

Gonzalez v Perez
2023 NY Slip Op 35210(U)
April 14, 2023
Supreme Court, Bronx County
Docket Number: Index No. 813340/2021E
Judge: Wilma Guzman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX-----X
IVETTE GONZALEZ,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 813340/2021E

ELLY M. PEREZ f/k/a ELLY SANTANA,

Motion Sequence No. 1

Defendant.
-----X

GUZMAN, J.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained on February 19, 2021, when she fell on a public sidewalk abutting property owned by Defendant located at 557 East 148th Street, Bronx, New York. Plaintiff alleges that she was on her way to work at 5:00 a.m. when she slipped and fell on the sidewalk as a result of snow and/or ice on the sidewalk.

On this motion, Defendant moves pursuant to CPLR § 3212 to dismiss the complaint on the grounds that there was a storm in progress at the time of Plaintiff's accident, and therefore there was no duty to remove snow or ice accumulating on the sidewalk. Defendant also contends that she is exempt from liability under New York City Administrative Code § 7-210 to maintain the adjacent sidewalk to the property because the premises is a partially owner-occupied, three-family home.

In order to make a prima facie showing of entitlement to judgment as a matter of law, the moving party must tender sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the nonmoving party to establish, through admissible evidence, the existence of disputed issues of material facts for trial. CPLR § 3212 (b); *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions that are not credible. Issue-finding, not issue-determination, is the role of the court on a motion for summary judgment. *Lebedev v. Blavatnik*, 193 A.D.3d 175, 142 N.Y.S.3d 511 (1st Dep't 2021).

Nevertheless, if the moving party fails to sustain its burden, the court need not address the adequacy of the opposing party's proof. *Licurgo-Cruz v. Ahmed*, 118 A.D.3d 420, 987 N.Y.S.2d 57 (1st Dep't 2014).

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. See *Entrada v. City of New York*, 162 A.D.3d 411, 74 N.Y.S.3d 737 (1st Dep't 2018). "This burden may be satisfied by presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell." *Smith v. Christ's First Presbyt. Church of Hempstead*, 93 A.D.3d 839, 839-840, 941 N.Y.S.2d 211 (2d Dep't 2012). The "storm in progress" doctrine provides that a property owner will not be held liable in negligence for accidents occurring as a result of a slippery snow or ice condition occurring during an ongoing storm or for a reasonable time thereafter. *Solazzo v. New York City Tr. Auth.*, 21 A.D.3d 735, 735-36, 800 N.Y.S.2d 698 (1st Dep't 2005), *aff'd* 6 N.Y.3d 734, 735, 748, 810 N.Y.S.2d 121 (2005); *Weinberger v. 52 Duane Assocs., LLC*, 102 A.D.3d 618, 619, 959 N.Y.S.2d 154 (1st Dep't 2013).

Here, in support of her motion, Defendant has submitted, *inter alia*, an expert affidavit of meteorologist Brett E. Zweibak, along with certified climatological data records. See NYSCEF Doc. No. 17. Zweibak states based on his review of the relevant weather data, as of 7:00 a.m. on February 16, 2021, there was approximately three to six inches of snow on ground surfaces as a result of prior snowfall, the last of which was on February 11, 2021. Throughout the morning of February 16, 2021, rainfall of just under one inch was reported. Zweibak states that temperatures reached up to 51 to 53 degrees fahrenheit, hence the snow depth decreased to between two to three inches as of 7:00 a.m. on February 17, 2021. There was no precipitation on February 17, 2021.

According to Zweibak, a storm producing snow began at approximately 6:58 a.m. on February 18, 2021, with snow accumulations of 3.1 to 3.2 inches by afternoon. The snow was mixed with sleet around 1:00 p.m., changed to freezing rain just after 3:00 p.m., and continued producing freezing rain and freezing drizzle overnight until approximately between 5:35 a.m to 6:09 a.m. on February 19, 2021, when it changed back to snow and continued into the evening with light snow. Total new snowfall accumulations for February 18, 2021, ranged from 3.1 to

3.2 inches. High temperatures for February 18, 2021, were 30 degrees Fahrenheit, while low temperatures ranged from 24 to 25 degrees.

Zweibak states that the total ice accumulations for the event lasting from the afternoon of February 18, 2021, into the morning of February 19, 2021, amounted up to almost one tenth of an inch. Zweibak also notes that the National Weather Service issued a Special Weather Statement for Bronx County at 3:04 a.m. on February 19, 2021, stating: “Areas of freezing drizzle and pockets of steadier light freezing rain will continue across the region for at least the next few hours. The precipitation may mix with or change over to a light snow later this morning. Many locations remain in the mid to upper 20s, which will result in icy conditions, especially on untreated roadways and walkways. Extreme caution should be taken if traveling early this morning.” *See* NYSCEF Doc. No. 17.

Defendant has also submitted the deposition testimony of both Plaintiff and Defendant. *See* NYSCEF Doc. Nos. 14, 15. Plaintiff testified that she was on her way to work on the morning of February 19, 2021; it was not snowing, as “the snow had passed the day before;” it was snowing the night before when she went to bed; she didn’t notice any footprints in the snow except her own; there was a lot of snow on the sidewalk; the sidewalk where she fell had not been cleaned; after falling, her clothes were wet; and she saw ice on the sidewalk. *Id.* at 21, 25, 28, 33, 35, 41.

