McLaughlin v Alchemy Props. Inc.
2024 NY Slip Op 35055(U)
December 17, 2024
Supreme Court, Westchester County
Docket Number: Index No. 63189/2022
Judge: David F. Everett
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARY-KATE MCLAUGHLIN,

Plaintiff,

-against-

ALCHEMY PROPERTIES INC.,
ALCHEMY BEDFORD TENANT LLC and
ALCHEMY BEFORD LLC,

Defendants.

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INDEX NO. 63189/2022

DECISION/ORDER
Motion Seq. 1

EVERETT, J.

Upon consideration of the papers filed in the New York State Courts Electronic Filing System (NYSCEF) Doc Nos. 24-43, relative to the motion by defendants for summary judgment (CPLR 3212), the Court determines as follows:

Background and Arguments

Defendants' statement of material facts (NYSCEF Doc No. 25), which are countered by plaintiff's response (NYSCEF Doc No. 38) states:

> 3. Plaintiff alleges on January 5, 2022, she slipped and fall on ice at the premises located at 633 Old Post Road, Bedford, New York (hereinafter referred to as the "Premises"). See Exhibit C.
> 4. On January 5, 2022, at approximately 7:40 a.m., Plaintiff allegedly slipped and fell at the Premises. See Exhibit F and Exhibit E at 63, ll. 22-25.
> 5. At the time of Plaintiff's alleged accident, the National Weather Service issued a Winter Weather Advisory for Northern Westchester County. See Exhibit G.
> 6. At the time of Plaintiff's alleged accident, freezing rain was falling. See Exhibit E at 36-37, 24-3.
> 7. At the time of Plaintiff's alleged accident, the temperature at the Premises was 29 degrees Fahrenheit, which is below freezing. See Exhibit G.

8. At the time of Plaintiff's alleged accident, the freezing rain turned to ice upon reaching the ground. See Exhibit E at 36-37, 24-3.

In the affirmation in support (NYSCEF Doc No. 26), defendants' attorney notes that plaintiff's bill of particulars alleges defendants were negligent in failing to properly clean and remove snow and ice. However, defendants' attorney argues that there was a storm in progress.

Regarding the accident, defendants' attorney states that on January 5, 2022, at approximately 7:40 a.m., plaintiff was leaving her apartment intending to go to the gym located at the Premises; that in order to access the gym, plaintiff exited the side entrance of the building located at the Premises, where she slipped on ice and fell; that plaintiff did not observe the ice before she fell and did not make any complaints to anyone at the Premises regarding any icy condition prior to her fall; that the ice was clear in appearance and plaintiff did not know how thick it was; that plaintiff knew the weather was nasty; that Premises superintendent, Elored Caku (Caku) testified that on the date of the accident it was freezing rain, which began before and continued after the accident; that Caku admitted before plaintiff's alleged accident, he spread de-icer on the sidewalk where plaintiff fell.

Defendants rely on John Lombardo and Kyle Gravlin, consulting meteorologist, who prepared a written report and affidavits following their review of the weather conditions (NYSCEF Doc No. 33), which determined that on "January 5, 2020, i.e., the date of Plaintiff's alleged accident, the National Weather Service issued a "Winter Weather Advisory", which was in effect at the Premises from 3:37 a.m. through 12:00 p.m., which included the time of Plaintiff's alleged accident.

In the affirmation in opposition (NYSCEF Doc No. 37), plaintiff's attorney contends that plaintiff was exiting her apartment building when she slipped and fell on the ice that covered the

doorway and entry mat, which existed due to the failure of defendants to properly maintain the entryway, properly clear out any ice in the area, and warn of the icy conditions, constituting a defective, hazardous and trap-like condition.

Plaintiff's attorney argues that the storm in progress rule is designed to relieve workers from the obligation to shovel snow while there is continuing precipitation; that defendants' remedial efforts were insufficient to render the walkway reasonably safe; that defendants do not show that there was a storm in progress, but light freezing rain, which is not a storm.

