Wald v County of Nassau

2009 NY Slip Op 31874(U)

August 5, 2009

Supreme Court, Nassau County

Docket Number: 002729/08

Judge: Daniel R. Palmieri

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SCM

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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ROSE WALD,

Plaintiff,

-against-

COUNTY OF NASSAU, MERRICK SHOPPING CENTER, and THE GAP, INC.,

Defendants.

----------x

TRIAL TERM PART 47

INDEX NO.: 002729/08

MOTION DATE:5-15-09
SUBMIT DATE: 7-9-09
SEQ. NUMBER - 002

MOTION DATE: 5-20-09
SUBMIT DATE: 7-9-09
SEQ. NUMBER - 003

MOTION DATE: 6-12-09
SUBMIT DATE: 7-9-09
SEQ. NUMBER - 004

The following papers have been read on this motion:

Notice of Motion (Seq. 2), dated 4-20-09.....1
Affidavit in Opposition (Def. Merrick Shopping Ctr, dated 5-11-09.....2
Affirmation in Reply, dated 6-8-09.....3
Affirmation in Opposition, dated 7-7-09.....4
Reply Affirmation to Plaintiff's Opposition, dated 7-28-09.....5

Notice of Motion (Seq. 3), dated 4-27-09.....6
Affirmation in Opposition, dated 5-13-09.....7
Affirmation in Reply, dated 6-3-09.....8
Affirmation in Reply to Plaintiff's Opposition, dated 7-17-09.....9

Notice of Motion (Seq. 4), dated 5-6-09.....10
Affirmation in Opposition, dated 6-4-09.....11
Affirmation in Opposition, dated 6-4-09.....12
Affirmation in Reply to Plaintiff's Opposition, dated 7-22-09.....13

Before this Court are three applications for summary judgment, all pursuant to CPLR §3212. Defendant The Gap Inc., (the Gap) moves (Seq. 2) for an order dismissing the plaintiff's complaint in its entirety and for summary judgment as to co-defendant Merrick Shopping Center (Merrick) on its cross claim for common law indemnification. The motion is granted as to the claims of the plaintiff and the complaint is dismissed as to this defendant. The motion is denied as to Merrick.

Co-defendant Merrick, similarly moves (Seq. 3) and seeks an order granting summary judgment dismissing the complaint. The motion is granted and the complaint is dismissed as to Merrick.

Co-defendant, County of Nassau (the County), also moves (Seq. 4) for summary judgment dismissing the complaint. The motion is granted and the complaint is dismissed as to the County.

The motion of all the defendants to dismiss all cross claims against them is granted.

The underlying action, sounding in negligence, was commenced by the plaintiff to recover damages for personal injuries she allegedly sustained on January 31, 2007, when she tripped and fell on the sidewalk outside of the property located at 1902 Merrick Road, Merrick, New York. The Gap is the tenant of said premises, pursuant to a lease, the owner of the premises is co-defendant Merrick and the County is the owner of the sidewalk.

The plaintiff testified that on the day of her accident, she was walking on the sidewalk located adjacent to the Gap store premises, when she tripped and fell over an uneven sidewalk flag approximately 10-20 feet from the Gap store entrance.

The Gap and Merrick move for summary judgment as to plaintiff on the grounds that they do not control the sidewalk and have not made any repairs or improvements to the sidewalk. The Gap moves for summary judgment on its cross claim for common law indemnification based on provisions of the lease which require the landlord to make certain repairs. The Court will consider this claim as for both common law and contractual indemnification.

The County moves for summary judgment on the grounds that it has never received any prior written notice of the alleged defect.

The plaintiff opposes the motions and contends that the Gap and Merrick had a duty to maintain the public sidewalk and relies in part for this contention on the provisions of the County Charter.

As to the County, the plaintiff claims that the cause fo the uneven sidewalk was due to the action of roots from a nearby tree and that a defect caused thereby is not subject to any legislation requiring that prior written notice of a defect must be given to the County. Plaintiff has not submitted any evidence to support this claim and plaintiff's statement that a witness for the County attributed the cause fo the condition to tree roots is not supported by the record.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d

Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are

insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*,

196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony, *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006), or as in this case, where plaintiff seeks to attribute her tree root theory to the County's deposition witness.

A municipality may enact a statute, requiring prior written notice of a defective, unsafe or dangerous condition of a sidewalk, and certain other areas, as a condition precedent to liability for injuries to person or property caused by such condition. General Municipal Law § 50-e(4); *Walker v Town of Hempstead*, 84 NY2d 360 (1994). Such a statute requiring prior written notice to the County, has been enacted in Nassau County Administrative Code § 12-4.0(e); *DeLuca v County of Nassau*, 207 AD2d 428 (2nd Dept. 1994). However, if the municipality created the dangerous condition by an affirmative act of negligence, the prior notice provision does not apply. *Amabile v City of Buffalo*, 93 NY2d 471 (1999); *Poirer v Schenectady*, 85 NY2d 310 (1995).

The affidavit of Veronica Cox, who is employed by the County in Bureau of Claims, alleges that the County did not receive any prior written notice of any defect. The oral deposition testimony of John Dempsey, who is employed by the County in the Department of Public Works is to a similar effect.

The County has thus established that written notice of a defective or unsafe condition located at the section of the sidewalk where plaintiff was hurt was never served and that the County was not responsible for creating any unsafe condition on the sidewalk. Accordingly, the motion for summary judgment dismissing the complaint on behalf of the County of is

granted.

As noted above, the speculation that the condition may have been caused by a tree in the vicinity is unsupported by any evidence and was not suggested by the Dempsey testimony. However, even if the cause of the condition may be attributed to the action of tree roots, it has been held that merely planting a curbside tree does not constitute affirmative negligence and that a prior written notice statute applies to conditions caused by tree roots. *Horan v. Christ Episcopal Church*, 227 AD2d 592 (2d Dept. 1996); *Michela v. County of Nassau*, 176 AD2d 707 (2d Dept. 1991).

Reliance by plaintiff and the Gap on the cases of *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517 (2008) and *Hartofil v. McCourt and Trudden Funeral Home, Inc.*, 57 AD3d (2d Dept. 2008), is misplaced because in those cases the courts found, that for the purposes of determining whether a liability shifting ordinance of a municipality applies to conditions of tree wells and brickwork, the ordinance in dispute did not shift liability for those defects to the abutting land owner. Those cases have no applicability to the prior notice ordinance of the County.

The law with respect to the liability of an abutting property owner or occupant such as Merrick and the Gap for injuries sustained by a third party from a defective sidewalk can be succinctly stated.

> "Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner (*see Hausser v. Giunta*, 88 NY2d 449, 452-453 [1996]; *Bruno v. City of New York*, 36 AD3d 640 [2007]). However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner negligently constructed or repaired the sidewalk, otherwise

> caused the defective condition, including causing the condition to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligated the owner to maintain the sidewalk (*see Hausser v. Giunta, supra* at 452-453; *Cannizzaro v. Simco Mgt. Co.*, 26 AD3d 401 [2006]; *Nichilo v. B.F.N. Realty Assoc., Inc.*, 19 AD3d 666 [2005]; *Packer v. City of New York*, 282 AD2d 587 [2007]". *Rocco v. Marder*, 42 AD3d 516, 517 (2d Dept. 2007).

There is no evidence here that the defective condition was created by the abutting owner and tenant defendants both of whom deny that they ever performed any work in the area of the defect. *Portanova v. Dynasty Meat Market*, 297 AD2d 792 (2d Dept. 2002). To the extent that it may be speculated that the condition was caused by tree roots that too is insufficient as it has been held that an abutting owner or occupant is not responsible for sidewalk damage caused by roots of a tree. *Jackson v. Thomas*, 35 AD3d 666 (2d Dept. 2006); *Zawicki v. Town of North Hempstead*, 184 AD2d 697 (2d Dept. 1992).

When a local ordinance or statute requires an abutting owner to maintain and repair sidewalks it will not impose tort liability in favor of others unless it specifically imposes liability for injuries resulting from a breach of that duty. *Lobel v. Rodco Petroleum Corp.*, 233 AD2d 369 (2d Dept. 1996); *see Bachman v. Town of North Hempstead*, 245 AD2d 327 (2d Dept. 1997) and *Appio v. City of Albany*, 144 AD2d 869 (3d Dept. 1988).

