

Rodriguez v Fianza

2020 NY Slip Op 35633(U)

May 26, 2020

Supreme Court, Bronx County

Docket Number: Index No. 30048/2017E

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX

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 Alberto Rodriguez,

Plaintiff,

Decision and Order

-against-

Index No.: 30048/2017E

Luigi Fianza, Maria Fianza, and Long
 Zhang,

Howard H. Sherman, J.S.C.

Defendants.

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Defendant Long Zhang ("Defendant") moves for summary judgment dismissing Plaintiff's complaint and any and all cross-claims against Defendant.¹ Plaintiff opposes the motion.

The cause of action is for personal injuries sustained by the Plaintiff on March 15, 2017, at approximately 5:00 am, when Plaintiff allegedly slipped and fell on the sidewalk due to snow and ice in front of 1821-1823 Radcliff Avenue in Bronx County.

In support of the motion, Defendant submits the deposition transcripts of the Plaintiff, co-defendants Luigi Fianza ("Mr. Fianza") and Maria Fianza ("Ms. Fianza") and Ya Fang Huang ("Ms. Huang"), a witness for the Plaintiff.

Defendant refers to the deposition testimony of Mr. Fianza wherein he stated that he was the owner of 1821 Radcliff Avenue for approximately eighteen (18) years including on the date of the accident. The property is a one-family house. To the right of the house there is a white gate in front of an alleyway, both of which are the property of 1821 Radcliff Avenue. The alleyway leads to the backyard of 1821 Radcliff Avenue. Mr. Fianza testified that his custom and practice when it snowed was to clear the snow before it built up too much then he would repeat the cleaning process again a few hours later. Mr. Fianza, his wife, and/or kids from the neighborhood whom Mr. Fianza hired, would perform snow removal operations for 1821 Radcliffe Avenue.

Mr. Fianza further testified that when he shoveled and salted the sidewalk, he would go approximately twelve inches past the brick pillar located to the right of his house. He used salt and blue-colored calcium chloride. Mr. Fianza stated that on the day before Plaintiff's accident as well as on the day of, Mrs. Fianza had shoveled the snow. Ms. Fianza testified that she was mainly responsible for snow removal in front of 1821 Radcliff Avenue. She stated that on occasion, she observed an Asian female superintendent clearing snow or ice on the sidewalk in front of the brick building adjacent to her house. However, she never observed the

¹ The action was discontinued against Defendants Luigi Fianza and Maria Fianza by Stipulation dated March 28, 2019, pursuant to a settlement.

superintendent shovel in front of 1821 Radcliff Avenue. Defendant asserts that Ms. Fianza identified the area where Plaintiff fell as an area that she would shovel when clearing the sidewalk of snow and ice.

Next, Defendant refers to the deposition testimony of Ms. Huang, who was hired to perform work for the Defendant who owned the building at 1823 Radcliff Avenue. Ms. Huang testified that since the alleyway and gate between the house and building belonged to the house, the sidewalk in front of it was not shoveled or salted by her or anyone on behalf of the Defendant, including her and the children she hires to assist with shoveling. When it snowed, she visited the property to supervise the removal of snow by the neighborhood children that she hired and paid with Defendant's money. Ms. Huang recalled that it snowed on March 14, 2017. She visited the building on that day and asked three (3) neighborhood children to shovel the snow. She instructed them to shovel by the edge of the brick building. Ms. Huang observed that the children started shoveling at the pillar by the building and away from the white house at 1821 Radcliff Avenue. When she left the property that day, she did not observe any icy conditions on the sidewalk. When she returned to the building on the day of the accident, she observed the sidewalk to be very clean and did not observe any icy conditions.

Defendant asserts that he is not liable for Plaintiff's accident because the Plaintiff testified that he slipped and fell in front of the white gate belonging to 1821 Radcliff Avenue, which is owned by the Fidanzas. The Fidanzas testified that they were responsible for shoveling and salting the sidewalk in front of the white gate. Defendant further attaches a certified land survey of 1823 Radcliff Avenue which illustrates the property line between 1821 Radcliff Avenue and 1823 Radcliff Avenue. The property line extension shows that the alleyway, white gate, and brick pillars are part of 1821 Radcliff Avenue. Therefore, since the sidewalk where Plaintiff allegedly slipped and fell was owned by the Fidanzas, Defendant is entitled to summary judgment.

In opposition to the motion, Plaintiff asserts that there are issues of fact to be resolved by a jury. Specifically, Plaintiff contends that the evidence shows that the icy condition which caused Plaintiff's fall, was present across the entire sidewalk in front of both properties. In the photograph taken by Plaintiff immediately after the accident, as he sat on the steps in front of the Fidanzas' house, he circled the general location of his accident. Plaintiff argues that it is clear that the area where he fell abuts both Defendant's and Fidanzas' properties. The Plaintiff testified that the accident occurred between the house and the building. In his opposition papers, Plaintiff further argues that the photograph shows a significant amount of snow and ice covering the sidewalk in front of both properties and notes a "skid-like" pattern on the sidewalk in front of both properties.

Plaintiff further refers to that portion of Ms. Huang's deposition testimony wherein she stated that the day before Plaintiff's fall, she did not recall what time she arrived at 1823 Radcliff Avenue to conduct snow cleaning. She testified that she hired three (3) children to shovel the snow but did not know what they actually did or how wide they shoveled the area.

With respect to the survey, Plaintiff argues that it is inadmissible without foundational testimony in the form of an affidavit from the surveyor. Furthermore, Plaintiff argues that the

survey is insufficient to warrant summary judgment because even though it may depict the property line between 1821 Radcliff Avenue and 1823 Radcliff Avenue, it does not show where the ice condition was located. Finally, Plaintiff argues that Defendant may be liable for the Plaintiff's fall pursuant to the Administrative Code of the City of New York §7-210, regardless of the location of the condition.

In reply, Defendant argues that the evidence is clear the accident occurred in front of Fidanzas' property and the white line that appears in the photographs introduced at Plaintiff's deposition does not pertain to any boundary akin to a designated property line. Therefore, since Plaintiff fell in front of the white gate between the two properties and the white gate belongs to the Fidanzas, summary judgment should be granted in favor of the Defendant.

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). The failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*, 101 A.D.3d 490 [1st Sept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). On a motion for summary judgment, "...issue-finding, rather than issue-determination is key..." (*Shapiro v. Boulevard Housing Corp.*, 70 A.D.3d 474 [1st Dept. 2010]).

In this case, the court finds that there are triable issues of fact as to whether or not the snow/ice condition which caused Plaintiff's fall was entirely located in front of the Fidanzas' property. The Plaintiff testified that ice was covering the entire sidewalk in front of the Fidanzas' property and the Defendant's property. The photographs show how closely the two properties abut each other. Contrary to Defendant's contention, the circle drawn by the Plaintiff in the photograph depicting the location of his fall, does not definitively show that the accident occurred completely on the Fidanzas' property. Therefore, Defendant has not demonstrated his entitlement to judgment as a matter of law. (see, *Delgado v. 5008 Broadway Associates, LLC*, 149 A.D.3d 583 [1st Dept. 2017]).

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's complaint and all cross-claims against it is denied.

This constitutes the Decision and Order of this Court.

Dated: May 26 2020

Hon. 
HOWARD H. SHERMAN, J.S.C.