Bustamante v Haven Equities, Inc.
2021 NY Slip Op 31108(U)
April 7, 2021
Supreme Court, New York County
Docket Number: 155313-2018
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES EDWARD D'AUGUSTE** — ***Justice*** | **PART** **IAS MOTION 55EFM**

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CRISELDA BUSTAMANTE,

Plaintiff,

- v -

HAVEN EQUITIES, INC., and PLYMOUTH MANAGEMENT GROUP, INC.,

Defendants.

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INDEX NO. 155313-2018

MOTION DATE 5/7/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19-46 were read on this motion to/for JUDGMENT - SUMMARY.

The plaintiff brings this action seeking damages for injuries she sustained when she slipped and fell on ice on a sidewalk adjacent to property owned and maintained by the defendants. She claims the defendants were negligent in failing to remove or remedy the icy condition prior to her fall. The defendants have moved for summary judgment and a dismissal of the complaint. The plaintiff has cross-moved for summary judgment on liability. For the following reasons, both motions are denied.

On January 10, 2018, the plaintiff was returning to her residence at 70 Haven Avenue, New York, New York following her morning shift at work. She had left for work at approximately 6:00 am and returned home at approximately 12:40 p.m. (cite). The plaintiff claims that while she was in the process of entering her apartment building, she slipped and fell on ice that was located on the entrance walkway (*see* NYSCEF Doc. 33, Plaintiff's Exh. 1, Bustamante Aff.). Other tenants claim to have found the plaintiff sitting in a patch of ice at the entrance walkway (*see* NYSCEF Doc. 34, Plaintiff's Exh. 2, Khan Aff.).

Depositions were conducted of both the plaintiff and the building's superintendent, Adam Mader. On or around January 25, 2018, approximately two weeks after the plaintiff's accident. Mr. Mader gave a statement to the plaintiff's investigator. That statement was introduced into evidence during Mr. Mader's deposition, which was conducted on June 14, 2019. At his deposition, Mr. Mader testified that he routinely removed snow from the awning above the entryway by using a broom to knock the snow to the ground from below (NYSCEF Doc 27, Mader Tr at 22). He acknowledged that snow on top of the awning would eventually melt and cause water to drip down to the ground below, and admitted that under the right temperature conditions, the water could refreeze and become ice (*Id.* at 61). He also acknowledged saying as much to the plaintiff's investigator (*Id.*). Mr. Mader stated, both at his deposition and in his statement to the investigator, that he used a broom to clear snow from the awning sometime during the evening before the plaintiff's accident (*Id.* at 47-48, 68). At that time, he also applied salt to the portions of the entranceway underneath the awning (*Id.* at 67).

Mr. Mader testified at his deposition that when he went to the scene of the accident, he observed the plaintiff sitting on a patch of ice (*Id.* at 57). After the plaintiff was removed from the scene, Mr. Mader applied salt to the patch of ice and the sides of the entranceway "just to be sure if any of the water will drop from the awning, it will be melted by the salt." (*Id.* at 64)

The record contains contradictory evidence regarding when and how often Mr. Mader inspected the entranceway prior to the plaintiff's accident, as well as Mr. Mader's acknowledgment of what the plaintiff characterizes as the 'recurring condition" caused by water from melting snow dripping down from the awning and then refreezing back into ice. Mr. Mader confirmed at this deposition that he did not spread salt on the entranceway the morning of the plaintiff's accident because he did not observe any ice buildup at that time (*Id.* at 58). He also

confirmed that he had told the investigator that the dripping from the awning is a recurring condition. In his January 25, 2018 statement to the investigator, Mr. Mader stated that, "[t]he dripping from the awning is a recurring condition and had I gotten to inspect the area earlier that day I would have spread salt over the walkway between the sidewalk and the entranceway." (*Id.* at 71-72) This statement indicates that he never inspected the subject area for ice or water from melting snow on the day of the incident and therefore, according to the plaintiff, cannot establish how long the icy condition existed or that the defendants did not have sufficient time to discover and remedy it.

A defendant who moves for summary judgment in a slip-and-fall case has the burden of making prima facie showing that it neither created the hazardous condition that caused the fall nor had actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*see Mehta v Stop & Shop Supermarket Co., LLC*, 129 AD3d 1037, 1038 [2d Dept 2015]). To constitute constructive notice, a defect or hazardous condition must be visible and apparent and must have existed for a sufficient length of time prior to the accident to permit the defendants' employees to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

If a defendant can establish that the area where a slip and fall on ice allegedly occurred was regularly inspected and/or inspected within a short period of time before the accident and no ice was discovered, they have established a prima facie entitlement to judgment as a matter of law (*see Roman v Met-Paca II Assocs., L.P.,* 85 AD3d 509, 510 [1st Dept 2011]; *see also Gagliardi v Compass Group, USA, Inc.*, 173 AD3d 574 [1st Dept 2019]). In this case, the defendants point to the deposition testimony of Mr. Mader wherein he claims to have inspected the subject area several times prior to the plaintiff's accident. He claims to have conducted

inspections of the area at 6:00 pm the night before, 8:00 am the morning of, 10:00 am the morning of and noon the day of, which would only be approximately one-half hour before the accident occurred (*Id.* at 79-80). He further claims that on every occasion where he inspected the area, the awning was free of snow, the area was dry, and there was no ice on the pathway (*Id.*).