The Court finds that Defendant has established, *prima facie*, that there was a storm in progress at the time of Plaintiff’s accident, and even if it was not snowing or raining at the precise time of Plaintiff’s accident, Defendants were not legally obligated to clear any icy conditions that had accumulated on the pavement prior to 7:00 a.m., which was before the time when Plaintiff fell.¹ *See Prince v. N.Y. City Hous. Auth.*, 302 A.D.2d 285, 285 (1st Dep’t 2003) (Defendant owed plaintiff no duty to remove ice on walkways where meteorological evidence established that trace precipitation in the form of freezing rain and ice pellets began falling in the region at 5:00 a.m., two hours before plaintiff’s fall). Moreover, a temporary lull or break in the storm at the time of an accident does not impose a duty on the owner to remove the accumulation before the storm ceases in its entirety. *Jakubowski v. Axton Owner LLC*, 156 A.D.3d 509, 65 N.Y.S.3d 444 (1st Dep’t 2017).

¹ Administrative Code § 16-123 (a) gives landowners a four-hour grace period to clear snow and ice, not including the period between 9:00 p.m. and 7:00 a.m. *See Jakubowski v. Axton Owner LLC*, 156 A.D.3d 509 (1st Dep’t 2017).

In opposition to Defendant's prima facie showing, Plaintiff has submitted an attorney affirmation and memorandum of law. Plaintiff relies principally on her own testimony that it was not snowing at the time of her accident at 5:00 a.m., nor was any precipitation falling at that time. Plaintiff further argues that "[t]riable fact issues exist as to whether a storm was in fact in progress at the time of Plaintiff's accident," because based on Zweibak's own conclusions, "Defendant had from 3 pm through 9 pm - a period of six hours - to clear the snow before the excluded hours from 9:00 pm through 7:00 am began." See NYSCEF Do. No. 22 at 14.

As noted above, however, Zweibak concluded that freezing rain continued overnight from February 18, 2021 to February 19, 2021, until approximately between 5:35 a.m to 6:09 a.m. on February 19, 2021, when it changed back to snow and continued into the evening with light snow. Accordingly, the Court finds that Plaintiff has not refuted Defendant's contention that there was a storm in progress overnight and through the morning before Plaintiff fell. See *Weinberger v. 52 Duane Assocs., LLC*, 102 A.D.3d 618, 619, 959 N.Y.S.2d 154, 155 (1st Dep't 2013) (noting that while plaintiff's experts opined that there was no "freezing rain" at the moment of her fall, her meteorological expert determined that a winter storm, which started on February 12, 2008, left snow, sleet and ice on the ground at approximately 7 a.m. on the morning of February 13, 2008, the date of plaintiff's accident); *Powell v. MLG Hillside Assocs., L.P.*, 290 A.D.2d 345, 346, 737 N.Y.S.2d 77 (1st Dep't 2002) (noting that the court should be "less concerned with what was happening at the very moment of the accident and "[m]ore relevant is what was happening during the period immediately preceding the accident"); *Jakubowski v. Axton Owner LLC*, 156 A.D.3d 509, 65 N.Y.S.3d 444 (2017) ("witness's observation that it was not snowing at 5:00 p.m. is indicative of a temporary lull in the storm and insufficient to raise a triable issue of fact as to the existence of a duty to clear snow and ice").

Nor has Plaintiff established a triable issue of fact as to whether Defendant undertook snow removal activities that created or exacerbated a hazardous condition, *Baumann v. Dawn Ligs., Inc.*, 148 A.D.3d 535, 537, 49 N.Y.S.3d 668 (1st Dep't 2017) (internal citation omitted), or whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress. Cf. *Guzman v. Broadway 922 Enters., LLC*, 130 A.D.3d 431 (2015) ("plaintiff's testimony that she had seen four to five inches of dirty snow in the area the evening before her accident raises issues of fact whether the ice was caused by either defendant's improper cleaning after past storms or

from the melting and refreezing of snow in the early morning hours preceding the accident and whether defendant's earlier cleaning of the area caused or exacerbated the hazardous condition").

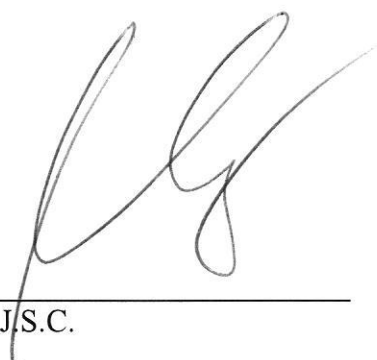
Finally, with respect to Administrative Code § 7-210, even assuming that Defendant is not exempt under subdivision (b),² Defendant has nonetheless established her entitlement to judgment as a matter of law under the "storm in progress" rule. *Simeon v. City of New York*, 41 A.D.3d 344 (1st Dep't 2007); see *Khaimova v. City of New York*, 95 A.D.3d 1280 (2d Dep't 2007) ("section 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable"). Accordingly, for the foregoing reasons, it is hereby:

ORDERED AND ADJUDGED that Defendant's motion to dismiss the complaint pursuant to CPLR § 3212 is GRANTED; and it is further

ORDERED AND ADJUDGED that Defendant shall serve a copy of this Decision & Order with Notice of Entry upon Plaintiff within thirty days of the date of this Decision.

Dated: Bronx, New York

April 14, 2023


HON. WILMA GUZMAN, J.S.C.

² Section 7-210 (b) provides that the statute "shall not apply to one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes."