

Evans v City of New York

2012 NY Slip Op 30115(U)

January 9, 2012

Sup Ct, NY County

Docket Number: 108464/2009

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 108464/2009
EVANS, BRENDA
vs.
725 NINTH AVE.
SEQUENCE NUMBER : 003
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 10/20/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-6
7

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided by the*
attached Memoranda Decision and Order
FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Jan 9, 2012

J.S.C.

Check one: FINAL DISPOSITION **EMILY JANE GOODMAN**
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: IAS PART 17

-----X
BRENDA EVANS,

Plaintiff,

-against-

THE CITY OF NEW YORK, 725 NINTH AVE.,
INC. and DUANE READE PHARMACY,

Defendants.

FILED
Index No. 1347509

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE
-----X

EMILY JANE GOODMAN, J.S.C.:

In this action for personal injuries, plaintiff Brenda Evans alleges that, on December 21, 2008, she tripped and fell on a defective and raised portion of the sidewalk abutting 725 Ninth Avenue in Manhattan (the premises). Defendant Duane Reade, a New York General Partnership s/h/a Duane Reade Pharmacy (Duane Reade) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it, and for summary judgment on its cross claims for indemnification against defendant 725 Ninth Avenue, Inc. (725 Ninth Avenue). Previously, defendant City of New York moved for summary judgment dismissing the complaint and all cross claims against it. On July 8, 2010, the Honorable Karen S. Smith granted that motion (Goutzounis Aff., Ex. E).

BACKGROUND

725 Ninth Avenue is the owner of the premises. Duane Reade is a commercial tenant on the ground floor of the premises. A rider to the lease adds the following to Article 4 of the lease:

“Notwithstanding anything to the contrary contained herein, Tenant shall be responsible for the maintenance, sweeping and cleaning of the sidewalks and the Owner shall be responsible for the repair of any damage to said sidewalks, except such damage which is caused by the negligence of Tenant”

(Goutzounis Aff., Ex. G [emphasis added]).

Plaintiff testified at her deposition that, on the date of her accident, she went to the nearby Amish Market and purchased two onions, and on her return trip, the toe of her right boot got stuck in the crack of the sidewalk, sending her “flying through the air” (Plaintiff EBT, at 20, 30, 39). Plaintiff fell on the west side of Ninth Avenue, in front of Duane Reade’s display window (*id.* at 35, 40).

Franklyn Grullon testified that he was employed as an assistant store manager at the Duane Reade, and that he had been employed there since October 2008 (Grullon EBT, at 9, 39). Grullon testified that Duane Reade swept the sidewalk and shoveled the snow on the sidewalk (*id.* at 22-23, 44-45). Grullon testified that he supervised warehouse deliveries to the store’s entrance located in the middle of the block on Fridays and Saturdays (*id.* at 12, 14, 64). Grullon did not observe the sidewalk defect prior to plaintiff’s accident (*id.* at 38).

Alan Brachfeld testified that he is the president of 725 Ninth Avenue (Brachfeld EBT, at 12). According to Brachfeld, 725 Ninth Avenue owns and manages the premises (*id.* at 13). Brachfeld testified that the cellar or basement of the premises can be accessed either by an interior stairway, or “through the outside street area,” referring to the sidewalk metal doors (*id.* at 40, 75-76). The basement is used by both Duane Reade and 725 Ninth Avenue (*id.* at 41). Brachfeld indicated that 725 Ninth Avenue was responsible for making repairs to cracks in the sidewalk (*id.* at 50, 53).

Plaintiff commenced the instant action on June 15, 2009 against defendants City of New York (the City), 725 Ninth Avenue, and Duane Reade. Plaintiff alleges in her verified bill of particulars that her accident occurred on the west side of Ninth Avenue between 49th Street and 50th Street, on a raised and defective portion of the sidewalk in front of 725 Ninth Avenue (Verified Bill of Particulars, ¶¶ 2, 3). Plaintiff also alleges that Duane Reade negligently

maintained the public sidewalk in front of the premises and allowed the sidewalk to remain in a dangerous and unsafe condition, which caused Evans to fall (*id.*, ¶ 17). As a result of the accident, plaintiff allegedly sustained a torn rotator cuff in her right shoulder (*id.*, ¶ 9).

In its answer, Duane Reade asserts a cross claim for indemnification and contribution against 725 Ninth Avenue (Duane Reade's Answer, Cross Claim). 725 Ninth Avenue's answer also contains cross claims for common-law and contractual indemnification and contribution against Duane Reade (725 Ninth Avenue's Answer, First through Fifth Cross Claims).