Plaintiff's attorney relies on T.C. Moore, a meteorologist, who finds that neither the weather that occurred, nor the ice accumulation would be sufficient to categorize the weather that occurred on the date of accident as a storm, but precipitation caused by a weak low pressure system; and that "the amount of ice accumulation was less than 1/10 of an inch which is less than the ¼" measurement required to establish the presence of a storm."

Plaintiff's attorney relies on the testimony of Caku (NYSCEF Doc No. 31), who testified that he covered that entryway with ice melt and that he only puts ice melt where he believes he sees ice. Plaintiff's attorney argues that Caku, as the employee tasked with removing ice from the Premises did not believe the weather to be severe enough to prevent him from both inspecting and from attempting to remove the ice and made two passes with the ice melt before the accident happened; that Caku's actions show that defendants had actual and constructive notice of the ice.

Plaintiff's attorney seeks that sanction of spoliation regarding videos relying on Caku's testimony that there would be footage of before and after the accident, which were provided, and that he sent other videos to the management company; that defendants have additional evidence of Caku's inspection and ice melt application, which is material and necessary, has not been provided.

In reply (NYSCEF Doc No 43), defendants' attorney challenges plaintiff's argument that there was no storm in progress, but there was an icy mix and freezing rain falling; that plaintiff's expert does not "conclusively state the weather condition on the date of Plaintiff's alleged accident, i.e., freezing rain, was not an "ice storm", but rather notes "[s]ignificant ice accumulations are usually accumulations of ¼" or greater"; that it is "not required to establish an 'ice storm' was present at the time of Plaintiff's alleged accident, but merely, there was a storm in progress at the time of the alleged fall"; and that it is undisputed that freezing rain was actively falling at the time of plaintiff's fall.

With respect to spoliation, "the video of Mr. Caku spreading ice melts at the subject premises were marked as exhibits and viewed by Mr. Caku during his November 20, 2023 deposition. See Exhibit 31 at 73 at 9."

Summary Judgment

Summary judgment is appropriate when there are no genuine triable issues of material fact between the parties and the movant is entitled to judgment as a matter of law (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327 [1986]). The movant 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 (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A defendant's prima facie showing is governed by the allegations of liability made in the plaintiff's pleadings (*see Beiner v Village of Scarsdale,* 149 AD3d 679, 680 [2d Dept 2017]). To defeat a motion for summary judgment, the opposing party must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*Zuckerman v City of New York*, 49 NY2d at 562; *Moore v 3 Phase Equestrian Ctr., Inc.*, 83 AD3d 677, 679 [2d Dept 2011]). On the motion for summary

judgment, the facts appearing in the movant's papers are deemed to be admitted by an opposing party unless controverted by admissible proof (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *Lambos v Weintraub*, 256 AD2d 446, 447 [2d Dept 1998]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation (*see, Federal Deposit Ins. Corp. v Jacobs*, 185 AD2d 913; *Smith v Johnson Prods. Co.*, 95 AD2d 675)." (*Morgan v New York Tel.*, 220 AD2d 728, 729 [2d Dept 1995].)

Storm in Progress

In *Cassino-Sharp v Whispering Hills Home Owners Assn., Inc.* (219 AD3d 457, 458 [2d Dept 2023]), the Court instructed:

> "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" (*Ryan v Beacon Hill Estates Coop., Inc.*, 170 AD3d 1215, 1215 [2019]). "This burden may be satisfied by 'presenting evidence that there was a storm in progress when the injured plaintiff allegedly slipped and fell' " (*Beaton v City of New York*, 196 AD3d 625, 626 [2021], quoting *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 839-840 [2012]). "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, 642 [2008]; *see Beaton v City of New York*, 196 AD3d at 626).

