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

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 117934/2004
TAUBENFELD, FLORENCE
vs
STARBUCKS
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE 3-1-07
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED
JUL 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 13, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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FLORENCE TAUBENFELD and HARRY TAUBENFELD,

Plaintiff,

Index No. 117934/04

-against-

STARBUCKS CORPORATION d/b/a STARBUCKS COFFEE COMPANY, PARK PLAZA LARCHMONT, LLC and PETER K. WAGNER,

Defendants.

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Joan A. Madden, J.

Defendants Park Plaza Larchmont, LLC ("Park Plaza") and Peter K. Wagner move for summary judgment dismissing the complaint against them, and plaintiffs oppose the motion and cross move to dismiss certain defenses asserted by defendants pursuant to CPLR 1601, and to preclude certain evidence (motion seq. no. 004). Starbucks Corporation d/b/a Starbucks Coffee Company (hereinafter "Starbucks") separately moves for summary judgment dismissing the complaint against it, and plaintiffs oppose Starbucks' motion (motion seq. no. 005)[1].

Background

Plaintiffs sue for damages arising out of injuries allegedly sustained by Florence Taubenfeld (hereafter plaintiff)[2] on November 3, 2003, when she tripped and fell over a tree root

[1]Motion seq. nos. 004 and 005 are consolidated for disposition.

[2]Plaintiff Harry Taubenfeld, who is Florence Taubenfeld's husband, asserts a derivative claim for loss of services and consortium.

in a tree well in front of a Starbucks located at 1929-1931 Palmer Avenue, Larchmont, NY ("the premises"). The tree well, which is surrounded by dirt, is cut-out from the sidewalk in front of the Starbucks.

In September 1996, Starbucks entered into a lease agreement for the premises with Park Plaza's predecessor-in-interest Peter Wagner and Yvonne Wagner d/b/a Park Plaza Realty Co. ("the Lease").[3] The Lease was for a ten-year term, beginning on October 1, 1996.

Section 6.2. of the Lease, provides that "the Landlord shall pay for and make all other repairs...to the premises and the building (including common areas as defined below[4])...[and] also repair and maintain all parking areas, sidewalks, landscaping [and that] Landlord may allocate the cost of such maintenance equally among all tenants...."

Section 18 of the Lease provides that:

> If such seating is permitted by the local authorities, Tenant may provide outdoor seating for its customers on property owned by Landlord adjacent to the Premises (the dimension and location of such area shall be agreed upon by the Landlord and Tenant) at any time during the term of the Lease at no additional rental. Tenant, at its own cost, shall comply with all relevant state, municipal or local laws and regulations, rules and ordinances with respect to outdoor seating and, obtain all necessary permits or licenses for same, and pay any increase in the Landlord's insurance directly resulting from such outdoor seating area. Tenant shall maintain the outdoor seating area exclusively serving its customers in a reasonably clean and neat fashion.

Plaintiff testified that the incident happened while she was walking with her husband

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[3]The record indicates that the lease agreement was provided by Starbucks.

[4]Section 12.1 defines common areas as "all portions of the building...including, without limitations, landscaped areas, parking lots and sidewalks."

down Palmer Road and they passed in front of the Starbucks, where there were two outdoor tables along the store front and people were sitting and also standing. She testified that "there was a crowd of people in front of the store, which gave only a small path towards the curb for people to pass" (Plaintiff dep testimony at 28). According to plaintiff, most of the people standing in front of the Starbucks were drinking coffee.[5] When asked what happened on the date she was injured, plaintiff testified that:

> There was a narrow path. The only way to pass was to go towards the curb. There is a tree there. The only path to take was–there was a cutout for the tree–was to step over that area–it was covered with leaves. I kept walking. My foot banged against some hard surface. I tripped....
> (Id. at 32).

Although plaintiff did not see the tree root before she fell, her fall disturbed the leaves and so that she noticed that she fell over a tree root. Id at 32, 57. Plaintiff also testified that a photograph marked during her deposition (Plaintiffs' Exhibit F) provides an accurate depiction of the tree root over which she tripped.