Duane Reade moves for summary judgment, arguing that it did not owe plaintiff a duty of care and was not the proximate cause of her accident, because it did not perform structural repairs to the sidewalk abutting the premises, and did not make a special use of the location of the sidewalk. Duane Reade further contends that, pursuant to the lease, responsibility for structural maintenance of the sidewalk rested with the owner. Additionally, Duane Reade moves for summary judgment on its cross claims for contractual and common-law indemnification against 725 Ninth Avenue. In support, Duane Reade submits a copy of the lease (Goutzounis Aff., Ex. G), and the affidavit of Joseph Zahon, a facilities manager responsible for this location, who states that Duane Reade's maintenance records indicate that it did not do any structural maintenance to the sidewalk abutting the store on or before December 21, 2008 (Zahon Aff., ¶ 4), nor did it make a special use of the sidewalk next to the building (*id.*).

In opposition, plaintiff argues that Duane Reade has failed to factually establish whether it made a special use of the sidewalk, whether it created the defective sidewalk condition, and whether it owed a duty to pedestrians using the sidewalk. Plaintiff submits photographs of the location of the accident which show that the defective sidewalk condition is located two sidewalk

flags away from metal cellar doors (Gotkin Aff., Exs. I, II). Therefore, according to plaintiff, there are issues of fact as to whether Duane Reade's regular and continuous use of the sidewalk caused and/or contributed to the defective condition, and as to whether Duane Reade negligently maintained the sidewalk in violation of its lease and its duty owed to pedestrians.

725 Ninth Avenue also opposes Duane Reade's motion, contending that Duane Reade maintained a certain amount of control over the sidewalk, and, thus, owed plaintiff a duty of care. 725 Ninth Avenue further argues that Duane Reade derived a special use or benefit from the sidewalk, since it received deliveries directly in the area where the defective condition existed two times per week. Additionally, 725 Ninth Avenue maintains that Duane Reade is not entitled to summary judgment on its common-law and contractual indemnification claims because there are issues of fact as to its negligence.

DISCUSSION

"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]). "Once the [moving party] establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the [nonmoving party] to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment" (*DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

"Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property" (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519 [1st Dept 2011]; see also *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept], *lv dismissed and*

denied in part 73 NY2d 783 [1988]). “The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property” (*Balsam*, 139 AD2d at 296-297). It is undisputed that Duane Reade did not own the premises abutting the sidewalk where plaintiff’s accident occurred.¹ No argument is made with regard to control of the premises. Thus, the issue is whether Duane Reade made a special use of the sidewalk.

In *Kaufman v Silver* (90 NY2d 204, 207 [1997]), the Court of Appeals explained that “where the abutting landowner [or occupier] ‘derives a special benefit from that [public property] *unrelated* to the public use,’ the person obtaining the benefit is ‘required to maintain’ the used property in a reasonably safe condition to avoid injury to others” (internal quotations marks, citation omitted, and emphasis in original). “Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit” (*id.*). Imposition of a duty to repair and maintain is necessarily premised upon the existence of the abutting land occupier’s access to and ability to exercise control over the special use structure or installation (*id.*; *see also Olivia v Gouze*, 285 App Div 762, 766 [1st Dept 1955], *affd* 1 NY2d 811 [1956] [since both owner and occupying tenant were in control of grating and coping on which plaintiff slipped, “each was under an affirmative duty to properly maintain the premises, and their failure to discharge that obligation rendered them both liable as joint tort-feasors”]).

¹Administrative Code § 7-210 requires owners of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition. This section became effective on September 14, 2003, and applies to accidents occurring on or after such date (Administrative Code of the City of NY § 7-210, historical note).

“A special use has been characterized as involving the installation of some object in the sidewalk or street or some variance in the construction thereof” (*Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004] [internal quotation marks and citation omitted]). The occasional use of a side of a store for deliveries does not constitute a special use (*Sampino v Crescent Assoc., LLC*, 34 AD3d 779, 781-782 [2d Dept 2006]; *Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]; *Tyree v Seneca Ctr.-Home Attendant Program*, 260 AD2d 297, 298 [1st Dept 1999]; *Kaminer v Dan’s Supreme Supermarket/Key Food*, 253 AD2d 657 [1st Dept 1998]). For instance, in *Tyree* (260 AD2d at 298), the First Department held that “[d]efendants’ mere receipt of ordinary deliveries of office supplies does not suffice to show special use of the sidewalk by the appellant tenants sufficient to withstand the summary judgment motions.” Similarly, in *Jordan* (23 AD3d at 437), the Second Department held that “the mere fact that [a] commercial tenant used the sidewalk to gain access to a nearby basement door was insufficient to establish the existence of a special use.” Furthermore, the *Sampino* Court held that “[c]ontrary to the plaintiffs’ contention, the mere fact that Eastern Meat used the sidewalk for deliveries did not constitute special use” (*Sampino*, 34 AD3d at 781-782).

