Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

----------X

JEROME TYLER,

Plaintiffs,

-against-

AMONA REALTY CORP. ADRIANA HOLDINGS, LLC, JOSEPH BALKAN, INC., and NCR CONSTRUCTION,

Defendants.

----------X

Index No: 1567/07
Motion Date: 7/11/07
Motion Cal. No: 48
Motion Seq. No: 1

The following papers numbered 1 to 19 read on this motion by defendants Amona Realty Corp. and Adriana Holdings, LLC, for an order granting summary judgment to defendants Amona Realty Corp. and Adriana Holdings, LLC, dismissing plaintiff's complaint and all cross complaints against them upon the ground that they lack merit as a matter of law, and for a further order granting a conditional summary judgment of indemnification; and on this cross-motion by defendant NCR Construction for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing all claims and cross-claims asserted against it, or in the alternative, for an order, pursuant to CPLR §3126, striking the complaint, precluding plaintiff from offering any evidence at the time of trial or, in the alternative, compelling plaintiff to respond to the defendant's demand for a bill of particulars and various discovery demands.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation on Behalf of Plaintiff in Support of Motion.....	6 - 8
Affirmation in Opposition.....	9 - 11
Notice of Cross-Motion-Affidavits-Exhibits.....	12 - 17
Reply Affirmation.....	18 - 19

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is a personal injury action commenced by plaintiff Jerome Tyler against defendants Amona Realty Corp. ("Amona Realty"), Adriana Holdings, LLC ("Adriana Holdings"), Joseph Balkan, Inc. ("Balkan") and NCR Construction ("NCR"), to recover damages for injuries sustained

by plaintiff on April 26, 2006, when he fell into a hole while riding his bicycle on the sidewalk of 182nd Street in Springfield Gardens, New York. At the time of the accident, Adriana, the owner of the premises known as 139-36 182nd Street, Springfield Gardens, New York, was constructing a new residence which required the installation of a new sewer line connection from the front of the premises to the existing city sewer. Balkan, a sewer and water main company, was hired to do such construction, necessitating the excavation, inter alia, of the sidewalk across the street from the subject premises. NCR, an interior carpentry company, was performing interior carpentry work, and Amona is a real estate company.[1] Balkan, in response to a Notice to Admit, admits that it created the condition complained of by plaintiff. As a result, plaintiff advised the respective counsel for defendants that he was prepared to discontinue the action against all defendants, except Balkan, and circulated a stipulation of discontinuance to achieve that result. Notwithstanding, Amona and Adriana allegedly refused to execute the stipulation unless they were reimbursed for attorney's fees, which forms the basis for their common-law indemnification claim asserted in their cross-complaint. Amona and Adriana thus move, with the support of plaintiff, for an order granting Amona and Adriana summary judgment and for a further order granting a conditional summary judgment of indemnification in favor of those defendants against Balkan. NCR cross moves for, inter alia, summary judgment.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Furthermore, although an owner or tenant owes a duty to the public to safely maintain the condition of their property, "an owner of land abutting a public sidewalk does not, solely by reason of being an abutting owner, owe a duty to keep the sidewalk in a safe condition [see, Hinkley v. City of New York, 225 A.D.2d 665 (2nd Dept.1996); Conlon v. Village of Pleasantville, 146 A.D.2d 736 (2nd Dept.1989)]. Liability may only be imposed on the abutting landowner where the landowner

---

[1] Although the record is unclear, NCR was performing interior carpentry work on either the subject premises or adjacent thereto, as the affirmation in support of the cross-motion states that NCR was performing work "on a house located across the street from where the plaintiff's accident occurred, at 139-36/44 182nd Street, Springfield Gardens, New York." More unclear, however, is how Amona is related to this matter, as it indicates that it neither owned the subject premises nor the property across the street from the subject premises, in front of which the sidewalk excavation occurred.

either (a) created the defective condition, (b) voluntarily but negligently made repairs, (c) created the defect through special use, or (d) violated a statute or ordinance which expressly imposes liability on the abutting landowner for failure to repair [Landau v. Town of Ramapo, 207 A.D.2d 384 (2nd Dept.1994); Mendoza v. City of New York, 205 A.D.2d 741(2nd Dept. 1994); Bloch v Potter, 204 AD2d 672 (2nd Dept. 1994); Surowiec v. City of New York, 139 A.D.2d 727(2nd Dept. 1988); Noto v. Mermaid Rest., 156 A.D.2d 435 (2nd Dept 1989)]." Loforese v. Cadillac Fairview Shopping Centers, U.S. Ltd., 235 A.D.2d 399, 400 (2nd Dept 1997); see, Flores v. Baroudos, 27 A.D.3d 517 (2nd Dept.2006); Lehner v. Boyle, 7 A.D.3d 677 (2nd Dept 2004); Cahill v. Foodland Deli of L.I., Inc., 270 A.D.2d 445 (2nd Dept. 2000).

