

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Lewis v. 311 Realty, LLC

2022 N.Y. Slip Op. 00505 (App. Div. Jan. 27 2022) · No. Appeal No. 15155; Case No. 2021-02849; Index No. 21816/17E · Decided January 27, 2022

SUMMARY

The Appellate Division, First Department reversed the denial of the defendant's motion for summary judgment in a slip-and-fall action. The court held that the storm in progress doctrine applied and that the plaintiff failed to raise a triable issue that the defendant's snow-removal activities created or exacerbated the hazardous condition.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Acosta, P.J.; Renwick, J.; Moulton, J.; Scarpulla, J.; Higgitt, J.
JURISDICTION	New York
DECIDED	January 27, 2022
DOCKET	Appeal No. 15155; Case No. 2021-02849; Index No. 21816/17E
DISPOSITION	reversed
PROCEDURAL POSTURE	Defendant appealed from an order denying its motion for summary judgment dismissing the complaint in a slip-and-fall action.
STANDARD OF REVIEW	Summary judgment is proper where the movant establishes entitlement to judgment as a matter of law and the opposing party fails to raise a triable issue of fact.
PRECEDENTIAL VALUE	Published appellate opinion; precedential under applicable New York law.
PARTIES	311 Realty, LLC v. Bernie Lewis

TOPICS

- premises liability
- negligence
- summary judgment
- standard of care
- appellate procedure

PRACTICE AREAS

premises liability

negligence

summary judgment

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether defendant established entitlement to summary judgment under New York's storm-in-progress doctrine.
2. Whether plaintiff raised a triable issue of fact that defendant's snow-removal activities created or exacerbated the dangerous condition.

HOLDINGS

1. A landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing and until a reasonable time after it ends; defendant established prima facie entitlement to summary judgment by showing that a winter storm was in progress when plaintiff fell.
2. After defendant showed that the storm-in-progress doctrine applied, plaintiff could defeat summary judgment only by raising a triable issue of fact that defendant's snow-removal activities created or exacerbated the hazardous condition; plaintiff failed to do so.

KEY QUOTATIONS

*“Under the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended” ([*1])*

FACTUAL BACKGROUND

Bernie Lewis slipped and fell on an exterior landing in front of 311 Realty, LLC's building during a winter storm. The defendant submitted climatological records and a meteorologist's affidavit establishing that the storm was in progress when the accident occurred. The plaintiff conceded that the storm was ongoing and did not allege that defendant's snow or ice removal activities created or worsened the hazardous condition.

PROCEDURAL HISTORY

The Supreme Court, Bronx County, denied defendant's motion for summary judgment. The Appellate Division, First Department, unanimously reversed on the law, granted the motion, and directed entry of judgment for defendant.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The motion for summary judgment was granted, and the Clerk was directed to enter judgment accordingly.

CASES CITED

- Weinberger v 52 Duane Assoc. LLC, 102 A.D.3d 618, 619 (1st Dep't 2013)
- Pippo v City of New York, 43 A.D.3d 303, 304 (1st Dep't 2007)
- Baumann v Dawn Liqs., Inc., 148 A.D.3d 535, 537 (1st Dep't 2017)
- Pipero v New York City Tr. Auth., 69 A.D.3d 493 (1st Dep't 2010)

OPINION

PER CURIAM.

Lewis v 311 Realty, LLC (2022 NY Slip Op 00505) Lewis v 311 Realty, LLC 2022 NY Slip Op 00505 Decided on January 27, 2022 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: January 27, 2022 Before: Acosta, P.J., Renwick, Moulton, Scarpulla, Higgitt, JJ. Index No. 21816/17E Appeal No. 15155 Case No. 2021-02849 [*1]Bernie Lewis, Plaintiff-Respondent, v311 Realty, LLC, Defendant-Appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellant. Sullivan Papain Block McGrath Coffinas & Cannavo P.C., New York (Christopher J. DelliCarpini of counsel), for respondent. Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered December 22, 2020, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted.

The Clerk is directed to enter judgment accordingly. Defendant established prima facie that it was not negligent in connection with plaintiff's slip and fall on the exterior landing in front of its building by submitting climatological records and a meteorologist's affidavit showing that there was a winter storm in progress at the time of plaintiff's accident.

Under the storm in progress doctrine, a landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is ongoing until a reasonable time after the storm has ended (Weinberger v 52 Duane Assoc. LLC, 102 AD3d 618, 619 [1st Dept 2013]; Pippo v City of New York, 43 AD3d 303, 304 [1st Dept 2007]). Upon a defendant's showing that the doctrine applies, the plaintiff may defeat summary judgment by raising a triable issue of fact as to whether the landowner had undertaken snow removal activities that created or exacerbated a hazardous condition (Baumann v Dawn Liqs., Inc., 148 AD3d 535, 537 [1st Dept 2017]).

Here, as plaintiff concedes, there was a storm in progress at the time of the accident. Thus, the burden shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether defendant created or exacerbated the hazardous condition, on the exterior landing in front of its building, through its snow removal activities (*id.*). Plaintiff has not met that burden.

In fact, plaintiff does not allege that defendant gratuitously and negligently performed snow and ice removal operations or that its failure to place sand or salt on the exterior landing in front of its building created or exacerbated a dangerous condition (see *Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

We have considered plaintiff's remaining arguments and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: January 27, 2022