In her affidavit, plaintiff describes the root "as protruding approximately 2 inches above ground," and "gnarly looking, oddly convoluted and at its point closest to the concrete it appeared to be entirely above ground."

According to Christopher Sackett, who was the manager of the Starbucks at the time of the incident, the area between where the seating area ends and the cut out for the tree well begins

[5] A police report taken on the day of the incident indicates that Harry Taubenfeld told the police that "the sidewalk was blocked by people drinking coffee'" and that they attempting to go around them and plaintiff slipped and fell on the leaves or the tree cut out.

is "approximately between four and five feet.[6]" (Sackett deposition, at 38). He also testified that on occasion, patrons would congregate outside the Starbucks and "depending on where they were hanging out could impede the flow on the sidewalk." (Id. at 39).

Andrew Buccafusca (Buccasfusca") testified on behalf of non-party the Village of Larchmont ("the Village"). According to Buccafusca, the Village is responsible for maintenance of the trees on Palmer Avenue, which included pruning and mulching (Buccafusca dep. at 22). However, he did not know whether anyone from the Village had specifically done work on tree wells including the one in front of Starbucks (id at 27). While the record indicates that a notice of claim was served on the Village, plaintiffs did not sue the Village apparently since it did not have any prior written notice of the root.

Park Plaza and Peter Wagner (together the "Plaza defendants") move for summary judgment, arguing that they have no legal responsibility for the tree well or the tree. In support of this argument, the Plaza defendants rely on Buccafusca's testimony the Village maintains the trees where the Starbucks in located, and the Village Code of Larchmont section 263-12, entitled Maintenance and Removal of Trees, which they assert imposes a duty on the Village to maintain the tree well and the tree.[7] The Plaza defendants also argue that as the tree root constitutes a

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[6]Plaintiffs assert that the photographs of the area depict of narrower space between the seating area and tree well of 2 1/2-3 feet when factoring in that patrons might have baby carriages, but provides no evidence to support this proposition or that any carriages or other obstructions were on the sidewalk at the time plaintiff fell.

[7]Section 263-12, provides, in part, that:

A. The Village shall study, investigate, develop and/or update annually and administer a plan for the care, preservation, pruning, planting, replanting, removal or disposition of trees and shrubs in parks, along streets, and other public areas....

B. The Village shall have the right to plant, prune, maintain and remove trees, plants and

trivial defect, it does not provide a basis for liability. They also assert that the complaint must be dismissed as against Peter Wagner as he no longer owns the premises.

Plaintiffs oppose the motion, asserting that based on the language of the Lease[8], Park Plaza, as Landlord, is responsible for landscaping, which would include the tree in front of the Starbucks, and that in any event, the tree well constitutes part of the public sidewalk which Park Plaza is required to maintain under the Lease and pursuant to Village Code of Larchmont § 245-19.[9] Plaintiffs also assert that the section of the Village Code relied on by the Plaza defendants does not apply to tree wells, and that Buccafusca's testimony is not to the contrary. Plaintiffs also argue that the defect is not trivial, and that the special use of the sidewalk as an outdoor seating area, as permitted under the Lease, resulted in an obstruction of the sidewalk and caused plaintiff to be channeled to the tree well and the root. Plaintiffs further assert that Peter Wagner may be liable even though he now longer owns the premises.

Starbucks moves for summary judgment, arguing that it was not responsible for the maintenance of the portion of the sidewalk containing the tree well, that it did not have notice of the allegedly defective condition, and that it did not cause or create the tree root condition and the

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shrubs on all streets, alleys, avenues, lanes....as it may deem necessary to ensure public safety ....

[8] While due to confidentiality concerns defendants agreed to produce only the relevant portions of the Lease, plaintiffs have not shown any resultant prejudice.

[9]This section 245-19 provides that:

It shall be the duty of the owner of every lot and piece of land in the Village of Larchmont to keep the sidewalks in front of the premises owned by him/her, them or it is good repair and in safe condition for public use and free from all obstructions and encumbrances so as to permit public use thereof in any easy and commodious manner.

evidence is insufficient to establish its special use of the sidewalk for tables, and that in any event any such use did not include the tree well, and was not a proximate cause of plaintiff's injuries.

