Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

MARGARITA ORJUELA x

- against -

BEATRICE OBIDIENZO, et al,

x

Index Number 13067 2006

Motion Date June 10, 2008

Motion Cal. Number 16

Motion Seq. No. 1

The following papers numbered 1 to 21 read on this motion by defendants Beatrice Obidienzo, Elizabeth Obidienzo and Ronald DiMasi for (1) summary judgement dismissing the complaint and cross claims against them and (2) costs and sanctions against co-defendant New York Donut Corporation d/b/a Dunkin Donuts based upon its failure to accept the tender of defense and indemnification of the moving defendants and cross motion by defendant New York Donut Corporation, d/b/a Dunkin Donuts, for an award for summary judgment dismissing the claims against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits.....	5-8
Answering Affidavits - Exhibits.....	9-14
Reply Affidavits.....	15-21

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is a negligence action to recover damages for personal injuries allegedly sustained by the plaintiff, on December 10, 2005, at approximately 10:00 A.M., when she slipped and fell on crystallized ice while traversing the public sidewalk abutting 34-01 Broadway in Astoria, Queens, the premises owned by defendants Beatrice Obidienzo, Elizabeth Obidienzo and Ronald DiMasi and leased by defendant New York Donut Corporation d/b/a Dunkin Donuts (New York Donut Corporation).

Defendants Beatrice Obidienzo, Elizabeth Obidienzo and Ronald DiMasi move and defendant New York Donut Corporation cross-moves for summary judgment dismissing the claims against them. In support of their motion and cross motion for summary judgment, the defendants submit copies of the transcripts of the parties' examination before trial testimony.

Upon examination before trial of the plaintiff, she testified that the accident occurred while she and her daughter, nonparty Patricia Orjuelo, were walking to the Dunkin Donuts store located at 34-01 Broadway in Astoria, Queens. As the plaintiff approached the outside of the premises, her left foot slipped and she fell on the sidewalk. The plaintiff urinated in her pants upon hitting the ground. After she fell, she looked at the sidewalk and observed the presence of "crystallized ice" on the ground beneath her. The crystallized ice was approximately one centimeter thick and covered an area of the sidewalk leading from the front of the store to halfway out onto the sidewalk. The plaintiff subsequently went home, whereupon she was taken to the hospital. The plaintiff did not report the incident to anyone in the Dunkin Donuts store.

According to the examination before trial testimony of nonparty Patricia Orjuela, she and the plaintiff were headed to the Dunkin Donuts store located at 34-01 Broadway in Astoria, Queens, when the accident occurred. There was no precipitation at the time of the incident. Ms. Orjuela testified that it had snowed the day before the incident. She observed that a path had been cleared on the sidewalk abutting the Dunkin Donuts store after that snowfall. Ms. Orjuela was walking behind the plaintiff when the incident occurred and witnessed the plaintiff slip and fall on the sidewalk abutting the Dunkin Donuts premises. As Ms. Orjuela helped the plaintiff get up from the sidewalk, she also observed that there was snow and crystallized ice on the sidewalk where the plaintiff had fallen.

Upon examination before trial, Ms. Sukla Mitra testified that she is the president of defendant New York Donut Corporation. According to Ms. Mitra, New York Donut Corporation leased the premises located at 34-01 Broadway from defendant owner Ronald Dimasi and operates a Dunkin Donuts store at the premises. Ms. Mitra visits the Dunkin Donuts store several times each day. She admitted that pursuant to the terms of the lease agreement, New York Donut Corporation is responsible for removing snow and ice from the public sidewalk abutting the subject premises. To that end, she instructed her employees that they must clean and remove snow and ice from the public sidewalk. However, Ms. Mitra does not recall whether snow or ice were removed from the sidewalk on the date of the incident. According to Ms. Mitra, her store manager checks the sidewalk approximately every half hour to ensure that it is clean.

Ms. Rukshana Akther testified upon examination before trial on behalf of defendant New York Donut Corporation. She stated that she was employed as a manager by New York Donut Corporation and worked at the Dunkin Donuts store that is adjacent to the sidewalk where the plaintiff fell. Ms. Akther indicated that in December 2005, Dunkin Donuts employees shoveled the sidewalk area where the plaintiff fell every time that it snowed. Ms. Akther also stated that she had placed salt on the subject sidewalk in December 2005, and would do so whenever it was necessary. However, she did not recall on which day or days in December 2005 she placed salt on the ground. Nor did she explain when she deemed it necessary to place salt on the sidewalk. Ms. Akther further averred that she never observed ice or snow on the sidewalk adjacent to the Dunkin Donuts store and never received any complaints regarding the existence of ice or snow on the sidewalk adjacent to the subject premises.

Defendant Ronald DiMasi, testifying at an examination before trial on behalf of himself and defendants Beatrice Obidienzo and Elizabeth Obidienzo, stated that he is the owner of the premises located at 34-01 Broadway in Astoria, Queens. Defendant New York Donut Corporation d/b/a Dunkin Donuts was a ground floor tenant at the premises and had been a tenant there for approximately seventeen years prior to the date of the incident. The lease to the subject premises requires defendant New York Donut Corporation to remove snow and ice from the sidewalk abutting the Dunkin Donuts premises.

A copy of the defendants' lease agreement has also been submitted in support of the motion and cross motion for summary judgment. In addition to requiring defendant New York Donut Corporation to remove snow and ice from the public sidewalk abutting the Dunkin Donuts premises, the lease agreement provides, in relevant part, that "Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance."

Finally, defendant New York Donut Corporation submits a copy of the December 2005 local climatological report prepared by the National Climatic Data Center. This report indicates that 3.8 inches of snow fell in the area on the day before the incident and, while there was no precipitation on the day of the incident, it was reported that there remained approximately two inches of ground snow/ice on the date of the incident.

