Zubli v 36 Middle Neck Rd., Inc.

2010 NY Slip Op 31455(U)

June 4, 2010

Supreme Court, Nassau County

Docket Number: 3735/09

Judge: Daniel R. Palmieri

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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

TRIAL TERM PART 45

---x

AVI ZUBLI and ALYSIA ZUBLI,

Plaintiff,

-against-

36 MIDDLE NECK ROAD, INC., HI-TECH PHOTO & IMAGING, INC., and VILLAGE OF GREAT NECK PLAZA,

Defendants.

---x

INDEX NO.: 3735/09

MOTION DATE:12-11-09
SUBMIT DATE: 5-28-10
SEQ. NUMBER - 001

MOTION DATE: 3-24-10
SUBMIT DATE: 5-28-10
SEQ. NUMBER - 003

MOTION DATE: 4-28-10
SUBMIT DATE: 5-28-10
SEQ NUMBER - 004

MOTION DATED:5-28-10
SUBMIT DATE: 5-28-10
SEQ. NUMBER - 005

The following papers have been read on this motion:

Notice of Motion, dated 11-13-09....................................1
Affirmation in Opposition, dated 2-1-10........................2
Affirmation in Opposition, dated 2-9-10........................3
Notice of Motion, dated 2-25-10....................................4
Notice of Motion, dated 3-9-10......................................5
Affirmation in Opposition, dated 3-9-10........................6
Affirmation in Opposition, dated 4-16-10......................7
Notice of Cross Motion, dated 4-28-10..........................8
Reply Affirmation, dated 4-27-10..................................9
Affirmation in Opposition, dated 5-19-10....................10
Amended Notice of Cross Motion, dated 5-4-10.........11
Reply Affirmation, dated 5-6-10..................................12
Affirmation in Opposition, dated 5-11-10....................13
Reply Affirmation, dated 5-27-10................................14

On March 9, 2008, at approximately 7:30 p.m. in the Village of Great Neck Plaza (the Village) on a public sidewalk, in front of a building owned by 36 Middle Neck Road, Inc., (the Owner) and occupied by Hi-Tech Photo & Imaging Inc., (the Tenant), plaintiff tripped and fell on loose bricks in a public sidewalk and was injured. This action ensued.

Defendant Village moves for summary judgment pursuant to CPLR §3212 (Seq. 1), dismissing the complaint on the grounds that it neither created nor received notice of the condition. The motion of the Village is granted and the action and all cross claims as to the Village are dismissed.

The Owner moves for summary judgment pursuant to CPLR §3212 (Seq. 3) against plaintiffs to dismiss the complaint and against the Tenant for indemnification and breach of the Tenant's contractual duty to procure insurance and to make sidewalk repairs. The Owner's motion as against plaintiffs is granted and the complaint is dismissed as to the Owner. The Owner's motion for common law indemnification from the Tenant is denied as moot because the Owner concedes in its moving papers such a claim is dependent on the success of the plaintiffs' claim. The cross claims by the Owner against the Tenant for contractual indemnification, breach of contract to obtain insurance and to make sidewalk repairs is denied as there are issues of fact which cannot be resolved and those claims shall continue.

The cross motion of Tenant for summary judgment pursuant to CPLR §3212 (Seq. 5) is granted as to plaintiffs and granted as to the Owner's cross claim for common law indemnification. The motion is denied to the extent the Tenant's motion seeks summary judgment against the Owner on the Owner's breach of contract claims. The Owner's claims

of common law indemnification are dismissed since the plaintiffs' claims against the Owner are dismissed. The contractual cross claims for breach of the Tenant's lease obligations shall continue .

The motion of plaintiff pursuant to CPLR §3124 seeking to compel discovery from the defendants Owner and Tenant (Seq. 4) is denied as moot.

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).

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 Village has been enacted in § 6-628 of the Village Law and CPLR § 9804. 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 and deposition testimony of Michael Sweeney, Public Services Commissioner of the Village, alleges that no prior written notice of any defect in the sidewalk here was ever served on the Village and that the Village did not undertake any work at the location of the accident. This testimony is sufficient to establish a *prima facie* showing of entitlement to relief. *Mahler v Incorporated Vil. of Port Jefferson*, 18 AD3d 450 (2nd Dept.

[* 6]

2005); *cf Rupp v City of Port Jervis*, 10 AD3d 391 (2nd Dept. 2004) [undated and unnotarized statement held to be insufficient]. Thus, testimony from a responsible official for the Village establishes 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 Village was not responsible for creating any unsafe condition on the sidewalk. Accordingly, the motions for summary judgment dismissing the complaint on behalf of the Village are granted. That the sidewalk was composed of brick and not concrete does not alter the result. *Carlo v. Town of Babylon*, 55 AD3d 769 (2d Dept. 2008); *Jacobs v. Village of Rockville Centre*, 41 AD3d 539 (2d Dept. 2007).

