

Mulayev v Starrett City, Inc.

2022 NY Slip Op 33393(U)

September 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 513161/2018

Judge: Ingrid Joseph

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At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of September 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
ALIK MULAYEV,

Plaintiff,

Index No.:513161/2018

-against-

STARRETT CITY, INC., STARRETT CITY ASSOCIATES, LP, GRNADIER REALTY CORP., AND BSC HOUSING COMPANY, INC.,

Defendants.

-----X
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The following e-filed papers considered herein:

E-Filed Papers Numbered

Notice of Motion/Affirmation/Statement of Material Facts/Exhibits.....	60 - 77
Affirmation in Opposition/Statement of Material Facts/Exhibit.....	81 - 83
Reply.....	91 - 93

In this matter, defendants, Starrett City, Inc., Starrett City Associates, LP, Grenadier Realty Corp., and BSC Housing Company, Inc. (“defendants”), move pursuant to CPLR § 3212 for an order granting summary judgment, dismissing the Verified Complaint of plaintiff, Alik Mulayev (“plaintiff”).

Plaintiff commenced this action on June 26, 2018 to recover damages for injuries that plaintiff allegedly sustained when he slipped and fell on black ice, on March 8, 2018 at approximately 6:50 a.m., after debarking the elevator on the roof of the F Loop parking

garage located at Starrett City/Spring Creek Towers (“the rooftop”).

Defendants contend they owed no duty to plaintiff, because it snowed the night before plaintiff’s incident and consequently, the grace period for the removal of snow and ice under the storm-in-progress doctrine was in effect at the time of plaintiff’s fall.

Defendants argue that they are also entitled to immunity pursuant to Section 16-23 of the Administrative Code of the City of New York, which affords property owners a 4-hour grace period to undertake snow remediation measures after a storm. Defendants annexed the report of meteorologist, Robert Cox, to corroborate their arguments in this regard.

Mr. Cox purports to have interpreted the weather data for the subject date and location upon review of the US Department of Commerce meteorological records maintained by the National Centers for Environmental Information and local climatological data from John F. Kennedy Airport. Based on Mr. Cox’s report, defendants maintain that rain, snow, and a combination of both began at 12:43a.m. on March 7, 2018 and continued throughout the morning into the afternoon, until 12:24 p.m. Defendants claim that a mixture of rain and snow occurred on March 7, 2018, from 8:48 p.m. through 10:09 p.m.; from 11:28 p.m. through 11:37 p.m., then again, from 12:37 a.m. through 1:42 a.m., on March 8, 2018. Defendants also argue they had no actual or constructive notice of any black ice condition and did not cause or create any such condition. Defendants annexed, among other exhibits, the transcripts of plaintiff and defendants’ employee, Girolamo

Pirrone, in support of their arguments.

Plaintiff, in opposition, argues that the defendants' motion is not supported by admissible evidence. Plaintiff points out that his deposition transcript is unsigned and the defendants failed to remit evidence showing they complied with CPLR § 3116. Additionally, plaintiff points out that Mr. Cox's report is neither affirmed, notarized, nor sworn to under the penalties of perjury. On substantive grounds, plaintiff contends that a portion of snow on the rooftop area had been cleared prior to his fall but there were icy conditions that remained. In particular, plaintiff alleges that snow had been pushed to the side of the rooftop but that there existed icy patches throughout the roof area. Plaintiff claims that the defendants caused tractor or snow removal machinery to operate during the night hours to remove the snow, as evinced by the tractor tracings that he observed.

Plaintiff argues that the information provided by Defendant's expert is incomplete, because he fails to establish whether the cause of plaintiff's fall was the result of old ice, from previous snow fall and precipitation, or new ice. Moreover, plaintiff argues that the defendants' own precipitation records indicate that there is no record of snow after 12:51 a.m. on March 8, 2018, which constitutes a period of six hours prior to the accident. Plaintiff also submitted the report of his own expert, Mark D. McGinnis, who opines that a storm was not in progress at the time of plaintiff's incident. Plaintiff points out that Mr. McGinnis, having reviewed all of the relevant records, reported that snow fell in the days preceding plaintiff's incident, from March 6, 2018, and ceased at approximately 1:40 a.m. on March 8, 2018, prior to plaintiff's incident at 6:50 a.m. Further, plaintiff argues that

the record presents factual issues as to whether the defendant's undertook snow removal efforts in a negligent manner that created, or exacerbated, the icy condition that led to plaintiff's slip and fall. Lastly, plaintiff argues that Section 16-123(a) of the Administrative Code of the City of New York does not apply in this matter, because the rooftop, fifth level of the defendants' parking garage, does not qualify as a public sidewalk, within contemplation of that section of the Code.

As the proponents of the motion for summary judgment, defendants have the burden of establishing, prima facie, that they neither created the ice condition nor had actual or constructive notice of the condition (*Ryan v. Taconic Realty Assoc.*, 122 AD3d 708, 709 [2d Dept 2014]; *Smith v. Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 941 [2d Dept 2012]; *Meyers v. Big Six Towers, Inc.*, 85 AD3d 877, 925 [2d Dept 2011]). The defendants' burden may be satisfied by presenting evidence that there was a storm in progress when the plaintiff allegedly slipped and fell (*Huan Nu Lu v. New York City Tr. Auth.*, 113 AD3d 818 [2d Dept 2014]). "Under 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 [2d Dept 2008]). 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 [2d Dept 2012]).

Here, the court finds that the defendants have failed to demonstrate prima facie entitlement to summary judgment as a matter of law. As an initial matter, the court finds that NYC Administrative Code 16-123 does not apply. Plaintiff's incident involved a rooftop; however, Section 16-123 applies to paved, public sidewalks that and affords building owners four days after snow ceases to fall to remove snow and ice accumulation.

Additionally, the court finds that the unnotarized report of defendants' expert meteorologist is not in admissible form. Even if the court considered such report, plaintiff's meteorologist opined that the last measurable snowfall occurred at the subject location at approximately 10 p.m., the night prior to plaintiff's fall. Further, it is undisputed fact that plaintiff fell on black ice, and there exists an issue of fact as to whether defendants' employees engaged in snow removal that ultimately caused the black ice to exist where plaintiff fell. Defendants' employee, Girolamo Pirrone, testified during his deposition that he did not recall whether snow and ice was cleared on or about the day in question, but Mr. Pirrone acknowledged that he was responsible for snow and ice removal. He further acknowledged that such removal is performed with machinery, which corroborates plaintiff's recollection of seeing tracks from snow removal machinery on the rooftop on day in question. Moreover, plaintiff recalls that there was no sand or salt placed on or about the path where he fell.

Based upon the foregoing, Defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.