

Adu v Riverbay Corp.
2024 NY Slip Op 35722(U)
October 8, 2024
Supreme Court, Bronx County
Docket Number: Index No. 811314/2021E
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA2-----X
Joseph Adu,

Plaintiff,

-against-

DECISION and ORDER
Index No. 811314/2021E

Riverbay Corporation,

Defendant.
-----X

Elizabeth A. Taylor, J.

Defendant moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes the motion.

Plaintiff alleges that he fell on a sheet of "black" ice, approximately two inches thick, on the sidewalk adjacent to 150 Dreiser Loop in Bronx County at approximately midnight. At his deposition, plaintiff testified that after work, he drove to Coop City and parked his vehicle, intending to walk to his friend's apartment. It was dark outside, and the temperature was below freezing at the time of the accident. Plaintiff further testified it had not snowed or rained at all that day, but the ground was icy. Plaintiff could not recall the last time it had rained or snowed. He had been walking for approximately five minutes before he slipped on "black ice" that he did not see at any point prior to falling. He described the patch of ice as "smooth", "big", and "a couple of inches thick."

Mr. Omar De Los Angeles, a janitorial supervisor, testified on behalf of defendant. He recalled that he removed snow from the subject walkway at 150 Dreiser Loop on February 18, 2021. He explained that he used a Jeep with an attached plow to clear the walkway, plowing the snow towards the side of the walkway near the bushes and out to the street. He plowed the snow "quite a few times" on February 18, 2021. When the plow is being used, calcium is also spread out on the area from a spreader attached to the back of the Jeep. After Mr. De Los Angeles is done plowing the walkways, porters walk down the walkway and inspect the walkway and perform clean-up of the area. He

continued plowing until approximately 7:30 PM.

Defendant's climatological expert, Steven Roberts performed an analysis of the weather conditions in the Bronx area around 150 Dreiser Loop for the period of February 17-19, 2021. His affidavit, supported by certified climatological data, opines that there was approximately five inches of snow and ice cover at the start of the day, and that freezing rain and snow fell intermittently through the day from 9:45 a.m. through 2:30 p.m., and again steadily through approximately 8:00 PM. At the end of the day, approximately six inches of snow and ice cover was present. Roberts opined that the "black ice" plaintiff testified he slipped on was caused by the winter storm that produced 5.6 inches of snow and ice that occurred between February 18, 2021, and February 19, 2021.

Plaintiff submits the affidavit of his climatological expert, George Wright, CCM, who states that between 3.0 and 3.5 inches of snow and sleet fell at the location of the accident on February 18, 2021, and on the day of the accident, freezing rain fell followed by an additional 1.5 inches of snow ending approximately 4 ½ hours before the accident. The expert states:

"My analysis of the weather conditions that occurred at the Premises on February 19, 2021 (day of Plaintiff's incident) indicated that intermittent light freezing rain developed between 2:00 a.m. and 2:15 a.m. The precipitation mixed with and changed to snow between 5:30 a.m. and 5:45 a.m. The snow continued to fall for the remainder of the morning and into the afternoon. The snow tapered off and ended between 7:30 p.m. and 7:45 p.m. There was no additional precipitation after this time on February 19, 2021. Between 1.0 and 1.5 inches of snow fell at the Premises on February 19, 2021."

The expert further opines that based on the plaintiff's description of a smooth sheet of ice covering the surface of the sidewalk, the ice must have formed earlier in the day and was made more dangerous by the defendant's snow removal efforts. This is because the defendant's employees removed the covering of light snow, exposing the underlying ice which had formed earlier in the day:

"As a result, the "smooth" ice that was a 'couple of inches' thick that covered the sidewalk where Plaintiff fell formed prior to approximately 5:45 a.m. on February 19, 2021. This ice formed by the period of freezing rain that fell between approximately 3:15 p.m. and 7:00 p.m. on February 19, 2021, and between approximately 2:00 a.m. and 5:45 a.m. on February 19,

2021 [*sic—clearly a typographical error as this matches the time period of freezing rain for February 18*]. The freezing rain formed slush and ice on the subject sidewalk that froze into ice that adhered to the surface of the sidewalk. This ice was not removed and salted by Omar De Los Angeles during his snow removal efforts on February 18, 2021, and February 19, 2021. Plaintiff did not see any snow around the ice patch when he fell. By removing the coating of snow that fell on February 19, 2021, and not removing the underlying ice, the Defendant's [*sic*] created a more dangerous, slippery condition since the snow would have provided better traction for walking.”

ARGUMENT

Defendant argues that for a plaintiff to prevail when a plaintiff claims to have slipped and fell on snow or ice, he or she must show the defendant had actual or constructive notice of the condition and had a reasonably sufficient time after cessation of precipitation to take corrective action. Defendant argues that it did not breach a duty of care to clear the ice and snow as a matter of law, as Admin. Code § 16-123 provides a “grace period” until 11:00 am the following morning to clear the sidewalk of snow and or ice which fell during the previous evening. Therefore, defendant maintains, this Court should grant defendants summary judgment based on Admin. Code § 16-123. Defendants further argue that they are entitled to summary judgment as a matter of law on the ground that a storm was in progress alleviating defendant of any duty to perform snow removal activities during the snow fall.