Plaintiff's contention that summary judgment should be denied because discovery has not been completed is insufficient to deny summary judgment. To defeat a motion for summary judgment pursuant to CPLR 3212(f), a party claiming ignorance of critical facts must demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover facts which would give rise to a triable issue (*Lumbsy v Gershwin Theater*, 282 AD2d 578 [2nd Dept. 2001]; mere hope is not sufficient. *Lightfoot v City of New York*, 279 AD2d 457 (2nd Dept. 2001). Plaintiff has failed to make any evidentiary showing to support the conclusion that there may be facts available that would defeat the motions of the defendants and speculation or conjecture is insufficient. *Falkowitz v Peters*, 294 AD2d 330 (2nd Dept. 2002); *Firth v State*, 287 AD2d 771 (3rd Dept. 2001). Plaintiff has not sufficiently explained the nature of any discovery that has been completed, what remains to be completed and how it might reveal evidence that might create a triable issue of fact. Plaintiff has not contended that recent work was performed by the Village or submitted any evidence that might support such an assertion. *Cf. Rengifo v City of New York*, 7 AD3d 773 (2nd Dept.

2004) [incomplete discovery did not relate to the defendant municipality] *i.e. Whelan v Port Authority of New York*, 19 AD3d 483 (2nd Dept. 2005) [evidence of work performed at the accident site]. In short, plaintiff's need for further discovery has not been related to the issues raised by this motion and thus does not constitute a basis for denial of these motions.

For the same reasons, plaintiff's motion to compel discovery is denied. The plaintiff's motion seeks to obtain a list of and depositions from all employees of the tenant, violations issued after the date of the accident, photographs and surveillance footage of the front door. Demand for these items and plaintiff's motion to compel were made long after the initial motion and plaintiff has not sufficiently explained how receipt of such discovery could alter the result.

The law with respect to the liability of an abutting property owner 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 defendants, the abutting Owner and Tenant or that they ever performed any work in the area of the defect. *Portanova v. Dynasty Meat Market*, 297 AD2d 792 (2d Dept. 2002).

Plaintiff has not offered any suggestions as to any other cause of the condition and there is no claim that there was any statute ordinance or regulation requiring the defendants to maintain and repair the sidewalk and imposing tort liability for failure to do so. *Weiser v. City of New York*, 41 AD3d 467 (2d Dept. 2007).

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).

Village Code §185-1, Responsibility for maintenance and repair, requires as follows:

> Every owner or occupant of any house or other building, and every owner or person entitled to possession of any lot, and any person having charge of any church or any public building in the Village of Great Neck Plaza shall, during the winter season or during the time snow shall continue on the ground, keep the sidewalk in front of such lot or house free from obstruction by snow or ice and icy conditions and shall at all times keep such sidewalk in good and safe repair and maintain the same clean, free from filth, dirt, weeds or other obstructions or encumbrances.

The foregoing does not impose liability as to third persons, such as plaintiff, for failure to so repair. Hence, there is no duty owned to the plaintiffs by the Owner and the Tenant.

Plaintiff's suggestion that the defendants may be liable because of work they might have performed, is not applicable here. An abutting landowner may be liable to a pedestrian passing on a public sidewalk if the owner 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). However, 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 of the sidewalk or that the special 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 either the Owner or the Tenant made special use of the defendant's sidewalk, or if they did, that such use created a hazard or caused the defect that resulted in the accident. *Carter v. 73 Cranberry street, Inc.*, 18 AD3d 795 (2d Dept. 2005); *Kaminer v. Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 (1st Dept. 1998). The opposition to the motion does not provide any evidence to connect any use of the sidewalk to the defect *Fishelberg v. Emmons Avenue Hospitality Corp.*, 26 AD3d 460 (2d Dept. 2006). Moreover, it has been held that the use of brick rather than cement to construct a sidewalk is insufficient to establish a special use, especially where, as here, there is no evidence that the bricks were installed at the Owner's (or Tenant's) direction in contemplation of any use other than by the general public. *Paterson v. City of New York*, 1 AD3d 139 (1st Dept. 2003). Whether the Owner or the Tenant had actual or constructive notice of the sidewalk condition is not relevant to the legal analysis because there is no showing of a duty on the part of those defendants to remedy the condition. *Reich v. Meltzer*, 21 AD3d 543 (2d Dept. 2005); *Portanova v. Dynasty Meat Corp., supra*. The analysis proffered by the plaintiff is based on a duty owed by the owner of the property where an accident occurs, not the duty of a property owner regarding an abutting sidewalk it does not own.

Based on the foregoing, it is evident that neither the defendant Owner nor the defendant Tenant created the defect, and their special use, if any, of the sidewalk did not have a role in creating the defect, and the Village does not impose tort liability to third parties for defects caused thereby. Thus, the complaint and any cross claims against the Owner and Tenant are dismissed.

The Owner has cross claimed against the Tenant for contractual indemnification, common law indemnification and breaches of contract to procure insurance and to repair the sidewalk. Tenant's motion also seeks summary judgment against the Owner on these issues. The lease between the Owner and Tenant contains provisions that require the Tenant to (i) purchase liability insurance in favor of the Owner (ii) indemnify the Owner for costs and expenses for which the Owner is not reimbursed by insurance incurred as a result of breach of the lease by Tenant and (iii) make non-structural repairs to the sidewalk. The lease does not however define what is meant by a nonstructural repair.

"Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an 'unmistakable intent' to indemnify." *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417, *quoting Levine v Shell Oil Co.*, 28 NY2d 205, 212 (1971). The *Great N. Ins.* Court, at that same page, also cited another of its precedents: "When a party is under no legal obligation to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise 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." *Hooper Assocs. v AGS Computers,* 74 NY2d 487, 491-492 (1989) [citations omitted].

[* 11]

Applying this law to the subject agreement, the Court does not agree with the Owner that it is clear that the Tenant's obligation and duty to indemnify extended beyond its obligation to purchase insurance, so that the Owner would have an insurance carrier standing ready to defend and indemnify it. The provision states that "the indemnity is to secure the Owner against costs not reimbursed by insurance ". This creates an issue of fact as to whether the Tenant's sole obligation under this provision was to provide the insurance coverage, as the language arguably indicates and that the indemnification was to come from the insurance carrier alone – *i.e.,* that the Owner was to be named as an additional insured on a policy covering the Tenant. The intent of the parties as to whether this extends to indemnification from Tenant without regard to insurance therefore will have to be ascertained at trial. Accordingly, so much of the branch of the Owner's motion that is for contractual indemnification is denied and Tenant's cross motion as to Owner is similarly denied, for the same reasons.

As to the claim of breach of contract to purchase insurance, neither the Owner nor the Tenant have presented any evidence as to whether insurance in favor of the Owner was ever obtained by Tenant. The Owner has not directed the Court to any testimony that the Tenant failed to comply with its obligation and the Tenant does not concede that it did not comply, arguing instead that if there was such a breach, damages should be limited. *Inchaustequi v. 666 5th Ave., Ltd Partnership*, 96 NY2d 111 (2001). Since the Owner has not made a *prima facie* showing of entitlement to relief, a trial is necessary on the issue of breach of contract to purchase insurance and the damages that might result from such a breach.

The Owner can look to the Tenant for damages occasioned by the loss it may suffer if it does not have its own insurance providing for a defense of the plaintiff's law suit and

indemnification for any judgment (the latter obviously no longer applies), or if it does have its own coverage, the cost of the premiums it paid for such insurance, any out-of-pocket expenses and any increase in premiums resulting from the claim. *Inchaustegui v 666 5th Ave. Ltd. Partnership, supra*; *Cucinotta v. City of New York,* 68 AD3d 682 (1st Dept. 2009); *Wong v New York Times Co.,* 297 AD2d 544, 548 (1st Dept. 2002). Of course, should the Owner prevail at trial on its interpretation of the indemnity agreement, it would be entitled to recoupment of all losses, irrespective of its own insurance.

Dismissed outright are the claims for common-law indemnification and contribution asserted by the Owner against the Tenant and Tenant against Owner. With regard to contribution, no duty of care in favor of the Owner independent of the Tenant's contractual obligations has been shown, nor any in favor of the plaintiff. *Roach v AVR Realty Co. LLC,* 41 AD3d 821, 824 (2d Dept. 2007). Further, as noted above, there is no proof that the condition which caused the plaintiff to fall was caused to exist wholly by the Tenant's act or omission, which is fatal to the claim for common-law indemnification. *Id.; see also, Corley v Country Squire Apts., Inc.,* 32 AD3d 978 (2d Dept. 2006). However, there remains to be resolved at trial the issue of whether the Tenant breached its duty to the Owner to make non-structural repairs to the sidewalk. There is simply no proof as to what constitutes a non-structural repair to a brick sidewalk. *Cf., Berkowitz v. Dayton Const. Inc.*, 2 AD3d 764 (2d Dept. 2003) [raised sidewalk slab is a structural defect not required to be repaired by lessee].

The branches of the motions of the Owner and Tenant to dismiss the cross claims asserted by each against the other for common law indemnification and contribution are denied as academic, as the plaintiff's action against them has been dismissed.

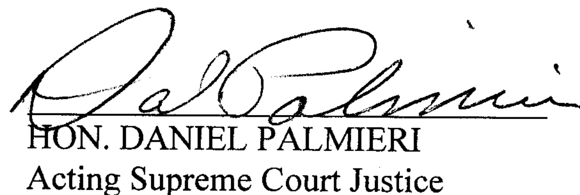
In sum, the motion by the Village, the Owner and the Tenant for summary judgement to plaintiff are granted and the plaintiff's action against the Village, the Owner and the Tenant is dismissed. The case will proceed on the cross claims by the Owner against the Tenant for contractual indemnification, failure to repair the sidewalk and breach of contract to procure insurance. Plaintiff's motion to compel discovery is denied.

All parties are reminded of a conference currently scheduled for June 28, 2010. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 4, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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