

Hirsch v 2 Spruce St., LLC
2007 NY Slip Op 33155(U)
September 27, 2007
Supreme Court, New York County
Docket Number: 0101259/2005
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **LOUIS B. YORK**
J.S.C.
Justice

PART _____

Index Number : 101259/2005
HIRSCH, JESSICA
vs
2 SPRUCE STREET
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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 *and the cross-motion*
are decided in accordance with the accompanying
decision.

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

FILED
OCT 03 2007
NEW YORK COUNTY CLERK

Dated: 9/27/07

Levy
LOUIS B. YORK 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 2

-----X
JESSICA HIRSCH,

Plaintiff,

Index No.: 101259/2005

- against -

2 SPRUCE STREET, LLC, BELLMARC REALTY, LLC
NASSAU STREET GARAGE CORP., and NYU
DOWNTOWN HOSPITAL,

Defendants.
-----X

2 SPRUCE STREET, LLC and BELLMARC
REALTY, LLC

Third-Party Plaintiffs,

Index No.: 591127/2005

- against -

RC DOLNER, INC.,

Third-Party Defendant.
-----X

RC DOLNER, INC.,

Second Third-Party Plaintiff,

Index No.: 590398/2006

- against -

RCC CONCRETE,

Second Third-Party Defendant.
-----X

LOUIS B. YORK, J:

In this personal injury action, defendant NYU Downtown Hospital (NYU Hospital) moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint by plaintiff, Jessica Hirsch, dated January 24, 2005 (the Complaint), and all cross claims asserted against NYU Hospital.

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Hirsch cross-moves for summary judgment, pursuant to CPLR 3212, seeking a declaration that the alleged defect in the sidewalk abuts the property of defendant 2 Spruce Street, LLC (2 Spruce Street).

Third-party defendant/second third-party plaintiff RC Dolner, LLC s/h/a RC Dolner, Inc. (RC Dolner), a general contractor, cross-moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the third-party complaint dated November 8, 2005 (third-party complaint), by 2 Spruce Street and Bellmarc Realty, LLC (Bellmarc), managing agent of 2 Spruce Street, for, among other things, indemnification. To the extent the cross motion is denied on that ground, RC Dolner alternatively moves for summary judgment, pursuant to CPLR 3212, for an order in favor of RC Dolner in the second third-party action for full contractual indemnity against its subcontractor, second third-party defendant RCC Concrete Corp. s/h/a RCC Concrete (RCC) (see second third-party complaint dated April 25, 2006).

For the following reasons, NYU Hospital's motion and Hirsch's cross motion are granted and the cross motion by RC Dolner is denied.

Background

The Accident

Hirsch claims that, on September 20, 2004, while walking along Spruce Street, between William and Nassau Streets, in Manhattan, New York, she tripped on a cracked elevation in the lip of the sidewalk pavement and fell, causing her to injure her knee, which required surgery. Hirsch testified that, immediately prior to her fall, she was in front of the entrance to the underground parking garage, which is owned by 2 Spruce Street. There were no witnesses to the alleged accident.

The General Contract

On June 26, 2001, RC Dolner and 2 Spruce Street's predecessor, 150 Nassau Street Associates, LLC (150 Nassau Street Associates) entered into a contract wherein RC Dolner was to perform construction work, including replacement of the sidewalk in front of the parking garage (see Owner - Construction Manager Agreement for Construction Management Services, dated June 26, 2001 [General Contract]).¹ The General Contract required RC Dolner to manage and oversee any work performed by all subcontractors. The General Contract also includes an indemnification provision which states:

"To the extent permitted by law, the Construction Manager shall indemnify, defend and hold its Indemnitees harmless from and against all Claims, . . . in connection with, or as a consequence of any act, error or omission of the Construction manager or its subcontractors in the performance of the Work services provided by the Construction Manager . . . ; provided, however that with respect to a party to be indemnified herein, the Claims giving rise to this indemnification are not the direct result of any act, error or omission by the party to be indemnified" (see General Contract, pp. 44 - 45).