Plaintiffs oppose the motion, arguing that the record raises issues of fact as to whether Starbuck's special use of the sidewalk as an outdoor seating area was a proximate cause of plaintiff's injuries.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

As a preliminary matter, contrary to the argument of the Plaza defendants, they have not made a prima facie showing that the tree root at issue was trivial and therefore does not provide a basis for liability. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury,' " Trincere v County of Suffolk, 90 NY2d 976, 977 [1997], citing Guerrieri v Summa, 193 AD2d 647, 647 (2d Dept 1993). In determining whether an alleged defect is trivial as a matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or a snare.

Trincere v County of Suffolk, 90 NY2d at 977, citing, Caldwell v Village of Isl. Park, 304 NY 268 (1952). Here, the photographs submitted on this motion and the testimony of plaintiff and her affidavit, are sufficient to raise a factual issue as to whether the tree root was a dangerous or defective condition or a trap or snare.

Nonetheless, the court finds that there is no basis for finding that the Plaza defendants are liable to the plaintiffs. While the tree well where plaintiff fell can be considered part of the sidewalk (Acosta v. City of New York, 24 AD3d 291, 292 [1st Dept 2005]), it is well established that an owner or occupier of property which abuts a defective public sidewalk does not owe a duty to the public to keep the sidewalk in reasonably good repair, unless the owner or occupier creates the defective condition or uses the sidewalk for a special use or purpose, or unless a statute or ordinance places an obligation to maintain the sidewalk on the owner. Id.; Montalvo v. Western Estates, Ltd., 240 AD2d 45, 47 (1st Dept 1998).

Furthermore, the section of the Village Code relied on by plaintiffs, while imposing a duty on property owners, like Park Plaza, to maintain the sidewalks abutting their properties in "good repair and in safe condition for public use and free from all obstructions and encumbrances" does not create tort liability since the section does not "specifically state[] that if the landlord breaches that duty [it] will be held liable to those injured as a result of a sidewalk defect or unsafe condition." Montalvo v. Western Estates, Ltd., 240 AD2d at 47. In addition, it is undisputed that the Plaza defendants did not create the condition on which plaintiff fell.

Accordingly, the remaining issue is whether the Plaza defendants enjoyed a special use of the sidewalk by virtue of the use of the sidewalk by its tenant, Starbucks, as an outdoor seating area. "The principle of special use ... imposes an obligation on the abutting landowner (or

occupier), where he puts part of a public way to a special use for his own benefit, and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." See, Balsam v Delma Engineering Corp., 139 AD2d 292, 298, appeal dismissed in part, denied in part, 73 NY2d 783 (1988)(citation omitted); see, also, Kaufman v Silver, 90 NY2d 204, 207 (1997) ("Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit"). Here, the use of the public sidewalk for an outdoor seating area constitutes a special use which provided a benefit independent of public use. See Curtis v. City of New York, 179 AD2d 432 (1st Dept), lv denied, 80 NY2d 753 (1992)(placement of newspaper rack on sidewalk os store constituted a special use); Lucciola v. City of New York, 12 Misc3d 365 (Sup Ct Bronx Co. 2005), appeal withdrawn, 36 AD3d 534 (2007)(evidence that defendant cafe's placed a freezer to display food and chairs to accommodate customers on sidewalk was sufficient to create a factual issue as to whether there was a special use of sidewalk).

However, a property owner cannot be held liable where a special use benefits its tenant only. Flores v. Baroudos, 27 AD3d 517 (2d Dept 2006)(out-of-possession landowner could not be held liable to infant plaintiff who was injured while playing a video game placed on a public sidewalk by tenant record store where record showed that landowner derived no benefit from tenant use of the sidewalk); Pantaleon v. Lorimer Management Corp., 270 AD2d 324 (2d Dept 2000)(out-of-possession landlord cannot be liable for special use of sidewalk by its tenant where it did not benefit from that use). Here, there is no evidence from which it could be inferred that the Plaza defendants benefitted from any special use of the sidewalk as an outdoor seating area

and, in fact, under the Lease, the Plaza defendants obtained no additional rent in connection with giving Starbucks permission to use the outdoor space.

