

Hamburgo v Presbytery of N.Y. City
2022 NY Slip Op 35154(U)
March 17, 2022
Supreme Court, Bronx County
Docket Number: Index No. 26286/2018E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX- IAS PART 7Index No. 26286/2018E
Motion Sequence No. 005
Motion Date: 12/06/2021-----x
BETZAIDA S. HAMBURGO,

Plaintiff,

-against-

PRESBYTERY OF NEW YORK CITY, FEATHERBEAD
LANE PRESBYTERIAN CHURCH AND SOUTH BRONX
HEADSTART, INC.,Defendant.
-----x**DECISION/ ORDER****Present:****Hon. Wilma Guzman**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these motions:

<u>Papers</u>	<u>Numbered</u>
HAMBURGO's Notice of Motion, Affirmation in Support and Exhibits thereto.....	1
BRONX HEADSTART, INC. Affirmation in Opposition and Exhibits thereto.....	2
FEATHERBED LANE PRESBYTERIAN CHURCH Affirmation in Opposition and Exhibits thereto.....	3
PRESBYTERY OF NEW YORK CITY Memorandum in Opposition and Exhibits thereto.....	4

Plaintiff BETZAIDA S. HAMBURGO (hereinafter "Plaintiff"), herein moves, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting Plaintiff Summary Judgment. Defendants PRESBYTERY OF NEW YORK CITY (hereinafter "Presbytery"), FEATHERBED LANE PRESBYTERIAN CHURCH (hereinafter "Featherbed") and BRONX HEADSTART, INC. (hereinafter "Headstart"), have submitted opposition thereto. Due deliberation having been had, the motion is decided as follows:

Plaintiff commenced this action by summons and complaint alleging personal injuries sustained on February 10th, 2017, when she slipped and fell in front of premises known as 141 Featherbed Lane, Bronx, NY owned by Featherbed and Presbytery, and leased by Headstart Daycare (hereinafter referred to as "subject premises"). Plaintiff moves for summary judgment on the issue of liability alleging the Defendants failed to remove the snow from the sidewalk in front of the subject premises.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a motion

for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding is the key to summary judgment. Rose v DaEcib USA, 259 A.D. 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material triable issues of fact. Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 385, 144 N.E.2d 498 (1957). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See Zukerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

Plaintiff alleges the sidewalk was too dangerous to walk on as it was covered in snow, and the defendants failed to remove the snow that had fallen the day before and had stopped by that evening. As plaintiff attempted to make her way towards the street, she fell on the sidewalk due to all the snow in the area. Plaintiff claims she tried to make her way towards the street because it was clearer than the sidewalk, which was all covered with snow.

In support of the motion the Plaintiff submits copies of the pleadings, deposition transcript of the plaintiff which taken on January 27, 2020 (NYSCEF Doc. No. 83), and exhibits annexed thereto. Plaintiff testified the accident occurred on February 10th, 2017, and that prior to her fall she had been looking down at the snow, the sidewalk was full of snow. Plaintiff at first testified that she did not see ice. Subsequently, plaintiff was asked about when she was walking on the sidewalk, and plaintiff testified "I couldn't walk through here because there was a lot of ice, I had to walk over here, closer to the curb." (NYSCEF Doc. No. 83, P. 73). When asked why she wanted to get off the sidewalk, plaintiff testified "Because the snow was like slippery, you could see that, but you could notice there was ice underneath". (NYSCEF Doc. No. 83, P. 76). Subsequently, plaintiff's co-worker, Deyanira appeared at the scene of the accident to assist her. Plaintiff further testified that she observed impression of her body in the spot where she fell. Plaintiff in her deposition identified the place of her accident and that snow and ice existed at the time of the occurrence.

Plaintiff argues that according to New York City Administrative Code Section 7-210, Defendants each had a duty to keep sidewalks of the subject property in a reasonably safe condition, specifically clear of ice and snow. Plaintiff also argues that according to New York City Administrative Code Section 16-123 that Defendants had a four-hour window period at the end of the storm prior to the Plaintiff's accident to clear up any snow on the subject premises. In support of the motion, Plaintiff submits a climatological report. . (NYSCEF Doc. No. 85). Plaintiff claims that this report indicates that the snow stopped falling around 4PM on February 9th, 2017. Plaintiff claims Defendants had ample time to remove the snow from the subject premises. Furthermore, plaintiff argues that the "snow in progress" rule would not be applicable because §16-123 states the clearly the "four-hour window period." Plaintiff claims that once the snow stopped, Defendants had a four-hour period afterwards to commence snow and ice removal from the sidewalk.