RC Dolner's Subcontract with RCC

Thereafter, RC Dolner subcontracted with RCC to, among other things, replace 220 square feet of sidewalk located in front of the parking garage (see RC Dolner Subcontractor Agreement, dated December 2001 [Subcontract]). The Subcontract includes an indemnification provision, which states:

"To the fullest extent permitted by law, [RCC] shall indemnify and hold harmless the Owner, RCDOLNER, . . . from and against claims, damages, losses and expenses, . . . arising out of or resulting from performance of the Work, provided that such claims, damage, loss or expense is attributable to

¹ While RC Dolner was originally retained by 150 Nassau Street Associates, in 2003, 2 Spruce Street acquired the property from 150 Nassau Street Associates and assumed the Contract.

bodily injury . . . , but only to the extent caused in whole or in part by the negligent acts or omissions of the Subcontractor” (see Subcontract, Article XXI, p. 13).

In addition, the Subcontract provided a guarantee of one year for all work performed by RCC (see Subcontract, Article XIX, ¶ 19.2, at p. 12). The sidewalk construction was completed on or before March 2003, eighteen months before the alleged accident.

Discussion

Section 7-210 (b) of the Administrative Code of the City of New York (Administrative Code of City of NY, § 7-210 [b]), commonly called the “sidewalk law,” provides that “the owner of real property abutting any sidewalk ... shall be liable for any ... personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition,” including the failure to “reconstruct, repave, repair or replace defective sidewalk flags.” The liability of an abutting landowner under the sidewalk law is not absolute or strict; rather, it is limited to “the negligent failure to install, construct, reconstruct, re-pave, repair or replace defective sidewalk flags” (see Administrative Code of City of NY § 7-210 [b]; see also Gangemi v City of New York, 13 Misc 3d 1112, 1130 [Sup Ct, Kings County 2006]). The owner will breach its “duty ... to maintain [the] sidewalk in a reasonably safe condition” (see id., § 7-210 [a]) only where it has actual or constructive notice of a condition on the property that renders it unsafe for a long enough period of time to allow corrective or precautionary action in the exercise of reasonable care (see New York Pattern Jury Instructions, Civil, PJI 2:225 [2007]; Quinn v City of New York, 305 AD2d 570, 571-72 [2d Dept 2003]).

In order to prove a prima facie case of negligence in a trip and fall case, a plaintiff must show that the defendant created the condition which caused the accident or that the defendant had

actual or constructive notice of the condition (Cruceta v Funnel Equities, Inc., 18 AD3d 693, 694 [2d Dept 2005]; Librandi v Stop and Shop Food Stores, Inc., 7 AD3d 679 [2d Dept 2004]; Pomerantz v Culinary Inst. of Am., 2 AD3d 821, 823 [2d Dept 2003]). On a motion for summary judgment, the defendant is required to make a prima facie showing affirmatively establishing that it did not create the dangerous condition or the absence of notice as a matter of law (Pomerantz, 2 AD3d at 823; see also Librandi, 7 AD3d at 679; Goldman v Waldbaum, Inc., 248 AD2d 436 [2d Dept 1998]).

Hirsch testified that, on the block where she fell, walking easterly, there is a garage and then a parking lot. According to Hirsch, she fell in front of a parking garage, not in front of the parking lot, owned by NYU Hospital. Although Hirsch may not have been sure which party owned the property at the onset of the litigation, evidence shows that the alleged defect in the sidewalk abuts the property owned by 2 Spruce Street. 2 Spruce Street took affirmative steps to repair the sidewalk, namely hired a general contractor, who in turn, hired a subcontractor to perform the concrete work (see Frierson v Concourse Plaza Assocs., 189 AD2d 609, 611 [1st Dept 1993] ["owners are those parties with a property interest who hire the general contractor"]).

