SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

567

CA 15-01719

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, AND CURRAN, JJ.

CHESLEY A. O'BRYAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TONAWANDA HOUSING AUTHORITY,
DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COUTU LANE, PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered February 10, 2015. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as the complaint alleges that defendant had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell on ice in a parking lot on property owned by defendant, Tonawanda Housing Authority. Plaintiff appeals from an order granting defendant's motion for summary judgment dismissing the complaint. At the outset, we note that plaintiff, by briefing the issue of constructive notice only, has abandoned any claim that defendant had actual notice of or created the dangerous condition (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiff that Supreme Court erred in granting that part of defendant's motion seeking summary judgment dismissing the complaint insofar as the complaint alleges that defendant had constructive notice of the allegedly dangerous condition. We therefore modify the order accordingly.

It is well established that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendant failed to establish that the ice was not visible upon a reasonable inspection (*see Derosia v Gasbarre & Szatkowski Assn.*, 66 AD3d 1423, 1424; *see*

also Gwitt v Denny's, Inc., 92 AD3d 1231, 1231-1232; *cf*. *Ferington v Dudkowski*, 49 AD3d 1267, 1267; *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857-858). In support of its motion, defendant submitted, inter alia, the deposition testimony of three of its maintenance employees, which, taken together, demonstrates that defendant had not inspected the parking lot for nearly two days prior to plaintiff's fall. Thus, by its own submissions, defendant raised an issue of fact "whether the condition was visible and apparent [upon a reasonable inspection] and had existed for a sufficient length of time before plaintiff's accident to permit defendant to discover and remedy it" (*Merrill v Falleti Motors, Inc.*, 8 AD3d 1055, 1056; *see Derosia*, 66 AD3d at 1424-1425).

Entered: June 10, 2016

Frances E. Cafarell
Clerk of the Court