

Libow v Waldbaum Inc.
2013 NY Slip Op 33148(U)
November 26, 2013
Sup Ct, Queens County
Docket Number: 700076/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

JANICE LIBOW,

Index No.: 700076/2013

Plaintiff,

Motion Date: 09/13/13

- against -

Motion No.: 85

WALDBAUM INC, THE GREAT ATLANTIC &
PACIFIC TEA COMPANY, Inc., FERRANDINO
& SON, INC., WALGREEN CO., BLUE BAY
DINER, INC., CROSS-PATH REALTY LLC and
CROSS-PATH REALTY CO., L.P.

Motion Seq.: 2

Defendants.

- - - - - x

CROSS-PATH REALTY LLC and
CROSS PATH REALTY CO., L.P.,

Third-Party Plaintiffs,

- against -

WALDBAUM, INC.,

Third-Party Defendant.

-----x

The following papers numbered 1 to 20 were read on this motion by defendant, DUANE READE s/h/a WALGREEN CO., for an order, pursuant to CPLR 3212, granting summary judgment in favor of said defendant and dismissing the plaintiff's complaint and all cross-claims asserted against it; and for an order granting summary judgment in favor of DUANE READE on its cross-claim asserted against codefendant CROSS-PATH REALTY for indemnification for the costs of defense arising out of this action:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 8
Plaintiff Libow's Affirmation in Opposition.....	9 - 11
Defendant Blue Bay Diner's Affirmation in Opposition...	12 - 14
Defendant Ferrandino & Son's Affirmation in Opposition.	15 - 17
Duane Reade'S Reply Affirmation.....	18 - 20

This is an action for damages for personal injuries sustained by plaintiff, Janice Libow, at approximately 12:30 a.m. on February 20, 2011, when she allegedly slipped and fell on snow and ice in a parking lot located near 5850 Francis Lewis Boulevard, Flushing, New York. The common parking lot is owned by defendant Cross-Path Realty, LLC. and is shared by defendants Blue Bay Diner, Duane Reade and Waldbaum Inc. Defendant Ferrandino & Son, is a snow plowing contractor who had an agreement with Waldbaum Inc. for snow plowing the subject parking lot.

As a result of the fall, the plaintiff sustained, inter alia, injuries to her left hip and knee including a left femoral neck fracture; a closed transcervical fracture; and a left hip total replacement.

The plaintiff commenced an action for negligence against Walgreen Co., Blue Bay Diner, Inc., Cross-Path Realty LLC and Cross Path Realty Co., L.P. by filing a summons and verified complaint on June 16, 2011. Issue was joined by Duane Reade s/h/a Walgreen Co. by service of defendant's verified answer dated August 8, 2011. Duane Reade served a cross-claim for common law and/or contractual indemnification against co-defendant Cross-Path Realty. Blue Bay Diner, Inc. served a verified answer with cross-claims dated October 3, 2011. Cross-Path Realty served its answer with cross-claims dated November 2, 2011. A third-party action was commenced by defendant Cross-Path Realty against Waldbaum Inc. for indemnification by service of a third-party complaint dated November 28, 2011. On January 9, 2013, the plaintiff commenced a second action based upon the same occurrence against Waldbaum, Inc., the Great Atlantic and Pacific Tea Company and Ferrandino & Son, Inc., under Index No. 700076/2013. By order dated May 20, 2013, the plaintiff's two actions were consolidated for trial under Index No. 700076/2013.

The gravamen of the complaint, as set forth in plaintiff's bill of particulars, is that the defendants were negligent in the maintenance of the premises, in causing the parking lot to remain

in a dangerous, unsafe and slippery condition covered with snow and ice, in failing to warn, in failing to inspect, in knowingly permitting said condition to remain, and in failing to provide plaintiff with a safe ingress and egress in the parking lot. Plaintiff claims that the defendants had actual and constructive notice of the accumulation of snow and ice in the parking lot in that the condition existed for such a period of time that defendants, in the exercise of due care, should have recognized and remedied it.

