Kisielewska v New York City Health & Hosps. Corp.
2022 NY Slip Op 32074(U)
June 29, 2022
Supreme Court, New York County
Docket Number: Index No. 805657/2015
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIKA EDWARDS** **PART 10M**

Justice

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MARIA KISIELEWSKA,

Plaintiff,

- v -

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and THE CITY OF NEW YORK,

Defendants.

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INDEX NO. 805657/2015

MOTION DATE 08/19/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 104, 108, 109, 110, 111, 112, 113

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the court grants Defendant The City of New York's ("City") motion for summary judgment dismissal of Plaintiff Maria Kisielewska's ("Plaintiff") complaint.

This is a consolidated action involving Plaintiff's claims for personal injuries she allegedly suffered on February 13, 2014, at approximately 5:00 p.m., when she slipped and fell on snow and ice on a sidewalk, and her medical malpractice claims against Defendant The New York City Health and Hospitals Corporation for injuries she sustained caused by Bellevue Hospital's alleged negligent care and treatment of her left knee, requiring multiple surgeries.

Defendant City now moves for summary judgment in its favor under motion sequence 004. The City argues in substance that it is entitled to dismissal of the complaint against it as a matter of law because of the snow in progress doctrine, since it had snowed almost the entire day of Plaintiff's fall and continued into the next day. A total of 12 ½ inches fell from approximately 1:00 a.m. on February 13, 2014, until 5:00 a.m. on February 14, 2014. Therefore, the City argues

that it had no actual or constructive notice of Plaintiff's alleged dangerous and hazardous condition, as there were no prior complaints of such condition and the snow and ice that Plaintiff alleges caused her injuries did not exist for a sufficient period of time to have permitted the City to remedy the alleged condition.

The evidence established that it had also snowed approximately 8 inches on February 3, 2014, 4 inches on February 4, 2014, 1.2 inches on February 9, 2014, then the 12 ½ inches on February 13-14, 2014. The City argues in substance that the temperature reached 36 degrees on the date of the alleged accident, so any snow that remained from previous snowfalls would have already melted. Additionally, the City argues that Plaintiff engaged in mere speculation and failed to demonstrate that a particular patch of snow and ice existed for a long enough period at the end of the precipitation in question prior to Plaintiff's accident. As such, the City argues that dismissal is warranted.

Plaintiff opposes the motion and argues in substance that Plaintiff slipped and fell on a dangerous and hazardous condition caused by the City's failure to remove snow from a snowfall several days prior to the date of the accident, which caused a layer of ice to develop underneath the layer of new snow. During the previous snow storms during the ten days prior to Plaintiff's accident, Plaintiff argues that the temperature fluctuated from 32 to 36 degrees, causing the snow to melt and freeze. Plaintiff further argues that the City created the dangerous condition by failing to remove the snow from the previous storms and failing to properly treat the area prior to Plaintiff's fall. Additionally, Plaintiff argues in substance that the City knew or should have known about the icy condition because it began plowing and spreading operations in that area.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.,* 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). An award of summary judgment is appropriate when no issues of fact exist (see CPLR 3212(b); *Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Additionally, neither a general awareness that a dangerous condition may be present in an area in the general vicinity of the accident location, nor that a plaintiff or another witness observed a dangerous condition on another portion of the sidewalk prior to the accident is sufficient to create constructive notice of the alleged dangerous condition that caused the accident (*id.* at 838 [internal citations omitted]).

Under the "storm in progress" doctrine, it is well established that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007] [internal citations omitted]). Once a defendant demonstrates that a plaintiff's accident occurred during a snowstorm, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact concerning defendant's negligence (*id.*). Although a defendant has no obligation to remove any snow or ice

during the storm, liability may result if the efforts it did take created a hazardous condition or exacerbated the natural hazards created by the storm (*Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992 [3d Dept 2006] [internal citations omitted]).

In applying these legal principles to the facts of this case, the court determines that the City met its initial burden of establishing that Plaintiff's alleged accident occurred while the snow storm was ongoing and that the City did not have actual or constructive notice of the alleged dangerous and hazardous snow and ice condition. It is uncontroverted that the evidence demonstrated that the snow began to fall at approximately 1:00 a.m. on the day of Plaintiff's fall and continued all day and into the following day, causing approximately 12 ½ inches of snow to fall. Therefore, the burden shifted to Plaintiff to demonstrate that the City elected to engage in snow removal activities and failed to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm.

The court finds that Plaintiff failed to raise a triable issue of fact regarding the City's liability, in that she failed to sufficiently demonstrate based on admissible evidence that the City had actual or constructive notice of the alleged dangerous condition, in that the condition was visible and apparent or that it existed for a sufficient length of time prior to the accident to permit the City to discover and remedy it. Plaintiff's claims regarding the City's alleged negligence in failing to remove the snow from a previous snowstorm or snowstorms and in allowing the snow to melt and freeze, thus creating a dangerous condition, is purely speculative and insufficient to defeat this motion.

Plaintiff was unable to identify which particular previous snowfall caused the alleged dangerous condition and the exact location of the particular patch of snow and ice that caused her fall. Furthermore, Plaintiff failed to raise a triable issue as to whether the City was negligent by

causing or exacerbating the dangerous condition, or that it was negligent in failing to place sand or other traction material on the area (*see*, *Pipero v New York City Tr. Auth*., 69 AD3d 493, 493 [1st Dept 2010] [internal citations omitted]; *Bauman v Dawn Liquors, Inc*., 148 AD3d 535 [1st Dept 2017]).

Therefore, the court grants the City's motion and dismisses Plaintiff's complaint as against the City.

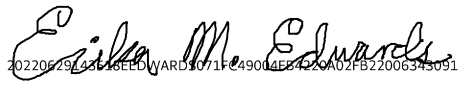
The court has considered any additional arguments not specifically addressed herein and the court denies all additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court grants Defendant The City of New York's motion for summary judgment dismissal of Plaintiff Maria Kisielewska's complaint; and it is further

ORDERED that the court directs the Clerk of the Court to enter judgment in favor of Defendant The City of New York as against Plaintiff Maria Kisielewska, without costs to any party; and it is further

ORDERED that Plaintiff Maria Kisielewska and Defendant New York City Health and Hospitals Corporation are required to appear for a virtual status conference and to set a trial date on July 26, 2022, at 9:30 a.m. via Microsoft Teams (separate link to be provided).



6/29/2022
DATE

ERIKA EDWARDS, J.S.C.

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