Defendant owners Beatrice Obidienzo, Elizabeth Obidienzo, and Ronald DiMasi seek (1) summary judgment dismissing the plaintiff's complaint and the defendant's cross complaint against them on the grounds that a triable issue of fact does not exist because there is no evidence that they contributed to the happening of the

accident and (2) costs and sanctions against co-defendant New York Donut Corporation based upon its alleged agreement and subsequent failure to accept the tender of defense and indemnification of the moving defendants. Defendant New York Donut Corporation cross-moves for summary judgment dismissing the plaintiff's claims and all cross claims against it on the grounds that it did not owe the plaintiff a duty of care to maintain the subject public sidewalk and did not create the condition that caused the plaintiff's accident.

It is well established that summary judgment should be granted only when there is no doubt as to the absence of triable issues of fact. (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223 [1978].) To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor, tendering evidence sufficient to eliminate any material issues of fact from the case. (GTF Mtkg., Inc. v Colonial Aluminum Sales, Inc., 66 NY2d 965, 965 [1985]; Winegrad v New York University Medical Center, 64 NY2d 851 [1985].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial. (Kosson v Algaze, 84 NY2d 1019 [1995]; Zuckerman v City of New York, 49 NY2d 557 [1980].)

Regarding a property owner's obligation to remove snow and ice from the public sidewalk, defendant owners Obidienzo and DiMasi contend that they are not liable for the plaintiff's injuries because any liability for negligent snow removal is the sole responsibility of their tenant, defendant New York Donut Corporation, pursuant to the terms of the lease agreement for the Dunkin Donuts premises. Contrary to defendants Obidienzo and DiMasi's contentions, Administrative Code section 7-210, which became effective on September 14, 2003, specifically charges real property owners with the duty to maintain the public sidewalk in a reasonably safe condition and imposes tort liability on them, inter alia, for failing to clear the sidewalk of snow and ice. This provision states, in relevant part, as follows:

> a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition.
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> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include ... the negligent

> failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

On the papers submitted herein, the defendant owners have not established a prima facie entitlement to summary judgment dismissing the plaintiff's complaint against them because they failed to demonstrate either (1) that they are not obligated to maintain the public sidewalk because their property falls within an enumerated exception to the law or (2) the absence of a dangerous condition.

Accordingly, that branch of the motion by defendants Obidienzo and DiMasi which seeks summary judgment dismissing the plaintiff's complaint against them is denied.

Next, the court rejects defendant New York Donut Corporation's claim that it is entitled to an award of summary judgment dismissing the plaintiff's complaint against it. Although a lessee of real property is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk abutting its premises (Klein v Chase Manhattan Bank, 290 AD2d 420 [2002]), liability will result if the lessee made the sidewalk more hazardous by its attempts at removal of snow and/or ice from the sidewalk. (Booth v City of New York, 272 AD2d 357 [2000]). The undisputed deposition testimony submitted herein indicates that it had snowed the day before the incident, defendant New York Donut Corporation's employee shoveled a path on the subject public sidewalk sometime after the snowfall. Defendant New York Donuts Corporation was not sure whether its employee placed salt on the sidewalk after shoveling the pathway, and the plaintiff was traversing the pathway on the sidewalk adjacent to the defendants' premises when she slipped and fell on crystallized ice that covered approximately one-half of the sidewalk abutting the Dunkin Donuts premises. Relying on the foregoing testimony, defendant New York Donut Corporation has not established a prima facie entitlement to summary judgment in its favor dismissing the plaintiff's claims against it because it did not establish that the sidewalk was safe for pedestrians after its employee shoveled the snow. Its claim that the plaintiff created the icy sidewalk condition when she urinated in her pants is speculative. (Cf. Perelstein v City of New York, 43 AD3d 844 [2007].) Moreover, the foregoing testimony, along with climatological evidence which indicates that icy conditions existed in the area on the date of the incident, highlights the existence of triable issues of fact as to whether defendant New York Donut Corporation was negligent in making the sidewalk more hazardous by shoveling the pathway after the snowfall and whether weather conditions permitted ice to form on the

shoveled pathway. (See Sanchez v City of New York, 48 AD3d 275 [2008]; Rugova v 2199 Holland Ave. Apt Corp., 272 AD2d 261 [2000]; see generally Vega v S.S.A. Props., Inc., 13 AD3d 298 [2004]).

Accordingly, defendant New York Donut Corporation's cross motion for summary judgment dismissing the plaintiff's complaint against it is also denied.

That branch of defendant New York Donut Corporation's cross motion which seeks summary judgment in its favor on its cross claims against defendant owners Obidienzo and DiMasi for common-law indemnity is denied and that branch of defendants Obidienzo and DiMasi's cross motion which seeks summary dismissal of New York Donut Corporation's cross claim for common-law indemnification is granted. The court notes that if the jury should find that the subject sidewalk was not reasonably safe and that defendant owners Obidienzo and Dimasi and defendant New York Donut Corporation, as the tenant who shoveled the sidewalk, are consequently both negligent, it will be required to apportion fault among the two tortfeasors. (See generally Guzman v Haven Plaza Housing Development, 69 NY2d 559 [1987].)

Finally, the defendants have not established an entitlement to summary judgment in their favor on the remaining cross claims which seek, inter alia, damages for breach of contract and contractual indemnity. (See Alvarez v Prospect Hospital, 68 NY2d 320 [1987]; Zuckerman v City of New York, 49 NY2d 557 [1980].) Accordingly, the motion and cross motion are denied in all other respects.

Dated: September 25, 2008

AUGUSTUS C. AGATE, J.S.C.