Plaintiff argues that defendant failed to establish a prima facie case. In addition, plaintiff maintains that the expert testimony adduced by his expert has established factual questions as to the defendant’s negligent snow removal operations with respect to the snow and ice condition which caused Plaintiff’s accident, making the condition more hazardous.

DISCUSSION

“The 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. Failure to make such prima facie showing requires a denial of the motion.” (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986].) Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact.” (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980].)

As reiterated by the Court of Appeals in *Sherman v. New York State Thruway Authority*, “[a]lthough 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.” (27 N.Y.3d 1019, 1020 [2016]; see also *Kantor v. Leisure Glen Homeowners Ass’n, Inc.*, 95 A.D.3d 1177, 1177 [2d Dept. 2012].) On a motion for summary judgment under the “storm in progress” rule, a defendant is required to submit evidence, in admissible form, that a storm was in progress at the time of the accident. The burden then shifts to the plaintiff to raise a triable issue of fact “as to whether the accident was caused by a slippery condition at the location where the [injured] plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition.” (*Burniston v. Ranric Enterprises Corp.*, 134 A.D.3d 973, 974 [2d Dept. 2015], quoting *Meyers v. Big Six Towers, Inc.*, 85 A.D.3d 877, 877 [2d Dept. 2011]; see also *Small v. Coney Is. Site 4A-1 Houses, Inc.*, 28 A.D.3d 741, 742 [2d Dept. 2006].)

"Pursuant to Administrative Code [of the City of New York] § 16-123 (a), owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk." (*Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660, 979 NYS2d 684 [2d Dept. 2014]; see *Eduardo v. Webster Equities LLC*, 194 A.D.3d 643, 643, 150 N.Y.S.3d 47, 48 [2d Dept. 2021] [under Admin. Code § 16-123 (a),

defendants had four hours to clear snow following the cessation of any snowfall, and the time to clear snow and ice was suspended between the hours of 9:00 p.m. and 7:00 a.m.].)

Contrary to the plaintiff's arguments, the defendant established a *prima facie* case that there was a storm in progress. Defendants submitted certified weather records and a meteorologist's affidavit showing that a winter storm was in progress at the time that plaintiff slipped and fell thereby suspending their duty to take reasonable measures to remedy dangerous conditions caused by the storm (see *Moreno v Trustees of Columbia Univ. in the City of N.Y.*, 161 AD3d 501, 73 NYS3d 422 [1st Dept 2018]).

Nevertheless, Wright's expert testimony that plaintiff fell on ice which formed earlier in the day raises issues of fact precluding summary judgment. The expert's testimony raises a plausible theory, based on climatological data, that the ice formed early in the day, and that the defendant's snow removal efforts left exposed sheets of ice by removing the top layer of snow. Evidence that snow removal efforts increased the hazard, despite the occurrence of a storm in progress, raises issues of fact precluding summary judgment. (*Burniston v Ranric Enters. Corp.*, 134 A.D.3d 973, 974, 21 N.Y.S.3d 694 [2d Dept. 2015] [summary judgment properly denied where plaintiff raised issue of fact as to whether he fell on old snow and ice from a prior storm, as opposed to snow and ice from storm in progress, and whether defendant had constructive notice of the preexisting condition"]; *Pipero v. New York City Tr. Auth.*, 69 A.D.3d 493, 493, 894 N.Y.S.2d 39, 40 [1st Dept. 2010] ["even if a storm was in progress at the time of the incident, plaintiff's testimony and defendant's own records raise issues of fact as to whether defendant gratuitously and negligently performed snow and ice removal operations and as to whether its failure to place sand or salt on the stairs created or exacerbated a dangerous condition"]; *De Los Santos v. 4915 Broadway Realty LLC*, 58 A.D.3d 465, 466, 869 N.Y.S.2d 905, 905 [1st Dept. 2010] ["Even if defendant had conclusively established that the storm was still in progress at the time of plaintiff's slip and fall, it would not be entitled to judgment as a

matter of law, because the evidence of its employees' snow-removal activities raised an issue of fact whether defendant created or exacerbated the condition that caused the accident.'))

Since the parties have submitted contradicting evidence as to the ice condition that caused plaintiff's accident, there are issues of fact that preclude the granting of summary judgment. There are triable issues of fact as to whether plaintiff's fall was caused by pre-existing ice on the ground or the storm in progress (see *Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 505, 47 NYS3d 32 [1st Dept 2017]; *Guzman v Broadway 922 Enters., LLC*, 130 AD3d 431, 432, 12 NYS3d 92 [1st Dept 2015]).

Accordingly, it is hereby,

ORDERED that the motion is denied.

This is the Decision and Order of the Court.

Dated: OCT 08 2024



Hon. Elizabeth A. Taylor, J.S.C.