

Zola v New York City Tr. Auth.

2007 NY Slip Op 31581(U)

May 31, 2007

Supreme Court, New York County

Docket Number: 0104507/2003

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

ZOLA, IRENE

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendant.

INDEX NO. 104507/03

MOTION DATE _____

MOTION SEQ. NO. 007,008

MOTION CAL NO. _____

The following papers, numbered 1 to 15 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-4

Answering Affidavits- Exhibits _____ 5-9

Replying Affidavits _____ 10-15

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

JUN 12 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5-31-07

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

INDEX NO.
104507/03

IRENE ZOLA

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants

FILED

JUN 12 2007

DECISION/ORDER

CITY OF NEW YORK
COUNTY CLERK'S OFFICE

DONNA M. MILLS, J:

Motion sequence nos. 007 and 008 are consolidated for disposition. In motion sequence no. 007, defendant Chase Manhattan Bank n/k/a JP Morgan Chase & Co. (Chase) moves for summary judgment dismissing the complaint, and defendant 2551 LLC cross-moves for summary judgment dismissing the complaint and all cross claims raised against it; for summary judgment based on common-law indemnification against defendants The City of New York (City) Adelhardt Construction Corporation (Adelhardt), Chase, and New York City Transit Authority (TA); and for summary judgment based on contractual indemnification against defendants Adelhardt, Chase, and Ace Scaffolding Company, Inc. (Ace). In addition, Ace cross-moves for summary judgment dismissing the complaint and all cross claims.

In motion sequence no. 008, defendant/third-party plaintiff/second third-party plaintiff Adelhardt moves for summary judgment dismissing the complaint and all cross claims raised against it, and for summary judgment awarding a defense and indemnity against third-party defendant Ace; and Chase cross-moves for summary judgment for common-law and contractual indemnification

against Adelhardt and Ace.

This is an action to recover damages for the personal injuries that plaintiff sustained when she allegedly tripped and fell in a hole in the public sidewalk adjacent to the building (Building) located at 2551 Broadway in Manhattan. The Building is owned by 2551 LLC, which leased a portion of the Building to Chase. Chase hired Adelhardt as the general contractor to perform construction work on its premises. Adelhardt hired Ace to install a sidewalk bridge. The hole in which plaintiff allegedly fell is proximate to one side of one of the poles supporting the sidewalk bridge. Plaintiff testified at her deposition that she and a friend were walking on the subject sidewalk, and that, as they came up to the pole, they separated in order to go around it on opposite sides, whereupon plaintiff stepped into the hole.

With regard to accidents occurring prior to September 14, 2003, the City was responsible for maintaining the public sidewalk, and neither an abutting landlord nor a lessee was liable to a passerby who was injured as a result of a defect in the sidewalk, unless the landowner or the lessee had either created the defect, or caused it to occur through a special use of the sidewalk. Jordan v City of New York, 23 AD3d 436 (2d Dept 2005); Otero v City of New York, 213 AD2d 339 (1st Dept 1995). Michael Campbell, the operations manager for non-party GVA Williams Real Estate Company (Williams), the company that manages the Building, testified that no one had complained to him about the condition of the subject sidewalk prior to plaintiff's accident. Plaintiff testified at her

deposition that she had walked on the subject block innumerable times, but had not noticed the hole in the pavement until her accident; that (therefore) she does not know how long the hole was there; and that she does not know how the hole came to be. Accordingly, plaintiff cannot show that either 2551 LLC or Chase created the hole into which she stepped.

To be sure, the lease between 2551 LLC and Chase provides that "[l]andlord will at its sole expense be responsible for all necessary repairs to the sidewalks adjoining the building" (Boyd Affirm., Exh. L, Footnotes to Lease, no. 5). However, plaintiff is not a third-party beneficiary of the lease, and 2551 LLC did not, by virtue of the lease, assume the City's then-responsibility for maintaining the public sidewalks. Moreover, Mr. Campbell testified that, after plaintiff's accident, and after the construction of the Chase premises had been completed, he hired an engineer to survey the sidewalk in front of the building, because two concrete flagstones needed to be placed in front of the Chase premises, and that the engineer informed him that the portion of the sidewalk beyond the planned location of the flagstones covered vaults maintained by the TA, and no work by Williams was permitted in that area.

As for Chase, the construction of the sidewalk bridge did not constitute a special use of the sidewalk. See generally Rubin v City of New York, 258 AD2d 371 (1st Dept 1999). Far from conferring a special benefit on Chase, the bridge was a required safety measure, erected to protect construction workers and

passersby from any falling construction debris. Moreover, plaintiff does not allege that the bridge was in any way defective (see Trustees of Vil. of Canadaiqua v Foster, 156 NY 354 [1898]), or that it obstructed her view of the hole. Compare D'Andrea v City of New York, 21 AD3d 926 (2d Dept 2005).

Plaintiff's argument, that she was somehow forced to step into the hole by the location of the pole of the bridge, has no basis in either the complaint, or in plaintiff's deposition. Nor has plaintiff submitted an affidavit in support of that argument. At bottom, plaintiff's argument is no more than that she might not have stepped into the hole, had the bridge not been there. That possibility does not make the bridge the proximate cause of her accident.

Because plaintiff cannot show any defect in the sidewalk bridge, because it is undisputed that neither Adelhardt nor Ace performed any sidewalk work, and that, as Joe Paladino, Ace's superintendent testified, the erection of the sidewalk bridge caused no damage to the sidewalk, plaintiff can no more make a prima facie case against Adelhardt or Ace than she can against 2551 LLC or Chase.

Finally, Adelhardt's claim for a defense from Ace fails, because such a claim can be predicated only upon injury "caused by the negligent acts or omissions" of Ace. Tosca Affirm. (2/28/07), Exh. L, at ¶ 4.6.1. No such acts or omissions have been shown.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 007, the motion is

granted, and the complaint is severed and dismissed as against defendant Chase Manhattan Bank n/k/a JP Morgan Chase & Co. with costs and disbursements as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that that branch of the cross motion of 2551 LLC that seeks dismissal of the complaint as against it is granted and the complaint is severed and dismissed as against defendant 2551 LLC with costs and disbursements as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that those branches of the cross motion of 2551 LLC that seek indemnity are denied as moot; and it is further

ORDERED that the cross motion of Ace Scaffolding Company is granted, and the complaint is severed and dismissed as against defendant Ace Scaffolding Company with costs and disbursements as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in motion sequence no. 008, that branch of the motion that seeks dismissal of the complaint is granted, and the complaint is hereby severed and dismissed as against Adelhardt

Construction Corporation with costs and disbursements as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that that branch of the motion that seeks a defense and indemnity against Ace Scaffolding Company, Inc. is denied; and it is further

ORDERED that the cross motion is denied as moot; and it is further

ORDERED that the remainder of this action shall continue.

Dated: 5-31-07

ENTER:



J.S.C.

FILED
JUN 12 2007
NEW YORK
COUNTY CLERK'S OFFICE