

Sanfilippo v Kull
2020 NY Slip Op 35804(U)
July 28, 2020
Supreme Court, Nassau County
Docket Number: Index No. 606086-18
Judge: Jeffrey S. Brown
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. JEFFREY S. BROWN, J.S.C.

-----X **TRIAL/IAS PART 9**

FRANK SANFILIPPO

INDEX NO. 606086-18

Plaintiff,

MOT. SEQ. 01, 02

-against-

SUBMIT DATE: 6.19.2020

**MARY KULL, COUNTY OF NASSAU, and
TOWN OF HEMPSTEAD,**

XXX

Defendants.

-----X

The following papers were read on this motion	DOCS NUMBERED
Seq. 02, 03	
Notice of Motion, Affirmations, Exhibits.....	64
Notice of Cross-Motion, Memoranda, Affirmation, Exhibits.....	55
Opposition Papers	79
Reply Papers.....	86, 89

Defendant Mary Kull moves by notice of motion for an order pursuant to CPLR 3212 granting summary judgment in her favor and dismissing the plaintiff's claims as against her. The Town of Hempstead cross-moves for summary judgment in its favor and dismissing the causes of action asserted against it.¹

This action arises out of an injury allegedly caused when plaintiff slipped on ice present on the sidewalk abutting the residential property owned by defendant Kull on February 9, 2017. In support of this motion, defendant Kull submits the plaintiff's deposition testimony as well as her own, and an affidavit from George Wright, CCM, a professional meteorologist.

Plaintiff testified that on the day of the accident, it was snowing during the day and he first left his home at about 9 pm to go to the drugstore for a prescription. Most of the blocks that he walked on were shoveled because by that time, it was no longer snowing. He did not take notice of whether there was snow remaining on the roadways. After he turned onto Roosevelt Street, he proceeded about 50 feet and slipped on ice on the sidewalk, sustaining a serious injury. Plaintiff explained that he did not see the ice on the sidewalk and "[i]t looked like it was a little shoveled .

¹ Plaintiff's claims against the County of Nassau were previously discontinued.

. . . They didn't shovel good enough. And there was ice and I slipped." He further testified "I didn't see the pavement. It looked like it was a little slushy. They shoveled it a little bit. But I didn't see the pavement . . . Ice was underneath the slush." Plaintiff further testified that there was no sand or salt and he could not see ice melt granules. He did not recall if there were snow piles near the area of the accident. He later stated that "[i]t looked like it was shoveled. There was slush over there, but they probably missed the ice or didn't shovel that well at all, and I slipped on the ice."

Defendant Mary Kull testified that on February 9, 2017, there was a blizzard and her office was closed for the day. She only left the house to perform snow removal together with her co-habitant. The two went outside at about 11am and there were already several inches of snow built up. They used a snowblower to remove the snow around her property, including about 100 feet along Roosevelt Street. She directs the blown snow onto her property but along Roosevelt, there is a stretch of fence and the snow blower is generally positioned such that the snow is added to the ridge line created by plows that clear the roadway. Following removal, she applied ice melt by even distribution using a container to shake it throughout the property line. The blizzard was ongoing during this first clean up and the process took about 45 minutes. The pair went out again to perform snow removal around 2pm, between 4 and 5pm, and between 8 and 8:30pm, following the same procedure. During the final clean-up, Kull recalls that it remained very windy and snow was blowing.

Defendant further stated that snow plows had come through several times during the day. She did not recall seeing snow plows push snow back onto the sidewalk along Roosevelt Street on that day but noted that she had seen that happen in the past. She did not see snow that she believed was pushed back onto the sidewalk on that date and the roads were not cleared curb to curb that day.

Defendant's expert George Wright indicates that he reviewed the relevant litigation materials as well as the climatological data recorded by several national weather services for the date in question at the John F. Kennedy International Airport, which is about 6 miles from the accident location. He indicates that on the day before the accident, February 8, 2017, it had rained in the overnight and cleared during the day with temperatures ranging from a high of 65 to a low of 39 degrees. Accordingly, there was no snow or ice present on the ground that day. A mix of rain and sleet began to fall in the early morning hours of February 9, 2017 and then changed to snow with winds gusting to 40 mph throughout the day. The snow ended at around 5:15pm and there was no additional snow after this time. Between 10.5 and 11.5 inches of snow had fallen at the premises that day. Winds continued to blow at speeds of 20 to 25 mph, with gusts to 40 mph. Mr. Wright states that blowing and drifting snow was occurring during this time.