Accordingly, NYU Hospital's motion for summary judgment dismissing the Complaint and all cross-claims asserted against it is granted. In light of the court's decision, it need not address the remaining arguments raised in the motion.

Based on the foregoing, Hirsch's cross motion seeking a declaration that the alleged defect in the sidewalk abuts the property of defendant 2 Spruce Street and not abutting the adjoining property of co-defendant NYU Hospital, is granted.

The court now turns to RC Dolner's cross motion for summary judgment. RC Dolner

cross-moves for summary judgment on the ground that defendants/third-party plaintiffs, 2 Spruce Street and Bellmarc, are not entitled to indemnity from RC Dolner. In the event that RC Dolner may be held liable, RC Dolner asserts that it is entitled to contractual indemnification from RCC.

RC Dolner asserts that 2 Spruce Street and Bellmarc are not entitled to indemnification from RC Dolner because a party is only entitled to contractual indemnification for damages incurred in a personal injury action when the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and relevant surrounding facts (Masciotta v Morse Diesel Int'l, Inc., 303 AD2d 309, 310 [1st Dept 2003]). Specifically, RC Dolner contends that the unambiguous language of the General Contract reflects that the parties did not expressly agree to indemnify 2 Spruce Street and Bellmarc for their own negligence. While there is no dispute that there is a valid indemnification clause, RC Dolner's argument is premature as there are triable issues as to whether 2 Spruce Street and Bellmarc were negligent (see Barraco v First Lenox Terrace Assocs., 25 AD3d 427 [1st Dept 2006], citing Taylor v Lehr Constr. Corp., 15 AD3d 242 [1st Dept 2005] [citation omitted]). As such, RC Dolner's motion on this ground is denied.

Next, RC Dolner alternatively argues that should it be held liable for Hirsch's alleged injuries, RC Dolner is entitled to be indemnified by RCC. Likewise, 2 Spruce Street and Bellmarc claim that based on the Subcontract, as owners of the subject property, they are entitled to indemnification from RCC. The Subcontract includes an indemnification provision requiring RCC to indemnify RC Dolner and the owner from any claims arising out of the work performed by RCC (see Subcontract, Article XIX, ¶ 19.2 at p. 12). RCC asserts that there are triable issues of fact as to whether: (1) RCC performed the sidewalk installation in a negligent manner; and (2)

there were any intervening acts that may have affected the work over the course of the 18 months after the work was completed to create the alleged defect in the sidewalk (cf. Trano v Federated Dept. Stores, Inc., 13 Misc 3d 1245 (A), 2006 NY Slip Op 52347 (U) [Civ Ct, New York County 2006] [holding indemnification provision applied where accident occurred within the one-year guarantee period and based on the unconditional language of the indemnification provision]). Although there is a valid indemnification clause, the motion brought by RC Dolner is similarly premature, as there are questions of fact concerning the extent to which the indemnification clause covers the alleged defect. As “it is not possible to ascertain whether the particular contractual duty to indemnify [as] set forth in the [Subcontract] would be triggered” (Navarreto v 995 Westchester Ave. LLC, 35 AD3d 267, 268 [1st Dept 2006]; see also Diaz v Eminent Assocs., LLC, 31 AD3d 296 [1st Dept 2006]), RC Dolner’s motion for contractual indemnification against RCC is denied.

Accordingly, RC Dolner’s cross motion for summary judgment is denied.

Conclusion

It is ORDERED that the motion for summary judgment by NYU Downtown Hospital is granted and the Complaint, as well as all cross claims, are hereby severed and dismissed as against defendant NYU Downtown Hospital; and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that plaintiff Jessica Hirsch’s cross motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that the defect in the sidewalk, if there be any, abuts the property of defendant 2 Spruce Street, LLC; and it is further

ORDERED that the cross motion by third-party defendant/second third-party plaintiff RC Dolner, LLC s/h/a RC Dolner, Inc. for summary judgment and for contractual indemnification is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 9/27/07

ENTER:

ly

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LOUIS B. YORK
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