The problem with this testimony is that it is completely contradicted by the statement Mr. Mader gave to the investigator approximately two years prior. At his deposition, Mr. Mader acknowledged that he gave a statement to the investigator and he did not dispute the substance of what the investigator recorded. There is an issue of fact as to whether Mr. Mader inspected the area three times on the morning of the accident, as he now claims, or only one time the night before as he told the investigator. The defendants have failed to produce any inspection logs or records which would resolve this discrepancy.

Based on this discrepancy, as well as a review of the meteorological records and expert meteorological opinion submitted by the plaintiff in opposition to the motion (NYSCEF Doc. 38, Plaintiff's Exh. 6, Argianas Aff.), the court finds there is an issue of fact as to whether the defendants had actual or constructive notice of the icy condition. The records indicate that temperatures began to rise on the morning of the plaintiff's accident and continued to rise above freezing for the remainder of the day (*see Id.*). Accordingly, any icy condition would have had to have formed no later than approximately 8:30 AM, roughly four hours before the plaintiff's accident. Notably, the defendant's metrological expert does not substantially disagree with this timeline and, in fact, indicates that the ice may have formed overnight or much earlier in the morning. Accordingly, the defendants have not met their prima facie burden to establish a lack of actual or constructive notice (*see Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [4th

Dept 2008]; *Scott v Redl*, 43 AD3d 1031, 1033 [2d Dept 2007]; *Gonzalez v American Oil Co.*, 42 AD3d 253, 256 [1st Dept 2007]; *Bullard v Pfhal's Tavern, Inc.*, 11 AD3d 1026 [4th Dept 2004]).

The cases cited by the defendants concerning constructive notice are not applicable as they all concern situations where the ice or hazardous condition clearly formed so close in time to the plaintiff's accident that the defendant could not have been expected to notice and remedy the condition (*see Gaglardi v Compass Group, USA, Inc.*, 173 AD3d 574, 574 [1st Dept 2019]; *Elizee v Village of Amityville*, 172 AD3d 1004, 1005 [2d Dept 2019]). Here, given the fact that, due to the contradictory assertions by the superintendent, the defendants cannot prove when they last inspected the area or that their inspections were reasonable and sufficient to address the danger caused by the formation of ice on the walkway, the cited cases do not support the defendants' request for summary judgment. Furthermore, even if one were to accept Mr. Mader's revised version of how often he inspected the subject area (a revision for which there is no documentary support), the fact remains that the area was unsalted for approximately 18 hours prior to the plaintiff's accident. Given that Mr. Mader has admitted being aware that some snow generally remains on the awning even after it is cleaned and that the awning was prone to have water dripping down from melting snow which would then be subject to refreezing, a jury could find that Mr. Mader had actual or constructive notice of a recurring condition that contributed to the plaintiff's accident (*see Harrison v New York City Transit Authority*, 113 AD3d 472, 474-476 [1st Dept 2014]; *Willis v Galileo Cortlandt, LLC*, 106 AD3d 730, 732 [2d Dept 2013]; *Tamhane v Citibank N.A.*, 61 AD3d 571, 572-573 [1st Dept 2009]; *Pasqua v Handels-En Productiemaatschappij De Schouw, B.V.*, 43 AD3d 647, 648 [1st Dept 2007]; *Schmidt v DiPerno*, 25 AD3d 545, 546 [2d Dept 2006]). Mader's deposition testimony, along with his statement to the investigator, is more than sufficient evidence from which a jury could infer that

the defendant had notice of a recurring dangerous condition that contributed to the plaintiff's accident and failed to take steps to remedy it within a reasonable period of time.

Finally, the defendants point to video surveillance of the entryway that they claim conclusively refutes the plaintiff's version of the accident (Defendant's Exh. F). Having viewed the video, the Court disagrees and finds there are issues of fact regarding whether the defendants had actual or constructive notice of a dangerous condition that contributed to the plaintiff's fall and failed to remedy it within a reasonable amount of time. The defendant's motion for summary judgment is denied. Based upon the same analysis, the plaintiff's cross-motion for summary judgment is also denied.

4/7/2021
DATE

JAMES EDWARD D'AUGUSTE, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**