Mr. Wright opines to a reasonable degree of meteorological certainty that "strong winds gusting above 35 mph produced blowing and drifting snow that covered the subject sidewalk with new snow after the fourth and last snow removal was performed" by the defendant between 8 pm and 8:30 pm, creating additional slippery areas. He concludes that "[t]he snow and ice plaintiff allegedly slipped and fell upon on the subject sidewalk was formed by the ongoing winter storm that was in progress and . . . blowing and drifting snow that continued to cover new areas of the subject sidewalk prior to and at the time of the alleged accident."

In opposition, plaintiff submits the affidavit of Mark L. Kramer, a consulting professional meteorologist. Like Mr. Wright, Mr. Kramer collected the meteorological records for the date in question from national weather services. Mr. Kramer points out that despite Mr. Wright's indication that snow continued to blow in the area, plaintiff did not refer to snow as the cause of his slip and fall. Rather, plaintiff repeatedly testified that ice covered by slush caused him to slip and fall.

Mr. Kramer explains that snow and ice melting materials, such as salt and calcium chloride, "melt snow and/or ice because when these materials are applied, they lower the freezing point of water below 32°F. The amount of snow/ice melt material necessary to melt a depth of snow and/or ice depends on the temperature of the surface, the depth and water content of snow/ice as well as the subsurface material." He further indicates that although air temperatures were warmer in the early morning hours of February 9, 2017, they remained below freezing for most of the day and through the time of the accident. Accordingly, he posits that there would be no natural snow melt and refreeze during the course of the day. In particular, he states:

On February 9, 2017 after 6 a.m., air temperatures remained below freezing. After the defendant's first snow removal and ice melt treatment at 11:00 a.m., air temperatures remained in the 20s through and past the last snow removal and ice melt treatment at 8:00 p.m. or 8:30 p.m.

The ice covered by slush that formed on the sidewalk on February 9, 2017 prior to approximately 10:30 p.m. that the plaintiff testified that he slipped and fell on, did not form naturally from the snowfall and below freezing temperatures after the sidewalk was cleaned down to the concrete at around 11 a.m.

Mr. Kramer concludes that:

[T]he ice covered by slush that plaintiff testified he slipped and fell on at approximately 10:30 p.m. on February 9, 2017 was the direct result of the melting and refreezing of snow that fell after the 11 a.m. snow removal, *and/or*

1. subsequent snow removals and ice melt treatments; *and/or*
2. residual snow, ice and slush that remained after any of the snow removal processes and ice melt treatments that froze and were subsequently covered by additional snow that partially melted by the addition of more ice melt, such that:

- a. the residual snow, ice, slush that was present at the time of the last snow removal at 8:00 or 8:30 p.m. did not have an

adequate amount of ice melt applied to melt the pre-existing snow, ice and/or slush completely, and/or

b. did not have enough ice melt applied to keep any new snow blown onto the sidewalk which melted from refreezing. [emphasis added]

“An owner of property abutting a public sidewalk is under no duty to pedestrians to remove snow and ice that accumulates on the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so, or the property owner made the sidewalk more hazardous through negligent snow removal efforts. (*Jablons v. Peak Health Club, Inc.*, 19 AD3d 369, 370; *Rao v. Hatanian*, 2 AD3d 616).” (*Martin v. City of New York*, 59 AD3d 501 [2d Dept 2009]; *Jablons v. Peak Health Club, Inc.*, 19 AD3d 369 [2d Dept 2005]; see also *Wei Wen Xie v. Ye Jiang Yong*, 111 AD3d 617 [2d Dept 2013]). Here, Hempstead Town Code § 181-11 places the responsibility on homeowners to keep abutting sidewalks “free from obstruction by snow or ice and icy conditions.” However, the code does not impose tort liability for a failure to do so. Indeed, the Appellate Division, Second Department has clearly stated that “while the Code of the Town of Hempstead imposes a duty on, among others, landowners to keep contiguous sidewalks in good and safe repair, **it does not impose tort liability** upon such parties for injuries caused by a violation of that duty (see *Dalder v. Incorporated Vil. of Rockville Ctr.*, 116 A.D.3d at 908; *O’Toole v. City of Yonkers*, 107 AD3d 866, 867; *Taubenfeld v. Starbucks Corp.*, 48 AD3d 310, 311).” (*Maya v. Town of Hempstead*, 127 AD3d 1146, 1148 [2d Dept 2015]; see also *Lahens v. Town of Hempstead*, 132 AD3d 954 [2d Dept 2015]).