Here, in view of the fact that NCR and Amona contend that they neither owned, leased, or maintained the subject premises, nor created the condition which subsequently caused plaintiff's injuries, coupled with plaintiff's expressed desire to discontinue this action against those defendants, the branches of the motion and cross-motion for summary judgment and dismissal of plaintiff's complaint and all cross-claims asserted against these defendants are granted. However, as this Court has been compelled to determine the respective liabilities of defendants based upon the unwillingness of Amona and Adriana to allow plaintiff to discontinue this action, that branch of the motion for summary judgment in favor of Adriana stands on a different footing. "It is well settled that 'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property []. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property' (citations omitted)." Minott v. City of New York, 230 A.D.2d 719, 720 (2nd Dept.1996). Here, as Adriana, as the owner of the subject premises, has wholly failed to demonstrate that it "neither created the defect in, nor exercised any control or supervision over the public sidewalk abutting the private property, nor did [it] make special use of the excavation (citations omitted),"there are triable issues of fact with respect to its liability. Soto v. City of New York, 244 A.D.2d 544, 545 (2nd Dept.1997). Consequently, that branch of the motion for summary judgment and dismissal as against Adriana is denied.

Likewise denied is that branch of the motion seeking conditional summary judgment in favor of Amona and Adriana as against Balkan for attorneys' fees. Here, in opposition to that branch of the motion, Balkan contends, inter alia, that in view of plaintiff's desired discontinuance of the action against Amona and Adriana, they are not allowed to recover counsel fees on their indemnification claim. In American jurisprudence, there exists a fundamental principle that the prevailing litigant generally is not entitled to recover attorneys' fees from the unsuccessful litigant as such fees are incidents of litigation and a prevailing party may not collect them from the losing party unless an award is authorized by agreement between the parties, statute or court rule. See, generally, Chapel v. Mitchell, 84 N.Y.2d 345 (1994). However, notwithstanding Balkan's contentions to the contrary, the "right to indemnification 'encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party'(citation omitted), and is not impaired by the fact that the personal injury action was resolved by settlement rather than judgment (citation omitted),"[American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc., 307 A.D.2d 939, 942 (2nd Dept.2003)], or as is the case here, by a

stipulation of discontinuance which was never executed by Amona and Adriana, and summary judgment as to Amona. See, Bazzicalupo v. Winding Ridge Home Owner's Ass'n , 42 A.D.3d 415 (2nd Dept. 2007). Nevertheless, neither Amona nor Adriana has established a right to such indemnification.

> To establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident, [Correia v. Professional Data Mgt., 259 A.D.2d 60, 65 (2nd Dept.1999); accord Priestly v. Montefiore Med. Ctr., Einstein Med. Ctr., 10 A.D.3d 493, 495 (2nd Dept.2004)], or 'in the absence of any negligence' that the proposed indemnitor 'had the authority to direct, supervise, and control the work giving rise to the injury' [Hernandez v. Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 (2nd Dept.2003)]. Perri v Gilbert Johnson Enters., 14 A.D.3d 681, 684-685 (2nd Dept.2005).

Moreover, "[s]ummary judgment on a claim for common-law indemnification 'is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (citations omitted)." Coque v. Wildflower Estates Developers, Inc., 31 A.D.3d 484, 489 (2nd Dept. 2006). "Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious." Kelly v. City of New York, 32 A.D.3d 901 (2nd Dept.2006). Here, as there are no issues of fact as to Amona's negligence, there is no basis for imposing liability on Amona, either vicarious or otherwise, and therefore, it can claim no right to indemnification. With respect to Adriana, indemnification rests on a finding of negligence on the part of Balkan, and such negligence being a proximate cause of the plaintiff's injuries and Adriana's freedom from such negligence, neither of which has been determined. Yacovacci v. Shoprite Supermarket, Inc., 24 A.D.3d 539 (2nd Dept.2005); Perri v Gilbert Johnson Enters., 14 A.D.3d 681 (2nd Dept.2005). Consequently, determination of the indemnification claim asserted by Adriana is premature.

Accordingly, that branch of the motion by defendants Amona Realty Corp. and Adriana Holdings, LLC, for an order granting summary judgment to defendants Amona Realty Corp. and Adriana Holdings, LLC, dismissing plaintiff's complaint and all cross complaints against them upon the ground that they lack merit as a matter of law, is granted to the extent that as there are no triable issues of fact asserted against defendant Amona, the complaint and all cross-claims are dismissed as against that defendant. That branch of the motion by defendants Amona Realty Corp. and Adriana Holdings, LLC, for a further order granting a conditional summary judgment of indemnification in their favor and against defendant Joseph Balkan, Inc., is denied as to defendant Amona and denied without prejudice to renew as to defendant Adriana, upon a determination of the respective liability of the parties. The cross-motion by defendant NCR Construction for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing all claims and cross-claims asserted against

it, or in the alternative, for an order, pursuant to CPLR §3126, striking the complaint, precluding plaintiff from offering any evidence at the time of trial or, in the alternative, compelling plaintiff to respond to the defendant's demand for a bill of particulars and various discovery demands, is granted to the extent that summary judgment is granted against defendant NCR Construction and the complaint and all cross-claims asserted against it hereby are dismissed.

Dated: September 17, 2007

.....
J.S.C.