHA,* 140 AD3d 580 (1st Dept. 2016). Mere speculation is insufficient. *See, Lori v. Edwards,* 106 AD3d 689, 690 (2d Dept. 2013) (plaintiff's contention that water runoff from melting snow piles played a role in her accident was "speculative and contradicted by the record"); *Folki v. McCarey Landscaping, Inc.,* 66 AD3d 825, 825-826

(2d Dept. 2009); *Zabbia v. Westwood, LLC,* 18 AD3d 542, 544 (2d Dept. 2005); *McCord v. Olympia & York Maiden Lane Co.,* 8 AD3d 634, 636 (2d Dept. 2004); *Urena v. NYCTA,* 248 AD2d 377, 377-378 (2d Dept. 1998); *Acar v. Ecclesiastical Assistance Corp.,* 125 AD3d 464 (1st Dept. 2015).

In the face of the testimonial record summarized above, Plaintiff here presented no evidence whatsoever that snowmelt flowed across the Defendants' driveway to the area where Plaintiff slipped and fell, whether on a recurrent basis or on the day of Plaintiff's accident. For multiple reasons, the opinion of Plaintiff's expert meteorologist is utterly insufficient to remedy the deficiency in Plaintiff's proof. As noted above, the expert's opinion lacks an adequate foundation because the meteorological records on which he purportedly relied were not submitted with his affidavit. *See, Werny v. Roberts Plywood Co., supra*; *Martin v. RP Associates, supra.* In any event, the meteorologist "merely addressed general conditions in the vicinity rather than the origin of the specific ice on which the plaintiff [alleges that [s]he] fell." *See, Robinson v. Trade Link America,* 39 AD3d 616, 617 (2d Dept. 2007). Relatedly, there is no photographic, topographical or other evidence of the incline of, or depressions in, the driveway to show that water *could* flow downhill from the grassy area onto the driveway and refreeze. *See, Haberman v. Meyer, supra,* 120 AD3d at 1302 ("affidavit and site plan of the plaintiff's expert failed to establish that any pooling condition allegedly created by the [defendant] cause the ice to form where the plaintiff slipped and fell").

In view of the foregoing, Plaintiffs' contention that Defendants created the condition that caused her accident by piling snow on the grassy area adjacent to the driveway, and allowing snowmelt to flow onto the driveway and refreeze in the area where Plaintiff slipped and fell is

hopelessly speculative. Hence, Plaintiff failed to demonstrate the existence of any triable issue of fact whether Defendants created the condition that purportedly caused her accident.

It is therefore

ORDERED, that Defendants' motion for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: February 7, 2020 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE