

Bartley v Nmee Realty Corp.

2010 NY Slip Op 33247(U)

November 10, 2010

Sup Ct, NY County

Docket Number: 109673/09

Judge: Jane S. Solomon

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

DECEMENT.

JANE S. SOLOMON

PART 55

Index Number : 109673/2009

BARTLEY, ISABEL

INDEX NO. _____

vs

NMEE REALTY

MOTION DATE 11/8/10

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

FILED

NOV 19 2010

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-11
12-13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the amended memorandum decision and order.

N.D. -- pre-trial conference scheduled for ~~11/10/10~~ 1/10/11 at 2 PM.

Dated: 11/10/10


JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
ISABEL BARTLEY and JOHN BARTLEY,

Plaintiffs,

Index No.: 109673/09

-against-

NMEE REALTY CORP. and 301 GRAND
STREET TRADING, INC.,

FILED ~~DECISION and ORDER~~

Defendants.

NOV 19 2010

-----x
SOLOMON, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Before the court are motions by defendants for summary judgment in a personal injury lawsuit.

Plaintiff Isabel Bartley alleges that she tripped and fell over mis-leveled sidewalk flags in front of 301 Grand Street in Manhattan. The property consists of land improved with a building containing a ground-floor commercial unit, with residential apartments above. The property is owned by defendant Nmee Realty Corp. (Owner), and is leased to defendant 301 Grand Street Trading Inc. (301 Grand). The lease states that 301 Grand will indemnify Owner from any claims that arise from the use, maintenance, management, etc., of the premises, but that said indemnification does not apply to personal injury claims by third parties caused by Owner's negligence (Lease, Notice of Motion Ex. G, section 5.05[d]). Lease section 6.02 states that 301 Grand is responsible for repairs within the leased premises, but, it argues, the sidewalk is outside the leased premises. However, 301 Grand's principal, Jun Liang, testified that he had made

repairs to the sidewalk before the accident, and 301 Grand shoveled snow and did all other maintenance with respect to the sidewalk.

The Lease defines the "Leased Premises" as "the Building together with the equipment attached or appurtenant to the Building and used solely in connection with the operation and maintenance of the building" (Lease, section 1.01[b]).

Owner moves for summary judgment dismissing the complaint, and for summary judgment on its cross-claim against 301 Grand for indemnification. 301 Grand cross-moves for summary judgment dismissing the complaint and Owner's cross-claims.

Defendants contend that summary judgment is appropriate because the alleged defect, a one-half inch height differential between two sidewalk flags, is de minimus and not actionable as a matter of law.

Bartley relies upon the Sidewalk Law of 2003, Local Law number 49, Administrative Code of the City of New York § 7-210 (Sidewalk Law), and Administrative Code § 19-152(4). The Sidewalk Law of 2003 imposes the duty to maintain a sidewalk upon the owner of abutting property, and states that the owner shall be liable for any personal injury proximately caused by the owner's failure to maintain the sidewalk in a reasonably safe condition. Administrative Code § 19-152(4) imposes a duty to repair substantial defects to sidewalks, including a duty to

repair a trip hazard where the "vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch . . .". Since there is evidence of a grade differential of at least one half inch, plaintiff's claim survives under these code sections. Moreover, the appearance of the sidewalk flags in the submitted photographs indicates wear and tear sufficient to support the inference that the condition existed for a long enough time that defendants had constructive notice.

Since Owner's duty to repair the sidewalk is imposed by the Administrative Code, its contention that it had no duty to repair under the terms of the lease is not dispositive.

301 Grand further contends that Bartley fails to make a prima facie case that the alleged defect caused her accident because, at her deposition, Bartley was unable to describe where she fell, and only implicated the subject premises after prompting by her lawyer. This issue, however, is addressed to Bartley's credibility, and is best left to the trier of fact.

301 Grand also argues that the sidewalk is not part of the Lease Premises, so it has no obligation under the Lease to indemnify Owner in a personal injury claim arising from use of the sidewalk. Owner's contention that the sidewalk is "equipment attached or appurtenant" to the Lease Premises is unpersuasive. A contract imposing an indemnification obligation "must be

strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). 301 Grand's motion for summary judgment is granted to the extent that Owner's claim for contractual indemnification is dismissed. Liang's testimony that 301 Grand undertook to maintain the sidewalk, and Owner's reliance on said maintenance, is sufficient to preserve the common law negligence and contribution claims against it.

Accordingly, it hereby is

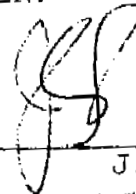
ORDERED that Owner's motion for summary judgment is denied, and it further is

ORDERED that 301 Grand's cross-motion is granted to the extent that Owner's claim for contractual indemnification is dismissed, and the cross-motion otherwise is denied, and the Clerk of the Court shall enter judgment accordingly; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on January 10, 2011 at 2 PM.

Dated: November 10, 2010

ENTER:



J.S.C

JANE S. SOLOMON

FILED
NOV 19 2010
NEW YORK
COUNTY CLERK'S OFFICE