

Abubaker v Columbus 95th St. LLC

2010 NY Slip Op 30782(U)

April 8, 2010

Supreme Court, New York County

Docket Number: 111595/2007

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 111595/2007
ABUBAKAR, BERYL
VS.
COLUMBUS 95TH STREET
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

this motion to/for summary judgment

PAPERS NUMBERED

1, 2

5

6, 7, 8

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, It is ordered that this motion & cross motion for

summary judgment are by defendant - third-party defendant are denied in accordance with the attached memorandum decision.

FILED

APR 08 2010

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JUDGE DORIS LING-COHAN

Dated: 4/8/10

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
BERYL ABUBAKAR and IBRAHIM ABUBAKAR,

Plaintiffs,

-against-

Index No.

COLUMBUS 95TH STREET LLC.,

111595/07

Defendant.

-----X
COLUMBUS 95TH STREET LLC,

Third-Party Plaintiff,

Index No.

-against-

591018/07

Motion Seq. No.: 001

FERRINDINO AND SONS, INC.,

Third-Party Defendant.

-----X
DORIS LING-COHAN, J. :

FILED

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Third-party defendant Ferrindino and Sons, Inc. (Ferrindino) moves for summary judgment dismissing the third-party complaint and moves for summary judgment in favor of defendant/third-party plaintiff Columbus 95th Street LLC (Columbus) dismissing the complaint. Columbus cross-moves for summary judgment dismissing the complaint.

In this is a personal injury action, plaintiffs seek to recover money damages for personal injuries sustained by plaintiff Beryl Abubakar, on May 18, 2007, when she tripped and fell on a sidewalk, at the premises located at 95 West 95th Street, New York, New York. According to plaintiffs, the fall was a result of an alleged gap, where a newly installed concrete sidewalk meets a brick walkway. Plaintiffs commenced this action for common law negligence against

Columbus by filing a summons and complaint dated August 21, 2007. Columbus subsequently commenced a third-party action and impleaded Ferrindino, seeking contractual and common law indemnification and alleging a cause of action for breach of contract based on Ferrindino's failure to procure insurance coverage. Plaintiffs verified bill of particulars alleges that Columbus failed to provide a proper brick walkway by allowing and permitting a gap to be and remain in the brickwork which constituted a tripping hazard, toehold and snare.

Ferrindino seeks summary judgment dismissing the third-party suit brought by Columbus. On October 2006, Ferrindino and Columbus entered into a contract whereby Ferrindino was to replace the concrete sidewalk at Columbus House, located at the subject premises. Said contract required Ferrindino to indemnify and hold harmless Columbus for any claim, damages, loss and expenses attributable to bodily injury or death to the extent caused by the negligent acts or omission by Ferrindino. Specifically, the contract provided that Ferrindino would remove the existing concrete sidewalk on the premises and install a four-inch reinforced concrete sidewalk. There was no requirement to provide or install bricks. The project was commenced in November 2006 and lasted approximately five to six weeks.

Ferrindino maintains that its custom and practice when performing sidewalk replacement is to flush the concrete sidewalk to the straight edge it abuts to ensure that the height of the concrete sidewalk matches the height of the straight edge it abuts. Upon completion of the project, Craig Murphy, Columbus' representative, inspected the entire area where Ferrindino performed the sidewalk replacement and signed off for final payment. Ferrindino claims that, during the inspection, Mr. Murphy did not notice any discrepancy between the bricks and the height of the concrete sidewalk. Moreover, Mr. Murphy inspected the renovation work twice a

month up until the day of the accident. Ferrindino states that to date, it has not received any requests from Columbus to re-do the sidewalk replacement.

Ferrindino contends that Columbus' claim for common-law and contractual indemnification must be dismissed because Ferrindino did not create or have actual or constructive notice of the alleged defect. Ferrindino states that it removed and replaced the concrete sidewalk and did not work on the brick walkway or install any bricks. Moreover, Ferrindino did not receive any complaints from Columbus or any third parties, about the condition of the sidewalk.

Ferrindino argues that plaintiffs' claim against Columbus must also be dismissed because the alleged defect was trivial in nature and not actionable under the common-law theory of negligence. Ferrindino cites to plaintiff Beryl Abubakar's deposition testimony, in which she defines the gap as being three-fourths of an inch in width and one-half of an inch in height. Photographs of the alleged defect exchanged by plaintiffs' counsel are attached to the moving papers. (Notice of Motion, Exh J). Ferrindino asserts that the photos demonstrate a minuscule gap between the concrete sidewalk and the brick walkway and no height discrepancy. In addition, the accident occurred in full daylight, between 2 and 4 p.m. Ferrindino avers that, based on the totality of the circumstances, the alleged gap does not constitute a trap or nuisance, as a matter of law.

Ferrindino states that in the absence of evidence of negligent acts or omissions, Columbus cannot bring a claim for contractual indemnification against Ferrindino. As for Columbus' claim for breach of contract, Ferrindino argues that it did in fact obtain insurance coverage on behalf of Columbus as an additional insured in Ferrindino's policy.

Columbus opposes the motion for summary judgment dismissing the third-party complaint and cross-moves for summary judgment dismissing the complaint. With respect to the cross motion, Columbus argues that the alleged defect complained of is trivial in nature and is not actionable. Columbus also raises the same arguments asserted by Ferrindino in its motion. Columbus also argues that plaintiffs have failed to prove that it had actual or constructive notice of the alleged defect.

With respect to the opposition to Ferrindino's motion, Columbus contends that if this court were to find that the defect at issue is more than *de minimis*, then said defect was the result of Ferrindino's negligence. Columbus asserts that this negligence includes failing to properly install the concrete sidewalk on the same level as the brick courtyard located in front of and alongside the entrance of the premises.

Columbus also asserts that the breach of contract claim must be sustained because Ferrindino has failed to demonstrate that it procured insurance on behalf of Columbus pursuant to the contract.

Plaintiffs oppose the motion and the cross motion on the ground that there are issues of fact as to whether the alleged defect is trivial. Plaintiff argues that because there is a dispute as to the trivial nature of the alleged defect, and based upon the evidence concerning the width, depth, elevation, irregularity and appearance of the defect, as well as the time, place and circumstance of the accident, the court cannot dismiss the case as a matter of law.

In its reply to the cross motion, Ferrindino submits a copy of its insurance policy, indicating a provision that shows Ferrindino included Columbus as an additional insured.

"The proponent of a motion for summary judgment must demonstrate that there are no

material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “ the party opposing a motion for summary judgment bears the burden of ‘produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The court should draw all reasonable inferences in favor of the non-moving party, and should not pass on issues of credibility (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

In order to prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that defendant created the condition which caused the accident or that defendant had actual or constructive notice of the condition. *Cruceta v Funnel Equities, Inc.* 18 AD3d 693, 694 (2d Dept 2005). Here, defendant and third-party defendant argue that the alleged defect is too trivial to be actionable.

The issue of whether a dangerous or defective condition exists “depends on the particular facts and circumstances of each case.” *Guerrieri v Summa*, 193 AD2d 647, 647 (2d Dept 1993). In determining whether a defect is trivial, “the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury [internal quotation marks and citation omitted].” *Ryan v KRT Property Holdings LLC*, 45 AD3d 663, 665 (2d Dept 2007).

Upon the submitted papers, there is an issue of fact as to whether the condition on the premises constituted a trap or nuisance. Although the depression is claimed to have been under

an inch, there is some indication that there might have been an edge to it, which could make it a tripping hazard. A gradual depression could be a nuisance under such a condition. *See Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 (1st Dept 2000); *Glickman v. City of New York*, 297 AD2d 220 (1st Dept 2002); *Nin v. Bernard*, 257 AD2d 417 (1st Dept 1999). Plaintiff testified at her deposition that she tripped when the flat shoe she was wearing got caught in the space between separated concrete, “like the edge of something”. [Plaintiff’s EBT, at 9-10, Exh. A, Affirmation in Opposition]. Since it is not disputed that Ferrindino was the party working on the construction of the subject sidewalk, it is the party alleged to have negligently created the condition at bar. At this stage, it cannot be dismissed from this action.

With respect to Columbus, the owner of the premises, if the jury finds that the condition which caused plaintiff to fall was a dangerous/defective condition, there is a factual issue as to whether Columbus had actual or constructive notice of such condition. While there was no proof submitted of any prior complaints or accidents relating to the area at bar, there is testimony that Columbus’ representative made inspections to the subject area and, thus, there is a factual issue as to whether Columbus had constructive notice of such condition. Further, generally, the issue of whether a dangerous or defective condition exists is a question for the jury. *See Trincere v. County of Suffolk*, 90 NY2d 976 (1997); *Schechtman v. Lappin*, 161 AD2d 118 (1st Dept 1990). For this reason, Columbus shall not be dismissed from this action.

With respect to the third-party suit against Ferrindino, Ferrindino is not liable for Columbus’ negligence. Ferrindino has also submitted sufficient proof that it did procure insurance coverage for Columbus as an additional insured. Therefore, Ferrindino is not liable to Columbus for breach of contract.

However, as to Columbus' claims for contractual and common law indemnification, since there is an issue of fact as to whether Ferrindino negligently performed its construction work to the sidewalk, Ferrindino's motion for summary judgment is denied as to the dismissal of Columbus' indemnification claims. Pursuant to the contract between Columbus and Ferrindino for the installation of concrete on the sidewalk, Ferrindino was to indemnify and hold Columbus harmless for any negligence caused by Ferrindino. Thus, dismissal of the contractual and common law indemnification claims is not warranted at this time.

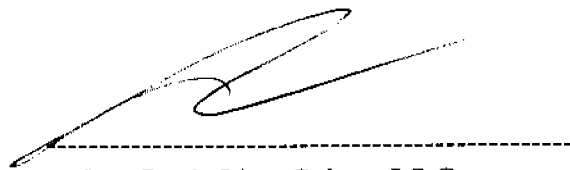
Accordingly, it is

ORDERED that Ferrindino's motion for summary judgment is granted with respect to the breach of contract cause of action brought by Columbus and is otherwise denied; and it is further

ORDERED that Columbus's cross motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy upon all parties, with notice of entry.

DATED: April 8, 2010



Hon. Doris Ling-Cohan, J.S.C.

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