

Morillo v De Los Santos
2021 NY Slip Op 33399(U)
October 12, 2021
Supreme Court, Westchester County
Docket Number: Index No. 56741/2019
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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.

-----X
DAISY MORILLO,

Plaintiff,

DECISION & ORDER

-against-

Index No: 56741/2019

ORESTES DE LOS SANTOS,

Motion Sequence No. 1

Defendant.
-----X

The following papers (NYSCEF document nos. 19-61) were read on the motion by the defendant for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

- Notice of Motion-Statement of Facts-Memorandum of Law-
- Affidavit (Else)-Exhibits (A-B)-Affidavit (Sherbansky)-Exhibits (A-G)-
- Attorney Affirmation-Exhibits (A-H)
- Affirmation in Opposition-Response to Statement of Facts-Exhibits (A-G)
- Reply Affirmation-Supplemental Affidavit (Sherbansky)-Exhibits (A-B)-
- Supplemental Affidavit (Else)-Exhibit (A)

Upon reading the foregoing papers, it is

ORDERED the motion is denied; and it is further

ORDERED that the matter is hereby referred to the Settlement Conference Part for a settlement conference. The clerk shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues for damages allegedly sustained on February 28, 2019, at approximately 1:00 p.m. when she purportedly slipped and fell on ice on the sidewalk located on the front side of the premises known as 54 Caroline Avenue, Yonkers, New York (premises). The premises is owned by the defendant, the plaintiff's uncle. The side of the premises contains a small cement pathway that slopes downwards towards a metal gate leading to the public sidewalk in front of the premises. The metal gate acts as a demarcation between the defendant's premises and the sidewalk. Defendant installed the cement pathway after purchasing the premises in 1994. A black metal tube connected to

the gutter drainage system from the roof of the premises diverted water from the roof onto the cement pathway and ultimately onto the sidewalk in front of the premises. Defendant also installed this black metal tube.

Defendant did not reside at the premises and, at the time of the plaintiff's alleged incident, he was out of the country at his residence in the Dominican Republic. Plaintiff resided in one of the apartments at the premises pursuant to a lease agreement she had entered with defendant. The lease agreement is silent as to responsibility for snow and ice removal. At deposition, defendant testified that whenever he was out of the country, he would ask either his cousin, non-party, Leonardo Soriano (Soriano), or the plaintiff, to hire a laborer for snow and ice removal at the premises. Defendant further testified that if a laborer was unavailable, then plaintiff was instructed to ask a family member to have the snow and ice removed. In affidavit submitted in opposition to defendant's motion, plaintiff attested that defendant was responsible for snow and ice removal and would either perform the removal himself or that the removal would be performed by Soriano.

At deposition, plaintiff testified that the day before the alleged incident, it had snowed approximately one inch. She further testified that on the morning of the date of the alleged incident, around 4:45 a.m., she had swept the front of the premises including, the stairs leading to the front entrance, and the sidewalk in front of the stairs. She did not sweep the area where she allegedly slipped and fell later that day. In affidavit submitted in opposition to the motion, plaintiff stated that she had taken it upon herself to sweep the front entrance since Soriano had not come by to remove the snow. At deposition, plaintiff described the snow she swept that morning as "very light and like very dry."

Around 1:00 p.m. on February 28, 2019, plaintiff, who was exiting from the rear door of the premises, slipped while walking on the cement pathway towards the gate leading to the sidewalk. She testified that she heard a cracking sound right before she slipped. Plaintiff testified that she had one foot on the sidewalk and one foot within the gate when she slipped. She testified that she slipped on ice. In affidavit submitted in opposition to defendant's motion, non-party Eddy Aquino, plaintiff's husband, described the ice on which plaintiff slipped as clear and more than one inch thick. Plaintiff further testified at deposition that the ice on which she slipped stretched from the garbage cans on the side of the premises within the gate to the sidewalk in front of the premises (outside the gate).

Plaintiff's complaint, as amplified by the bill of particulars, alleges that defendant violated various provisions of the City of Yonkers Municipal Code, specifically, plaintiff

alleges defendant violated §§ 103-8¹, 103-9², 96-34³, and 103-78⁴. Plaintiff claims that defendant was negligent in causing the black metal tube leading from the gutter to dispense and divert water onto the cement pathway and ultimately onto the sidewalk in front of the premises which, given the freezing temperatures, allowed the water to freeze thereby causing the icy condition on which plaintiff slipped. Plaintiff also claims defendant was negligent in failing to place salt, ashes, sand, sawdust or other similar substances to address the ice condition, and that the gutter and drainage system was defective in that, through installation of the black metal tube, water was permitted to flow from the gutter to the side of the house and onto the front sidewalk. Plaintiff alleges that defendant was on notice of this defective condition based on prior verbal complaints from neighbors as well as herself.

Following the completion of discovery, defendant moves for an order granting summary judgment dismissing the complaint. Plaintiff opposes the motion. For the reasons that follow, the motion by defendant is denied.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable

¹ § 103-8 provides that “[i]t shall be duty of every owner, or their designee, of any house or other building and of every owner of any vacant lot to keep or cause to be kept the sidewalks in front of the premises owned or occupied by him clear and clean from snow, ice and dirt....”

