

Smith v New York Hotel Trades Counsel

2024 NY Slip Op 34718(U)

January 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 501240/2020

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of January, 2024.

P R E S E N T :
HON. WAVNY TOUSSAINT
Justice.

IVORINE N. SMITH,

Plaintiff,

-against-

NEW YORK HOTEL TRADES COUNSEL
AND HOTEL ASSOCIATION OF NEW YORK
CITY HEALTH CENTER, INC.,

Defendant.

Cal. No. 26

Index No.: 501240/2020

DECISION AND ORDER

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered
64-76
81-84
92-94

Upon the foregoing papers, defendant New York Hotel Trades Counsel and Hotel Association of New York City Health Center, Inc. (“defendant”) moves (Seq. 03) for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint. Plaintiff Ivorine N. Smith (“plaintiff”) opposes.

Background

This is an action to recover compensatory damages for personal injuries allegedly sustained by plaintiff, who on February 20, 2019 at approximately 1:00 p.m., allegedly slipped and fell on a patch of ice on the sidewalk abutting defendant's property located at 265 Ashland Place, Brooklyn, NY (the "premises"). Plaintiff commenced this action on January 16, 2020 alleging defendant's negligent snow and ice removal efforts created or exacerbated the hazardous condition (i.e., the patch of ice) causing her accident.

Defendant now moves for summary judgment dismissing the complaint insofar as asserted against it, based on the "storm in progress" rule, codified in New York City Administrative Code §16-123(a), which provides in relevant part:

(a) 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 to fall, or after the deposit of any dirt or other material upon such sidewalk, remove the snow or ice, dirt, or other material from the sidewalk and gutter . . .

Defendant's Contentions

For the purposes of the motion, defendant accepted plaintiff's allegation that she fell on the sidewalk abutting its property. Nonetheless, defendant argues, *inter alia*, that plaintiff's fall occurred in the midst of a winter snowstorm and that as such, it is insulated from liability under the "storm in progress" rule. Defendant's forensic meteorological expert, Mark L Kramer ("Mr. Kramer") submitted an affidavit in which he concluded that on the date of the accident, there was no snow, sleet and/or ice which would have accumulated on the subject sidewalk as of 7am the morning of the accident, due to mild temperatures during the period February 15th through February 19th, 2019. Mr. Kramer

also contends that on the date of the accident, a winter storm had commenced during the late morning and continued as snow through the time of plaintiff's fall, during which snow accumulated on "ground surfaces that were not chemically treated". He further posits that the storm's transition to freezing rain, or freezing drizzle and rain, did not occur until after plaintiff's fall, which was sometime after 1:50pm.

Defendant also argues that it did not conduct any snow or ice removal operations immediately prior to or during the relevant time period of plaintiff's accident, notwithstanding the testimony of its security officer, Kevin Murray ("Mr. Murray"), who stated defendant had "service people" who would come and clear the sidewalks during a winter storm. Defendant further argues there was no evidence of a prior existing snow or ice condition which it had failed to abate before plaintiff's fall.

Plaintiff's Contentions

In opposition, plaintiff contends, *inter alia*, that defendant has not met its prima facie burden on summary judgment in that it failed to proffer evidence that it had not performed any snow and ice removal earlier in the day of plaintiff's accident; thereby raising a triable issue of fact. Plaintiff points to the testimony of defendant's witness, Mr. Murray, who testified regarding defendant's protocol that defendant had "service people" to clear its sidewalks if it snowed.

Defendant's Reply

Defendant replies, *inter alia*, arguing that plaintiff's own testimony -- that there was ice and snow on the sidewalk and that she did not see any evidence that rock salt or snow melt had been put down -- belies plaintiff's opposition. To counter the testimony of Mr.

Murray, defendant submits for the first time on reply, the affidavit of Eric Clancy, its Director of Facilities, who stated that once a snow event begins, snow removal activities are undertaken only after snow accumulation reaches one inch. As snow accumulations allegedly did not amount to one inch, Mr. Clancy asserts defendant did not undertake any snow and ice remediation prior to or during the relevant time period of plaintiff's accident. Mr. Clancy also stated defendant keeps no written log of its snow removal activities.

Discussion

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact [citations omitted]. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 499 [2d Dept 1989]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Derise v Jaak*, 127 AD3d 1011, 1011 [2d Dept 2021]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Spilman v Matyas*, 212 AD3d 859, 860 [2d Dep't 2023]). It “must clearly appear that no

material triable issue of fact is presented” (*Rebecchi v Whitmore*, 172 AD2d 600, 600 [2d Dept 1991]). In order to avoid summary judgment, the non-moving party “must make a showing by producing evidentiary proof in admissible form” (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979]).

“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” (*Scarlato v. Town of Islip*, 135 AD3d 738, 738 [2d Dep’t 2016]; *Fernandez v City of New York*, 125 AD3d 800, 801 [2d Dep’t 2015]). “If a storm is ongoing, and a property owner elects to remove snow, the owner must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm” (*Fernandez*, 125 AD3d at 801; *Blair v. Loduca*, 164 AD3d 637, 639 [2d Dep’t 2018]). Such a showing must be established as part of a property owner’s prima facie case seeking dismissal on the basis of the “storm in progress” rule (*Fernandez v City of New York*, 125 AD3d 800, 801 [2d Dep’t 2015]; *Robles v City of New York*, 56 AD3d 647, 648 [2d Dep’t 2008]; *Artis v City of New York*, 24 AD3d 477, 478 [2d Dep’t 2005]).

Here, viewing the evidence in the light most favorable to the plaintiff as the nonmoving party (*Derise, supra*), defendant failed to establish, prima facie, that it did not undertake snow and ice removal during the relevant time period immediately before or during the relevant time period of plaintiff’s accident and that any such efforts on its part did not create or exacerbate the alleged icy condition. Defendant’s witness, Mr. Murray,

indicated that if a storm was in progress, defendant's "service people" would undertake snow and ice removal. However, defendant provided only general information about their snow and ice removal practices, and no evidence was submitted, inter alia, to establish that given the snow event, defendant did not in fact undertake snow and ice removal prior to the time of plaintiff's accident. The affidavit from Mr. Clancy, offered by defendant to refute the testimony of Mr. Murray, was self-serving and conclusory and, in any event, cannot be submitted by defendant for the first time on reply to meet its prima facie burden (*Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1059 [2d Dep't 2023]; *David v Bryon*, 56 AD3d 413, 414–415 [2d Dep't 2008]; *Rengifo v City of New York*, 7 AD3d 773, 773 [2d Dep't 2004]).

Inasmuch as defendants failed to meet its prima facie burden, it is unnecessary to determine whether the papers submitted by plaintiff in opposition were sufficient to raise a triable issue of fact (*Espinal v Shortis*, 164 AD3d 1217, 1218 [2d Dep't], citing *Winegrad*, 64 NY2d at 853).

Conclusion

Accordingly, it is hereby

ORDERED that defendant New York Hotel Trades Counsel and Hotel Association of New York City Heath Center, Inc.'s motion (Seq.03) for an order, pursuant to CPLR §3212, granting summary judgment dismissing plaintiff Ivorine N. Smith's complaint, is denied.

Any issue raised and not addressed in this decision and order is denied.

This constitutes the decision and order of the Court.

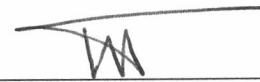
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MD

Motion Seq. # 2

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J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.

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KINGS COUNTY CLERK
FILED