Defendants oppose these arguments for multiple reasons. First, Defendant Headstart argues that the reasonableness of when they should have removed snow is an issue to be determined by the fact finders. In addition, Defendant Headstart argues that discovery has not been completed in that additional depositions are necessary to determine what the actual procedure for snow removal was pursuant to the Use of Space Agreement between the defendants herein. Defendant Featherbed argues that § 16-123 does not apply between the hours of 9pm and 7am. Defendant Featherbed claim although a climate report was submitted by the Plaintiff it was submitted without any affidavit of an expert meteorologist to establish when the snow started and stopped, and as well as the reasonableness of any actions the Defendants could have taken. Furthermore, defendant, Featherbed submits the affidavit of Rev. Lonnie Bryant, the Pastor of Featherbed Lane Presbyterian Church. Rev. Bryant attests that Under a Use of Space Agreement the parties agreed that there would be a joint effort between them to remove snow. Rev. Bryant attests that on the day before plaintiff's accident, both the Church and Headstart were closed due to the storm. Rev. Bryant further attests that on the date of plaintiff's accident, Head Start would have opened at 7:00 a.m. and snow removal would have commenced immediately by the custodian or maintenance person. (NSCEYF Doc. No. 98.).

New York City Administrative Code Section 7-210 states: "It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition." NYC Admin. Code § 7-210. New York City Administrative Code Section 16-123 states "Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases...remove the snow or ice... from the sidewalk and gutter, the time between nine post meridian and seven ante meridian not being included in the above period of four hours ..." NYC Admin. Code § 16-123. The "snow in progress" rule states that a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress and does not commence until a reasonable time after the storm has ended. See Weinberger v. 52 Duane Assocs., LLC., 102 A.D.3d 618, 619 (2013).

Plaintiff submitted a climate report Certified Local Climatological report (NYSCEF Doc. No. 85). The climatological data report submitted by plaintiff, which consists of approximately forty (40) pages, is was prima facie evidence of the facts stated therein, See CPLR 4528. (NYSCEF Doc. No. 85). However, plaintiff failed to submit an affidavit of an expert or meteorologist to permissibly conclude that the snow had stopped anywhere between 2PM and 4PM on February 9th, and the "time between nine post meridian and seven ante meridian" was not being included in the period of four hours after the snowing ceased. See Perez v. Canale, 50 A.D.3d 437, 855 N.Y.S.2d 488 (1st Dept.2008), Daley v. Janel Tower L.P., 89 A.D.3d 408, 931 N.Y.S.2d 865 (1st Dept.2011). Failure to submit an affidavit or expert report can be a basis to deny summary judgment. See Sikora v. Earth Leasing Prop. Ltd. Liab. Co., 994 N.Y.S.2d, 527, 531 (2014); Rodriguez v. Woods, 994 N.Y.S.2d 474, 584-85 (2014). To apply four-hour time period of 16-123, there needs to be a confirmation of when the snow officially stopped falling. As to the reasonableness in time of when defendants should remove snow after a snowstorm, this is usually a question of fact. See Rodriguez v. Woods, 994 N.Y.S.2d 474, 585 (2014).

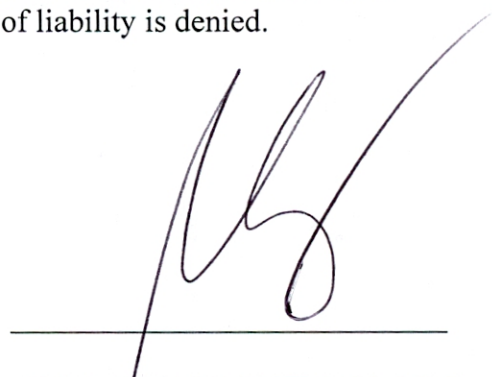
In addition, A question of fact exists based upon the credibility of the plaintiff with regards as to whether plaintiff accident occurred due to snow, ice or as alleged in the Verified Bill of Particulars a defective sidewalk. (NYScEF Doc. No.17). It is well settled that on a motion for summary judgment the court may not weigh the credibility of witnesses. See, Glick v. Dolleck v. Tri-Pack Export Corp., 22 N.Y.2d 439 (1968); Perez v. Bronx Park South Associates, 285 A.D.2d 402 (1st Dept. 2001). The court in the case of Quinn v. Krumland, 179 A.D.2d 448 (1st Dept. 1992) stated: "The function of a court on a motion for summary judgment is not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of a material issue of fact."

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff BETZAIDA S. HAMBURGO's Motion for Summary Judgment pursuant to CPLR §3212 on the issue of liability is denied.

This constitutes the Decision and Order of the Court.

Dated: March 17, 2022



HON. WILMA GUZMAN, J.S.C.