[Further,] ‘[u]nder the so-called ‘storm in progress’ rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm’ (*Marchese v. Skenderi*, 51 AD3d 642, 642, 856 NYS2d 680; see *Solazzo v. New York City Tr. Auth.*, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748; *McCurdy v. KYMA Holdings, LLC*, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; *Smith v. Christ’s First Presbyt. Church of Hempstead*, 93 AD3d 839, 840, 941 NYS2d 211). A person responsible for maintaining property is not under a duty to remove ice and snow until a reasonable time after the cessation of the storm (see *Mandel v. City of New York*, 44 NY2d 1004, 408 NYS2d 342, 380 NE2d 173; *Drake v. Prudential Ins. Co.*, 153 AD2d 924, 545 NYS2d 731). However, once a property owner elects to engage in snow removal activities, the owner must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm (see *Cotter v. Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524, 947 NYS2d 608; *Kantor v. Lesiure Glen Homeowners Assn., Inc.*, 95 AD3d

1177, 944 NYS2d 640; *Petrocelli v. Marrelli Dev. Corp.*, 31 AD3d 623, 624, 817 NYS2d 913).

(*Wei Wen Xie v. Ye Jiang Yong*, 111 AD3d at 618; *Cotter v. Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524 [2d Dept 2012]).

Under either formulation, defendant cannot be held liable unless she created or exacerbated a hazardous condition on the sidewalk abutting her property. Defendant established her prima facie entitlement to summary judgment by demonstrating that she took reasonable care in her four snow removal efforts and did not exacerbate the conditions otherwise presented by the blizzard. (See *Wei Wen Xie*, 111 AD3d at 618). In opposition, plaintiff has failed to raise a triable issue of fact. First, incomplete removal alone, as suggested at plaintiff's deposition, is generally insufficient to impose liability. (*Wise v. Filincieri*, 163 AD3d 609, 610 [2d Dept 2018]; *John v. City of New York*, 77 AD3d 792 [2d Dept 2010]). Further, despite plaintiff's testimony that there was no salt or sand and he did not recall seeing ice melt in the subject area, the plaintiff's expert accepts and in fact relies on defendant's testimony about the application of ice melt granules. Nonetheless, plaintiff's expert himself offers several competing potential causes of ice formation (i.e. melting and refreezing of snow falling after the 11am clean-up, **and/or** residual snow and ice left behind by defendant's snow removal and ice melt process, **and/or** ice created by melting and refreezing due to the inadequate application of ice melt). (See *Carmona v. Mathisson*, 54 AD3d 633 [1st Dept 2008] [plaintiff's expert failed to exclude alternative causes of injury caused during cataract surgery]). Such speculative assertions about various potential causes of ice formation at the site of the accident are insufficient to raise a material question of fact to withstand summary judgment. (*Ryan v. Beacon Hill Estates Coop., Inc.*, 170 AD3d 1215, 1216 [2d Dept 2019]; *Koelling v. Cent. Gen. Commun. Serv's., Inc.*, 132 AD3d 734 [2d Dept 2015]; see also *Moreno v. Trustees of Columbia University*, 161 AD3d 501, 501-502 [1st Dept 2018] ["The opinion of plaintiff's expert was too speculative to raise an issue of fact as to whether defendant's snow removal efforts involved insufficient salt or ice melt materials, resulting in the creation of new ice"]).