"Although a landowner owes a duty of care to keep his or her property in a reasonably safe condition, he 'will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter' (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005])." (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016].) "The rule is designed to relieve a landowner of the obligation to clear the area 'while continuing precipitation or high winds are simply re-covering [it] as fast as

they are cleaned, thus rendering the effort fruitless' (*Powell v MLG Hillside Assoc.*, 290 AD2d 345, 345 [1st Dept 2002]). Accordingly, while there does not need to be a major winter storm occurring in order to invoke the storm in progress rule, the proof does need to 'establish[ ] the existence of an ongoing hazardous weather condition' (*Zima v North Colonie Cent. School Dist.*, 225 AD2d 993, 994 [3d Dept 1996]; *see Camacho v Garcia*, 273 AD2d 835, 835 [4th Dept 2000])." (*Anson v Monticello Raceway Mgt., Inc.*, 217 AD3d 1231 [3d Dept 2023]; *see Gervasi v Blagojevic*, 158 AD3d 613, 613-614 [2d Dept 2018].) "If a property owner has elected to clear a sidewalk during a storm in progress, the owner is required to act with reasonable care and may be liable if its efforts create a hazardous condition or exacerbate a natural hazard created by the storm *(see Yassa v Awad*, 117 AD3d 1037, 1038 [2014]; *Chaudhry v East Buffet & Rest.*, 24 AD3d 493, 494 [2005]; *Gibbs v Rochdale Vil.*, 282 AD2d 706, 707 [2001])." (*Aronov v St. Vincent's Hous. Dev. Fund Co., Inc.*, 145 AD3d 648, 649 [2d Dept 2016]; *cf. McCurdy v KYMA Holdings, LLC*, 109 AD3d 799, 800 [2d Dept 2013] [The "plaintiff failed to establish that the defendant either created or exacerbated the condition upon which the plaintiff slipped."].)

Spoliation

The Court in *Lilavois v JP Morgan Chase & Co.* (151 AD3d 711, 712 [2d Dept 2017]), the Court explained:

> "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]; *see Golan v North Shore-Long Is. Jewish Health Sys., Inc.*, 147 AD3d 1031, 1032 [2017]; *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [2012]). The Supreme Court is empowered with broad discretion in determining the appropriate sanction for spoliation of evidence (*see* CPLR 3126; *Pegasus Aviation I, Inc. v Varig Logistica*

S.A., 26 NY3d at 551; *Giuliano v 666 Old Country Rd., LLC*, 100 AD3d 960, 962 [2012]).

In *Suazo v Linden Plaza Assoc., L.P.* (102 AD3d 570, 571 [1st Dept 2013]), the Court found that spoliation of a video did not leave the plaintiff prejudicially bereft of appropriate means to confront a claim or defense with incisive evidence as at trial the plaintiff could present testimony of deponents who viewed the video.

Conclusion

Here, defendants and plaintiff rely on expert testimony. Defendants' experts opine that on the morning of plaintiff's accident, freezing rain began at 4:55 a.m. and continued through 9:30 a.m., which encompasses the time of plaintiff's accident. Defendants conclude that the deposition testimony and weather records establish there was a storm in progress, with below freezing temperatures, at the Premises at the time of plaintiff's slip and fall.

Plaintiff's expert provides the definition of a storm and opines that at the time of the accident, there was a light freezing rain present and an ice accumulation of less than 1/10" on the ground, which is below the accumulation level of ¼" and concludes that there was no ice storm, or any storm of any kind in progress on January 5, 2022, at 7:40 a.m. at the Premises.

While defendants make a prima facie showing, plaintiff raises questions of fact including whether the level of precipitation rises to the level of a storm; whether Caku's inspection and application of ice melt multiple times of the area where the accident occurred negate that there was a storm; whether Caku's actions were sufficient to place defendants on notice that there was a need to remedy a dangerous situation; and whether the alleged ice that covered the doorway and entry mat existed due to the failure of defendants to properly maintain the entryway, properly clear out any ice in the area, and warn of the icy conditions, constituting a defective, hazardous and trap-like condition.

With respect to spoliation, Caku's testimony that he sent other videos to the management company, raises a triable issue of fact as to whether spoliation of the "other videos" occurred, particularly since defendants assert that the video was marked as an exhibit and viewed by Caku at his deposition.

The remaining contentions do not require a different result.

Accordingly, it is,

ORDERED that defendants' motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 17, 2024

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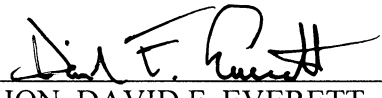

HON. DAVID F. EVERETT, J.S.C.

Filed in NYSCEF