² § 103-9 provides that “[s]now and ice shall be removed from abutting fire hydrants and such sidewalks for the whole width thereof within six hours after every fall of snow which shall cease in the daytime and before 12:00 noon of the day after any fall of snow which may come in the nighttime. It shall be unlawful in any manner to sweep, throw or deposit or cause to be swept, thrown or deposited any snow or ice into any street, street gutter, or sidewalk[.]”

³ § 96-34 provides that “[n]o person shall allow or cause to be allowed, in or on any court, yard, area or the premises of any habitable building or in or on any vacant lot or other place or direct or divert the flow on the property of others, any surface drainage which may or may become a public nuisance.”

⁴ § 103-78 provides that “[n]o person, being the owner, lessee or tenant of any house or building or premises, shall allow any water or liquid to run from or out of or from the roofs of, into or upon the premises adjoining or across any sidewalk curbstone, gutter or upon the surface of any street.”

issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant satisfies her *prima facie* burden, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). “Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues” (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

“A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, *prima facie*, that it neither created the snow or ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition” (*Ryan v Beacon Hill Estates Coop., Inc.*, 170 AD3d 1215, 1215 [2d Dept 2014]). “An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct” (*Bartels v Eack*, 164 AD3d 1202, 1202 [2d Dept 2018] [internal quotation marks omitted]).

In establishing its *prima facie* entitlement to judgment as a matter of law, defendant proffers the expert affidavit of Thomas M. Else (Else), a meteorologist. Else opines, *inter alia*, that based upon his review of the relevant weather data, plaintiff’s deposition testimony, the pleadings, as well as his education, training and experience, that the ice on the walkway which allegedly caused plaintiff to slip and fall was a result of pre-dawn light snow and freezing drizzle that occurred on February 28, 2019, and not as a result of running water from the gutter system. Defendant further proffers the expert affidavit of Rudi O. Sherbansky (Sherbansky), P.E., F. NSPE, a New York State licensed professional engineer. Sherbansky opines, *inter alia*, that based upon his review of various documents, property surveys, videos, and a visit to the premises, that plaintiff’s accident occurred on a portion of the public sidewalk abutting the premises located at 58 Caroline Avenue, Yonkers, New York, which he opines does not belong to defendant. Sherbansky further opines that neither the gutter system nor the sidewalk was defective and that the Yonkers Municipal Code provisions which plaintiff alleges defendant violated are inapplicable. Accordingly, the burden of going forward shifted to plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, plaintiff raised a triable issue of material fact. Viewing the evidence in a light most favorable to plaintiff, as the non-moving party, triable issues of fact exist as to whether defendant, as an out-of-possession landlord, retained control over the premises, whether the icy condition on which plaintiff fell was caused by water which had flowed from the roof through the gutter drainage system and onto the cement pathway and sidewalk, and whether defendant had notice of such defective condition of the gutter and drainage system based on prior complaints from plaintiff and from neighbors.

Plaintiff proffers the expert affidavit of Mark L. Kramer (Kramer), a meteorologist who opines, based on his review of the relevant weather data, as well as the parties' deposition transcripts, and his training, education, and experience, that the subject icy condition formulated as a result of prior precipitation events which allowed water to thaw and flow into the gutter drainage system and onto the cement pathway and the sidewalk where it ultimately froze. Kramer thus disagrees with the opinion reached by Else that the ice formed as a result of freezing drizzle that occurred during pre-dawn hours on February 28, 2019. Plaintiff further proffers the expert affidavit of Scott Silberman (Silberman), P.E., a New York State licensed engineer, who disagrees with the conclusions reached by Sherbansky. Silberman's affidavit is sufficient to raise a triable issue of fact as to whether the alleged incident occurred on defendant's premises and not the abutting premises as opined by Sherbansky. Silberman's affidavit is also sufficient to raise a triable issue of fact as to whether the provisions of the Yonkers Municipal Code plaintiff alleges defendant violated are applicable. Although defendant contends that certain provisions of the municipal code are inapplicable (specifically, §§ 96-34 and 103-78) because the premises was constructed in 1903 before enactment of those code provisions, plaintiff, through Silberman, contends that alterations made by defendant to the gutter drainage system and specifically, with respect to the installation of the black metal tube, render any "grandfathered" arguments asserted by plaintiff inapplicable. In any event, Silberman contends that regardless of when the premises was constructed, the maintenance code provisions to which he cites in his affidavit which defendant purportedly violated apply to all buildings.

Generally, where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. Capra*, 212 AD2d 594, 596 [2d Dept 1995]; *Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984]). The reasoning is that conflicting expert opinions raise credibility issues that can only be resolved by the trier of fact (*Roca v Perel*, 51 AD3d 757, 759 [2d Dept 2008]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]). Here, defendant and plaintiff have proffered competing expert meteorologist and engineer affidavits thereby rendering summary judgment in defendant-movant's favor inappropriate. The supplemental expert affidavits submitted by defendant in reply only reinforce the existence of triable issues of fact. Accordingly, the motion by defendant is denied.

ENTER,

Dated: White Plains, New York
October 12, 2021


HON. JOAN B. LEFKOWITZ, J.S.C.