The Town of Hempstead cross-moves for summary dismissal on the grounds that it neither created or contributed to the condition in question nor had prior written notice of the condition on the sidewalk. In support of its motion, the Town presents an affidavit from Sheila Dauscher, Records Access Officer of the Highway Department of the Town of Hempstead. Ms. Dauscher states that it is part of her duty to receive and record complaints that are sent to the Town regarding defects or unsafe conditions on the Town's sidewalks. She indicates that she has "searched the records of the Highway Department for complaints involving the condition of the sidewalk in the vicinity of the accident [and her] search of the records of the Town Highway department revealed no written notice of any defective, unsafe or dangerous condition or any snow or ice, on the sidewalk in the vicinity of the accident location . . . from February 9, 2015 to February 9, 2017."

Significantly, the Town of Hempstead Code § 6-3 provides, in relevant part:

No civil action shall be maintained against the Town of Hempstead for injuries or damages to persons or property sustained by reason of any defect or obstruction whatsoever in its traffic signs,

sidewalks, walkways, footpaths or bicycle pathways . . . or in consequence of the existence of snow or ice upon any of its traffic signs, sidewalks, walkways, footpaths or bicycle pathways unless said traffic signs, sidewalks, walkways, footpaths or bicycle pathways, no matter where situated, have been constructed or are maintained by the Town of Hempstead or the Commissioner of Highways pursuant to statute and written notice of, by the witness to, said defect or obstruction causing the injuries or damages was actually served upon the Town Clerk or Town Commissioner of Highways in accordance with § 6-4 hereof, nor shall any action be maintained for injuries or damages to persons or property sustained by reason of any defect or obstruction or in consequence of the existence of snow or ice unless such written notice thereof was actually served upon the Town Clerk or Town Commissioner of Highways in accordance with § 6-4 hereof and there was a failure or neglect to cause the particular defect to be remedied or the obstruction of the snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. (*Leiserowitz v City of New York*, 81 AD3d 788 [2d Dept. 2011]; *De La Reguera v City of New York*, 74 AD3d 1127 [2d Dept. 2010]; *Schleif v City of New York*, 60 AD3d 926 [2nd Dept. 2009]; *Smith v Town of Brookhaven*, 45 AD3d 567 [2d Dept. 2007]; see *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Poirer v City of Schenectady*, 83 NY2d 310, 314-315 [1995]). Because suits against the municipality are allowed only by legislative act of the state, statutory preconditions to suit are strictly construed. (*Amabile*, 93 NY2d at 476).

There are two exceptions to the rule: (1) “where the locality created the defect or hazard through an affirmative act of negligence” which “immediately results” in the existence of a dangerous condition; and (2) “where a ‘special use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, 93 NY2d at 474; see *San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]; *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Diaz v City of New York*, 56 AD3d 599 [2d Dept. 2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Delgado v County of Suffolk*, 40 AD3d 575, 576 [2d Dept 2007]).

In this case, the Town demonstrated its prima facie entitlement to judgment as a matter of law by submitting proof that there was no prior written notice of the existence of an icy condition and that it did not affirmatively create a dangerous condition. Despite plaintiff’s unsupported assertion that “[o]n a motion for summary judgment, [d]efendant Town must make a prima facie demonstration that it did not undertake plowing of the streets and areas at or surrounding the locus of the accident . . .”, the Town has made such a showing. At deposition, defendant testified that the roads had not been plowed curb to curb and plaintiff did not recall snow piles or mounds in the area. There is no evidence in the record to suggest that the Town created snow piles by plowing

that would have caused or contributed to the icy condition on which the plaintiff fell. Indeed, plaintiff's expert is silent as to any action of the Town that caused or contributed to the icy condition and he opines only that defendant Kull's snow removal efforts created a hazardous condition. Accordingly, the plaintiff has failed to defeat the Town's prima facie showing on the cross-motion.

For the foregoing reasons, it is hereby

ORDERED, that the motion by the defendant Mary Kull and the cross-motion by the Town of Hempstead for summary judgment are **granted** and the complaint is dismissed.

The foregoing constitutes the decision and order of this court. All applications not specifically addressed are denied.

Dated: Mineola, NY
July 28, 2020

E N T E R:

/s/ Jeffrey S. Brown

Jeffrey S. Brown, J.S.C.

ENTERED

Aug 12 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE