

Phillips v Park E. Synagogue
2007 NY Slip Op 33674(U)
November 7, 2007
Supreme Court, New York County
Docket Number: 0101822/2005
Judge: Marylin G. Diamond
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

LILY PHILLIPS,

Plaintiff,

- v -

PARK EAST SYNAGOGUE et al.,

Defendants.

And Third-Party Actions.

INDEX NO. 101822/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

FILED
NOV 15 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 002-006 are consolidated herein for decision. In this personal injury action, plaintiff Lily Philips alleges that she was injured on October 18, 2004 when she tripped on scaffolding consisting of a sidewalk bridge which was improperly maintained and/or constructed on a sidewalk on East 68th Street in Manhattan in front of premises under construction and owned by the defendant Park East Synagogue. Specifically, the plaintiff alleges that she tripped on a wooden plank which had been placed on the ground near the curb to support the metal scaffolding which was constructed above to protect pedestrians from falling debris. The defendant Sweet Construction Corp. was the construction manager on the project and the defendant Seasons Contracting Corp. was the subcontractor which it retained, *inter alia*, to furnish and install the scaffolding.

Park East's contract with Sweet incorporated the standard AIA "general conditions of the contract for construction," which includes a provision stating that the contractor shall take reasonable precautions for the safety of employees on the job and other persons who may be affected thereby. The main body of the contract included an indemnification clause which provides that, to the fullest extent permitted by law, Sweet shall indemnify and hold Park East harmless from claims arising out of or resulting from the performance of the work but only to the extent caused by the acts or omissions of Sweet or one of its subcontractors. Under the subcontract between Sweet and Seasons, Seasons was to provide a "bridge and site fence for demolition of existing building (12 months)." It required Seasons to provide a competent person to oversee all safety aspects pertaining to the work and contained an indemnification clause covering both the owner and Sweet.

Pursuant to these contracts, Park East has asserted cross claims against Sweet and Seasons for contractual indemnification. Sweet has asserted a similar cross claim against Seasons, as well as a claim for common law indemnification against Park East. Seasons has also asserted a cross claim against Sweet and Park East for common law indemnification. In addition, Sweet has brought a third-party actions against the Arch Insurance Group, Inc. and Seasons has brought a third-party action against Eagle Scaffolding Co., Inc. and two-related Eagle entities. In its third-party action against Arch, Sweet seeks a declaratory judgment that Arch is obligated to defend and indemnify it in this action. In its third-party action against Eagle, Seasons seeks indemnification on the ground that it was Eagle which allegedly erected the scaffolding and placed the supporting plank on the ground.

In motion sequence number 002, Sweet has moved for summary judgment on its cross claims against Seasons for indemnification. In motion sequence number 003, Sweet has moved for summary judgment dismissing the complaint and all cross claims which have been asserted against it. Seasons has

cross-moved for summary judgment seeking the same relief with respect to all claims asserted against it. The plaintiff has cross-moved for an order severing the third-party action brought by Seasons against Eagle. In motion sequence number 004, Sweet has moved for an order vacating the note of issue and compelling discovery from the plaintiff. In motion sequence number 005, Park East has also moved to vacate the note of issue. In motion sequence number 006, Park East has moved for summary judgment on its cross claims against Sweet and Seasons for indemnification and for an order dismissing the cross claims which they have asserted against it. It also seeks an order dismissing the complaint as against it.

Discussion

A. The Liability of Park East, Sweet and Seasons to Plaintiff

1. Park East - Effective September 14, 2003, section 7-210 of the Administrative Code of the City of New York imposes on a property owner the affirmative and non-delegable duty to maintain the abutting public sidewalk. Although Park East, the owner of premises under construction, argues that this statute does not apply because the plaintiff's accident occurred at or near the curb, *see Irizarry v. The Rose Bloch 107 Univ. Place Partnership*, 12 Misc3d 733 (Sup Ct Kings Co 2006), the court need not address this issue. It is well settled that, even in the absence of a statute, a landowner may be liable to a pedestrian injured by a defective condition in a public sidewalk abutting the landowner's premises where the landowner created the defective condition or caused the defect to occur because of some special use. *See Richter v. Reade*, 303 AD2d 232 (1st Dept 2003); *Bachman v. Town of North Hempstead*, 245 AD2d 327 (2nd Dept 1997). The principal of special use imposes an obligation on the abutting landowner who puts part of a public way to a special use for his own benefit to maintain the part so used in a reasonably safe condition so as to avoid injury to others. *See Yee v. Chang Xin Food Market*, 302 AD2d 518, 519 (2nd Dept 2003); *Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 298 (1st Dept 1988). Here, in having a scaffold installed over the abutting sidewalk as part of a construction project on its premises, Park East clearly put the area where plaintiff tripped to a special use for its own benefit. Since it may therefore be liable to the plaintiff, its motion for summary judgment dismissing the complaint as against it must be denied.

2. Sweet - There is no evidence before the court that Sweet itself erected the scaffolding or had anything to do with the placement of the board on which plaintiff tripped. Rather, plaintiff's claim against Sweet is based on Sweet's contractual obligation to Park East to take reasonable precautions for the safety of persons who may be affected by the construction. In moving to dismiss the complaint as against it, Sweet argues that although it may have owed a duty of care to Park East, it did not owe a duty of care to the plaintiff. The court agrees.

It is well settled that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 138 (2002). Nevertheless, there are three circumstances in which a duty of care to noncontracting third parties may arise out of a contractual obligation. First, where the contracting party creates an unreasonable risk of harm to others or exacerbates that risk. Second, where the plaintiff detrimentally relies on the defendant's performance of the contract. Third, where the contracting party comprehensively agrees to assume and displace the promisee's safety-related obligations. *Id.* at 138. *See also Fernandez v. Otis Elevator Co.*, 4 AD3d 69, 72-73 (1st Dept 2004). None of these exceptions apply in this case. Sweet neither created nor exacerbated the risk posed by the plank. The plaintiff clearly did not rely on Sweet's performance of its contract with Park East. Finally, nothing in the contract, a standard AIA form, suggests that Sweet comprehensively assumed all of Park East's safety obligations as owner of the premises. The complaint must therefore be dismissed as against Sweet.

3. Seasons - A former employee of Seasons, Dennis Brooks, has submitted an affidavit in which he states that he was the Seasons supervisor for the job at issue and that although Eagle delivered materials to the site, it was Seasons which erected the scaffolding and sidewalk bridge. Thus, there is

evidence that Seasons may have created the condition which caused plaintiff's accident. Although Seasons contends that the presence of the plank under the scaffolding did not pose a hazard to pedestrians and that the only reason the plaintiff tripped was because she walked around the bridge near the curb rather than under the bridge, such an argument raises a triable issue of fact which should be resolved at trial. Its motion for summary judgment dismissing the complaint as against it must therefore be denied.

B. The Liability of Sweet and Seasons to Park East - As already noted, both Sweet and Seasons are contractually obligated to indemnify Park East from claims and liability arising out of or resulting from the performance of the work to the extent caused by the acts or omissions of themselves or of their subcontractors. However, under General Obligations Law § 5-322.1, an owner such as Park East may not be held harmless for its own negligence. See *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997); *Zeigler-Bonds v. Structure Tone, Inc.*, 245 AD2d 80, 81 (1st Dept 1997). Here, there is a triable issue as to whether the wooden plank on which plaintiff tripped constituted a hazardous condition and, if so, whether Park East had constructive notice about the presence of such a condition in front of its building. It would appear that the plank had been placed on the ground at the time the scaffolding was erected, months before the accident, thus giving its employees sufficient length of time to discover and remedy it. See *Gordon v. American Museum of Natural History*, 67 NY2 836, 837 (1986). In view of the fact there is a triable issue concerning Park East's negligence, its motion for summary judgment on its claims for indemnification must be denied, as must its request for an order dismissing all cross claims which Sweet and Seasons have asserted against it.

C. The Liability of Sweet and Seasons to Each Other - Sweet has asserted a cross claim against Seasons for contractual indemnification and Seasons has asserted a cross claim against Sweet for common law indemnification. Sweet's cross claim is based on its assertion that either Seasons or a subcontractor which Seasons retained, such as Eagle, negligently created a dangerous condition causing plaintiff's accident. However, there is evidence that Sweet reached an agreement with Seasons, months before the accident, to entirely take over from Seasons the responsibility for maintaining the scaffolding. If, in fact, it entered into such an agreement and nevertheless failed to correct an existing hazardous condition involving the plank, it may be liable, in part, for its own omissions. Its motion for summary judgment against Seasons must therefore be denied.

As to Seasons, its motion for summary judgment against Sweet must also be denied. Not only is there a question of fact as to whether Sweet agreed to take over from Seasons and maintain the scaffolding five months before the accident, but also whether, as previously discussed, Seasons itself was negligent.

D. The Parties Remaining Applications

1. Severance - The plaintiff has moved to sever Seasons's third-party action against Eagle on the ground that since this third-party action was only recently commenced, the completion of discovery will unduly delay the trial in the underlying action. The court disagrees. The third-party action against Eagle involves the limited, discrete issue of whether Eagle was the entity which erected the scaffolding and the supporting plank on which plaintiff tripped. The court does not anticipate that discovery on this issue matter should or will unduly delay the commencement of the trial. Since the resolution of the cross claims in the underlying action turns in large part on the identity of the party which erected the scaffolding, the court is persuaded that, in the absence of any substantial delay, the issues raised herein should be resolved at a single trial.

2. Note of Issue and Further Discovery - The motions by Park East and Sweet to vacate the note of issue and compel further discovery are denied. As to the note of issue, the motions are unnecessary. Part 48 is a pure IAS part. Although the note of issue has already been filed, no trial will be scheduled until the court is satisfied that discovery has been completed. As to an order compelling further

discovery, counsel should be aware that the court rules for Part 48 discourage discovery-related motions and encourage the parties to resolve their discovery disputes at a conference with the court. The motion is therefore denied without prejudice to renew, upon permission from the court, in the event that the parties and the court are unable to resolve the discovery disputes at issue herein.

Accordingly, in motion sequence number 002, Sweet's motion for summary judgment on its cross claims against Seasons for indemnification is denied. In motion sequence number 003, Sweet's motion for summary judgment is granted to the extent that the complaint is hereby dismissed as against it. The motion is otherwise denied. Seasons's cross-motion for summary judgment seeking the same relief with respect to all claims asserted against it is denied. The plaintiff's cross-motion for an order severing the third-party action brought by Seasons against Eagle is denied. In motion sequence number 004, Sweet's motion for an order vacating the note of issue and compelling discovery from the plaintiff is denied. In motion sequence number 005, Park East's motion to vacate the note of issue is also denied. In motion sequence number 006, Park East's motion for summary judgment is denied in its entirety.

The parties shall appear before the court on November 27, 2007 at 10:00 a.m. in Room 412, 60 Centre Street for a status conference at which time all outstanding discovery issues, if any, will be discussed and resolved.

ENTER ORDER

Dated: 11/7/07 _____

MGD

MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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