The Court has not been directed to any statute or ordinance which requires an abutting owner or occupant to keep sidewalks in good and safe repair which also imposes tort liability to third parties for failure to do so hence, the moving defendants, Merrick and the Gap, cannot be held liable for failure to repair a sidewalk which is owned by the County.

An abutting owner or occupant may be liable to a pedestrian passing on a public

sidewalk if they caused the defect to occur because of some special use of the sidewalk. *Benenati v. City of New York*, 282 AD2d 418 (2d Dept. 2001); *see also Kaufman v. Silver*, 90 NY2d 204 (1997).

In order to find an abutting owner responsible for a defect based upon a special use of the public way, there must be evidence that the defect was caused by the special use or that the use contributed to the condition. *Benenati v. City of New York, supra*; *Thomas v. Triangle Realty*, 255 AD2d 153 (1st Dept. 1998).

In this case there is insufficient evidence that Merrick or the Gap made any special use of the sidewalk or if they did that, the use of thereof created a hazard or caused the defect that resulted in the accident. *Kaminer v. Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 (1st Dept. 1998).

Based on the foregoing, it is evident the Merrick and the Gap defendants did not create the defect, their special use, if any, of the sidewalk did not have a role in creating the defect, they are not responsible if the defect was caused by tree roots and there is lacking any County Ordinance which might impose tort liability to third parties. Thus the complaint and any cross claims against them are dismissed.

The Gap has also made a claim against Merrick for common law indemnification. The concept of common law or implied indemnification finds its roots in the principles of equity. *McDermott v. City of New York*, 50 NY2d 211, 216-17 (1980). In order to prevent unjust enrichment, courts have assumed the duty of placing the obligation where in equity it belongs. *Id* at 217. Courts have permitted indemnity actions in a variety of circumstances, including a situation in which a person has been held vicariously liable for the tort of another.

Id. at 218

It is a well-established principle that "common-law or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." *Tiffany at Westbury Condominium By Its Bd. of Managers v. Marelli Development Corp.*, 40 AD3d 1073, 1077 (2007 2nd Dept); *17 Vista Fee Assoc. v. Teach Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1999 1st Dept); *D'Ambrosio v. City of New York,* 55 NY2d 454, 460 (1982); *McDermott*, 50 NY2d at 217. Common law indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer. *17 Vista Fee Assocs., supra; Mas v. Two Bridges Assocs.,* 75 NY2d 680, 690 (1990); *Guzman v. Haven Plaza Hous. Dev. Fund Co.,* 69 NY2d 559, 567-568 (1987). A party could, "if his negligence was merely "passive," nevertheless shift his liability to the tortfeasor whose negligence was considered "active"'(*D'Ambrosio*, 55 NY2d at 461) in order to shift full liability from the secondary to the primary wrongdoer. *Id.*

The party seeking indemnification "must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and must not have committed actual wrongdoing itself." *Tiffany*, *supra*; *17 Vista Fee Assocs.*, *supra*; *Guzman*, *supra*. "[A] party who has itself actually participated to some degree in the wrongdoing, cannot receive the benefit of the doctrine of indemnification." *Tiffany, supra*; *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.,* 109 AD2d 449, 453 (1985 1st Dept). Here, the claim by the Gap for common law indemnification will not lie because

neither the Gap nor Merrick has been found to be negligently liable to the plaintiff.

Considered as a claim for contractual indemnification, the Gap's motion must also fail and Merrick's motion to dismiss as to the Gap must succeed. The provision of the lease between the Gap and Merrick simply does not contain a provision for contractual indemnification by Merrick to the Gap.

A contractual promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. A contract assuming an obligation of indemnification must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. *Eldoh v. Astoria Generating Co., LP*, 57 AD3d 603 (2d Dept. 2008).

The provision of the lease relied upon by the Gap does not impose an obligation on the part of the landlord, Merrick, to repair the public sidewalk and the indemnity provision which follows provides for an indemnification by the Gap to Merrick. Moreover, reading the lease as a whole, the reference to payment of common area maintenance costs refers to the sidewalks and other installations located upon the parking area and maintained by Merrick as landlord for the benefit of all the tenants and there is no reference anywhere in the lease to the repair and maintenance by Merrick of public sidewalks.

Hence the complaint and all cross claims are dismissed.

This shall constitute the Decision and Order of this Court.

ENTERED
AUG 07 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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DATED: August 5, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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