In addition, the facts here are easily distinguished from cases in which a property owner has been found to be potentially liable under the special use doctrine for permitting a tenant to make an improvement that obviously benefitted the owner's property. See, e.g., Gage v City of New York, 203 AD2d 118, 119 (1st Dept 1994)(under special use doctrine property owner obligated to maintain terrazzo tile in sidewalk installed by its tenant with the owner's "knowledge and consent"). As there is no basis for finding them liable to plaintiffs, the Plaza defendants are entitled to summary judgment.

The final issue for the court's determination is whether the special use of the sidewalk by Starbucks provides a basis for its liability. Liability based on a special use of a sidewalk has been found when such use obstructs a portion of the sidewalk and thus diverts a plaintiff to a defect that causes her injuries. See e.g. Curtis v. City of New York, 179 AD2d at 432 (newspaper rack on sidewalk defined plaintiff's path and directed him towards sidewalk defect causing him to fall); Ryan v. Gordon L. Hayes, Inc., 22 AD2d 985 (3d Dept 1964), affirmed, 17 NY2d 765 (1966) (ladder, tools and wires obstructing sidewalk directed plaintiffs to defective portion of sidewalk causing them to fall); Lucciola v. City of New York, 12 Misc3d 365 (record raised triable issue of fact as to whether placement of freezer and chairs on sidewalk diverted plaintiff to defective bricks surrounding tree area and thus proximately caused plaintiff's fall).

Here, even assuming arguendo that Starbucks has made a prima facie showing that its placement of the tables near the store front was not a proximate cause of plaintiff's injuries, plaintiff's deposition testimony is sufficient to raise a triable issue of fact in this regard.

Specifically, plaintiff testified that the sidewalk in front of the Starbucks was crowded with people sitting and standing, and that most of them were drinking coffee, and that as a result, the only available path was over the cut out for the tree well where she fell over the root. Thus, the record is sufficient to create a factual question as to whether Starbuck's use of the sidewalk for not only the two tables, but also its customers, was a proximate cause of plaintiff's injuries. compare Lopez v. City of New York, 19 AD3d 301 (1st Dept 2005)(display of items against wall of store did not compel infant plaintiff to alter his path).

Moreover, contrary to Starbuck's position, MacLeod v. Pete's Tavern, Inc., 87 NY2d 912 (1996) is not dispositive here. In MacLeod, plaintiff was injured when she fell in a hole on a sidewalk abutting the defendant restaurant's outdoor café, while standing outside of iron guardrail which surrounded the café. Plaintiff maintained that she did not notice the hole since "she was walking around the crowd gathered at the guardrail."Id. at 913. The court held that "the special use of the sidewalk represented by the outdoor café [did not] extend beyond the guardrail to include the public area where plaintiff fell," and that "[n]either the existence of the crowd nor the fact that one of defendant's employees was seen on the sidewalk outside the rail creates a triable issue of fact in this respect." Id. at 914.

In contrast to the circumstances in MacLeod, in this case, there was no guardrail or other barrier limiting the special use of the sidewalk by Starbucks. Moreover, unlike in MacLeod, the record here contains evidence that use of the public sidewalk by the defendant's patrons caused the plaintiff to divert her path towards the alleged defect on which plaintiff fell.

Accordingly, as there are triable issues of fact as to whether Starbuck's special use of the sidewalk was a proximate cause of plaintiff's injuries, its motion for summary must be denied.

Finally, plaintiff's cross motion to dismiss certain defenses asserted by defendants pursuant to CPLR 1601, and to preclude certain evidence is denied as premature.

In view of the above, it is

ORDERED THAT the motion for summary judgment by defendants Park Plaza Larchmont, LLC and Peter K. Wagner is granted and the complaint and all cross claims against these defendants are dismissed; and it is further

ORDERED THAT the remainder of the action shall continue; and it is further

ORDERED THAT the motion for summary judgment by Starbucks Corporation d/b/a Starbucks Coffee Company is denied; and it is further

ORDERED THAT the cross motion by plaintiffs to dismiss certain defenses asserted by defendants pursuant to CPLR 1601, and to preclude certain evidence is denied.

DATED: July 17, 2007

J.S.C.