Defendant Walgreen Co. (hereinafter referred to as "Duane Reade"), now moves, prior to depositions, for an order granting summary judgment and dismissing the plaintiff's complaint and all cross-claims filed against it on the ground that the defendant bears no liability to the plaintiff for negligence due to an allegedly dangerous condition in the parking lot adjacent to its premises. Duane Reade also seeks summary judgment on its cross-claim against its landlord, Cross-Path Realty, for indemnification for defense costs. Defendant, Duane Reade, who leased a building in the shopping center from Cross-Path Realty, contends that it had no duty to maintain the parking lot in which the plaintiff fell and has no common law or contractual obligation to maintain, shovel or clear snow and ice from the parking lot nor did they affirmatively assume any duty to do so. In addition, Duane Reade contends that based upon the terms of its lease, co-defendant Cross-Path Realty, the owner, is legally responsible to hold harmless and indemnify Duane Reade for actions arising out of claims associated with the parking lot. Duane Reade alleges that despite correspondence to the landlord, Cross-Path realty has failed, to date, to accept the proffered defense and indemnity of Duane Reade. Duane Reade alleges that it did not hire any contractors to assist in snow removal for the parking lot in issue nor did it contract with any entity that created the alleged dangerous condition nor were they obligated to do so. Duane Reade alleges that the lease between Duane Reade and the owner of the parking lot specifically indicates that the landlord, Cross-Path Realty, has the legal and contractual responsibility for the care and maintenance of the common parking lot including snow and ice removal from the sidewalks and parking lot in the shopping center.

In support of the motion, defendant's counsel, Louis P. Giordana, Esq., submits his own affirmation; a copy of the pleadings; a copy of the affidavit of Duane Reade store manager, Bibi Jugdeo; a copy of the affidavit of Christopher Nigro, the Facilities Asset Manager of Duane Reade; and a copy of Duane Reade's lease agreement.

In his affidavit, dated March 14, 2013, Bibi Jugdeo the store manager at Duane Reade states that the Duane Reade store is part of a larger shopping complex. He first learned that plaintiff fell on ice and snow in the parking lot on February 20, 2011. He states that the parking lot is not owned by Duane Reade and Duane Reade has no responsibility for its maintenance, repair or snow and ice removal. He states that Duane Reade has never performed snow and ice removal in the parking lot and no employees performed snow and ice removal in the parking lot on the date of the accident or at any other time at or near the date in question. He also states that no one ever brought the alleged dangerous condition to the store's attention. He states that prior to the accident he did not have notice of the snow and ice condition based upon observation or prior incidents. He states that as Duane Reade had no responsibility for snow and ice removal in the subject parking lot that said defendant has no liability for damages incurred by the plaintiff due to her alleged slip and fall in the parking lot.

Christopher Nigro, in his affidavit, states that he is the Facilities Asset Manager for Duane Reade and states that he has reviewed the lease dated March, 1993 pertaining to the subject store between Duane Reade and the landlord Cross-Path Realty LLC. He states that said lease was taken over by Duane Reade as assignee in September 1998. He states that the lease states clearly that the landlord, Cross-Path Realty, is responsible for snow and ice removal on the sidewalks and parking lot. He states that pursuant to Paragraph 4 of the lease, Duane Reade was not responsible for snow removal and paragraph 46 specifically indicates that the landlord is in fact responsible for snow removal from the other sidewalks and parking lot in the shopping center. Duane Reade is responsible for clearing the snow from its own sidewalk. Thus, Mr. Nigro contends that pursuant to the lease, Duane Reade had no contractual obligation to care for or maintain the common parking lot and had no responsibility for snow and ice removal.

Counsel asserts that defendant has demonstrated, prima facie, that the lease and affidavits of Duane Reade employees establishes that Duane Reade did not have any connection with alleged ice condition in the parking lot on the date of the accident and that said defendant is, therefore, entitled to dismissal of the complaint. Counsel also states that pursuant to the lease provisions, co-defendant Cross-Path Realty should accept the tender of defendant Duane Reade's defense and contractual indemnity and should reimburse Duane Reade's legal expenses which at this time amount to \$21,728.68.

In opposition, Thomas B. Goren, Esq, counsel for the defendant, Ferrandino & Son, Inc., contends that the motion is premature as defendant Ferrandino has not had an opportunity as yet for depositions of the parties. Counsel alleges that as there are facts essential to justify his opposition, which are exclusively within the knowledge and control of the movant, further opportunity for disclosure is required before he can oppose the motion.

Plaintiff's counsel, Audra R. Roth, Esq., also requests that the motion be denied without prejudice as premature following the completion of discovery. Counsel claims that cases involving strip mall type shopping plazas with numerous stores and tenants usually have various lease, subleases, contracts and agreements to be exchanged which are in the exclusive possession of the parties involved and are obtainable during the discovery phase of the action. Here, counsel states that plaintiff has not had the opportunity to conduct necessary discovery so as to be able to oppose Duane Reade's motion for summary judgment.

Counsel for codefendant, Blue Bay Diner, David S. Aromowitz, Esq., contends that the instant motion must be denied notwithstanding the landlord's contractual obligation to perform snow and ice removal in the common parking lot where the accident allegedly occurred. Counsel claims that the moving party has a common law duty to maintain the parking lot (see e.g. Sarisohn v 341 Commack Rd., Inc., 89 AD3d 1007[2d Dept. 2011][a tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair]; Cohen v Cent. Parking Sys., 303 AD2d 353[2d Dept. 2003][the fact that the landlord was contractually responsible for snow and ice removal does not relieve the defendants from liability for the alleged dangerous condition on the premises]). Counsel claims that as the moving party failed to establish prima facie that it did not have actual or constructive notice of the defective condition the motion should be denied (citing Sarisohn v 341 Commack Rd., Inc., 89 AD3d 1007[2d Dept. 2011]; Reimold v Walden Terrace, Inc., 85 AD3d 1144 [2d Dept. 2011]). In addition, counsel requests that the motion be denied as premature, claiming that the issues of notice and whether the moving party contributed to the condition which caused the subject accident is within the exclusive knowledge and possession of the moving party (citing Gardner v Cason, Inc., 82 AD3d 930 [2d Dept. 2011]).

Counsel for Waldbaum Inc. and Cross-Path Realty, Michele L. Meiselman, Esq. opposes the motion on the ground that Duane Reade failed to establish, prima facie, that it is entitled to summary judgment as a matter of law and material issues of fact exist warranting denial of the motion. Counsel contends that the complaint alleges that all defendants created the allegedly defective condition, and thus Duane Reade must establish that it did not create the condition. In that regard, counsel contends that the self-serving affidavit of BiBi Judgeo is insufficient to make such a showing as he states that he had no personal knowledge of the accident, learning of it only after the commencement of the action. Counsel also states that as depositions have not been held, the exact location of the plaintiff's accident vis a vis its proximity to the Duane Reade store or the sidewalks adjacent to the store has not been determined. Counsel also asserts that it is premature to award summary judgment on the issue of contractual indemnification as there are triable issues of fact as to whose negligence, if any, caused the plaintiff's accident.

Upon review and consideration of the defendant's motion, the affirmations in opposition and the defendant's reply thereto, this court finds that the motion for summary judgment by the defendant Duane Reade dismissing the plaintiff's complaint and granting summary judgment on its counterclaim for indemnification against Cross-Path Realty is denied without prejudice to renew following the completion of discovery. As pointed out by the co-defendants, the courts have held that "a tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair" (Sarisohn v 341 Commack Rd., Inc., 89 AD3d 1007 [2d Dept. 2011]; also see Reimold v Walden Terrace, Inc., 85 AD3d 11 [2d Dept. 2011]; Giannattasio v Han Suk Kang, 57 AD3d 728 [2d Dept. 2008]; Cohen v Cent. Parking Sys., 303 AD2d 353 [2d Dept. 2003]).

However, a real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it (see Flores v BAJ Holding Corp., 94 AD3d 945 [2d Dept. 2012]; Cantwell v Fox Hill Community Assn., Inc., 87 AD3d 1106 [2d Dept 2011]).

Here, there are questions of fact as to exactly where the plaintiff fell, as Duane Reade was responsible for shoveling its own sidewalks, and whether the moving defendant created or had

actual or constructive notice of the dangerous condition. As the parties have not yet had an opportunity to depose the plaintiff or any of the co-defendants and as the parties have not yet had an opportunity to exchange all relevant documentary evidence, the defendants motion is denied as premature without prejudice to renew following the completion of discovery (see CPLR 3212(f); Park Edge Condominiums, LLC v Midwood Lbr. & Millwork, Inc., 109 AD3d 890 [2d Dept. 2013]; Wesolowski v St. Francis Hosp., 108 AD3d 525 [2d Dept. 2013]; Jones v American Commerce Ins. Co., 92 AD3d 844 [2d Dept. 2012]; Gardner v Cason, Inc., 82 AD3d 930 [2d Dept. 2011]; The parties have demonstrated that additional depositions and additional document discovery may produce evidence which will enable them to oppose the motion on the merits.

The branch of the motion for summary judgment against Cross-Path Realty on the issue of indemnification is also denied as premature as the party or parties who are liable for the causation of the accident has not yet been determined (see Fritz v Sports Auth., 91 AD3d 712 [2d Dept. 2012]; Martinez v City of New York, 73 AD3d 993 [2d Dept. 2010]

Dated: November 26, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.