However, in *Peretich v City of New York* (263 AD2d 410, 411 [1st Dept 1999]), the Court permitted a plaintiff to amend her complaint to add a supermarket/tenant, noting that the evidence suggested that the supermarket’s delivery trucks “mounted the sidewalk with sufficient regularity as to constitute a special use.” In that case, there was testimony that the supermarket “receive[d] merchandise every day, many trucks a day, heavy trucks, trailers” and that the trucks “mount[ed] the sidewalk or hit the curb of the sidewalk” (*id.*; see also *Rosario v City of New York*, 289 AD2d 133, 134 [1st Dept 2001] [genuine issue of material fact as to whether regular use of sidewalk portion of driveway by housing authority’s vehicles caused defect]).

Here, although plaintiff and 725 Ninth Avenue point out that the defective sidewalk condition is situated two flags away from the metal cellar doors, there is no evidence that the cellar doors were the proximate cause of her accident (*see Taveras v City of New York*, 59 AD3d 178 [1st Dept 2009] [regardless of any special use owner may have had in connection with padlocked cellar doors, plaintiff, who tripped on construction fencing, failed to present any evidence that the use was the proximate cause of her accident]; *Fine v City of New York*, 303 AD2d 306 [1st Dept 2003], *lv dismissed* 1 NY3d 607 [2004] [alleged special use was not shown to be in any way connected to plaintiff's trip and fall]). Rather, plaintiff testified that she tripped after the toe of her boot got stuck in a crack in the sidewalk (Plaintiff EBT, at 34, 39).

Unlike *Peretich*, there is no evidence that Duane Reade's trucks mounted the sidewalk or hit the curb. Even if Duane Reade occasionally used the sidewalk for deliveries, such use does not constitute a special use of the sidewalk (*see Tyree*, 260 AD2d at 298; *Kaminer*, 253 AD2d at 657). Moreover, there is no evidence that Duane Reade otherwise created the defective and raised portion of the sidewalk where plaintiff fell. Accordingly, Duane Reade is entitled to summary judgment dismissing the complaint and all cross claims against it.

Duane Reade also moves for contractual indemnification from 725 Ninth Avenue, pursuant to Article 88 (B) of the lease, entitled "Indemnification," which provides, as relevant:

"Owner [725 Ninth Avenue] covenants and agrees that in case Tenant [Duane Reade] shall be made party to any litigation commenced against Owner arising from (i) the negligence or willful misconduct of Landlord or its agents, employees or contractors . . . then Owner will defend, hold harmless and otherwise indemnify Tenant, and Owner will pay any expenses, costs and reasonable attorneys' fees incurred by or imposed on Tenant by or in connection with such litigation . . ."

(Goutzounis Affirm. in Support, Exh. G [emphasis added]).

Duane Reade contends that the lease specifically requires 725 Ninth Avenue to

indemnify, hold harmless, and defend it for *any* action, suit, and proceeding, and seeks attorneys' fees incurred in the defense of this matter. For its part, 725 Ninth Avenue contends that there are issues of fact as to Duane Reade's negligence.

However, Duane Reade's indemnification claim must be resolved at trial. As noted above, 725 Ninth Avenue is required to defend and indemnify Duane Reade for any litigation "arising from . . . the negligence or willful misconduct of [725 Ninth Avenue]" (*id.*). There has been no finding that 725 Ninth Avenue was negligent. Therefore, Duane Reade's motion for contractual indemnification is premature (*see Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446, 447 [1st Dept 2008] [contract obligated employer to indemnify owner for losses caused by negligence of employer or its agent; summary judgment correctly denied on contractual indemnification claim where there was no finding that employer or its agents were negligent]; *D'Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007] [since it had not been determined that plaintiff's accident was caused by any act or omission of a subcontractor, contractual indemnification was premature]).

Duane Reade also seeks common-law indemnification from 725 Ninth Avenue, noting that 725 Ninth Avenue was responsible for repairing defects in the sidewalk.

Common-law 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" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the

accident” (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Here, there are triable issues of fact as to whether 725 Ninth Avenue was negligent in failing to repair the sidewalk defect. Accordingly, Duane Reade’s motion for summary judgment seeking common-law indemnification from 725 Ninth Avenue is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 003) of defendant Duane Reade, a New York General Partnership s/h/a Duane Reade Pharmacy for summary judgment is granted to the extent of dismissing the complaint and all cross claims against it, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 1/9/12

ENTER:

FILED
JAN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.
EMILY JANE GOODMAN