

<b>Wahl v JCNYC, LLC</b>
2014 NY Slip Op 31458(U)
June 3, 2014
Supreme Court, New York County
Docket Number: 100662/2012
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ

*Justice*

PART 13

DORIS WAHL,

Plaintiff,

-against-

JCNYC, LLC., and CITIBANK, N.A.,

Defendant(s).

INDEX NO. 100662/2012

MOTION DATE 04-09-2014

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 12 were read on this motion and cross-motion to/ for Declaration.

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

Answering Affidavits — Exhibits \_\_\_\_\_ cross motion JUN 06 2014

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-2, 3-4

5-6, 7-8, 9

10, 11, 12

Cross-Motion:  Yes  No **NEW YORK COUNTY CLERKS OFFICE**

Upon a reading of the foregoing cited papers, it is Ordered that defendant Citibank's motion for Summary Judgment dismissing the Complaint and cross claims as against Citibank is granted. Defendant JCNYC, LLC's motion for Summary Judgment dismissing the Complaint and cross claims as against it, is denied.

In this action to recover damages for personal injuries allegedly sustained by plaintiff, Doris Wahl, defendants JCNYC, LLC (herein LLC) and Citibank (herein Citi), move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint. Defendants cross-move against one another seeking Summary Judgment on their cross claims and for contractual indemnification.

Plaintiff allegedly sustained injuries as a result of a trip and fall on December 7, 2011 on the sidewalk abutting a Citi branch at 1512 1<sup>st</sup> Avenue, New York, New York (herein Premises). Citi leases the Premises from the LLC. Plaintiff alleges that a raised corner section of flagstone on the sidewalk on the side of the Citi branch resulted in plaintiff tripping and falling. In her Examination Before Trial, plaintiff testified that at the time of the fall, she did not see the raised part of the sidewalk because it was raining heavily and the raised part of the sidewalk was covered in a puddle of water. Plaintiff has lived near the Premises for about 10 years and recalls seeing the elevated portion of the sidewalk prior to her fall because she walks past that area at lease once per month.

Plaintiff commenced the instant action against defendants based upon the allegation that they maintained the area upon which plaintiff tripped. The co-defendants cross-claimed against one another for indemnification pursuant to the lease agreement (herein Lease).

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

**FILED**

Citi now moves for Summary Judgment dismissing the Complaint as against it, arguing that Citi does not owe a duty to plaintiff and cannot be held liable for the alleged defective condition, and that the alleged defect is trivial in nature. Citi moves for Summary Judgment dismissing LLC's cross claims arguing that Citi has no duty to maintain the sidewalk pursuant to Administrative Code of NY sec 7-210, which imposes a duty on the owner of real property, not a tenant, of an abutting sidewalk, to maintain such sidewalk in a reasonably safe condition. Citi asserts that it has no contractual obligations to maintain or repair the sidewalk abutting the Premises pursuant to the Lease. Citi seeks costs and legal fees as against LLC pursuant to the Lease.

LLC moves for Summary Judgment dismissing plaintiff's Complaint as against it arguing that LLC did not create the alleged condition, did not have notice of the condition, and the alleged defect is de minimis and not actionable. LLC moves for Summary Judgment dismissing Citi's cross-claim and granting LLC's cross-claim asserting that Citi was responsible for the maintenance and repair of the abutting sidewalk pursuant to the Lease. LLC seeks costs and legal fees as against Citi pursuant to the Lease.

Plaintiff opposes both motions for Summary Judgment dismissing the Complaint arguing that the Administrative Code of New York Section 7-210 imposes a non-delegable duty on the owner of real property to maintain the adjoining sidewalk, and as such, LLC's motion should be denied. Plaintiff contends that defendants have not met their burden of proving that the defect is trivial and not actionable. Plaintiff asserts that LLC is an out-of-possession land lord and that Citi is responsible for performing sidewalk repairs pursuant to the Lease.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

New York City Administrative Code § 7-210 provides that it shall be the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition, and the owner shall be liable for any injury to person or property, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

Where it was undisputed that the tenant did not create the condition or make special use of the sidewalk, the Administrative Code of the City of New York § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk (*Collado v. Cruz*, 81 A.D.3d 542, 917 N.Y.S.2d 178 [1<sup>st</sup> Dept., 2011]). A tenant's motion for Summary Judgment dismissing the complaint as against the tenant should be granted even when there are "provisions of a lease obligating a tenant to repair the sidewalk," because these provisions "do not impose on the tenant a duty to a third party, such as plaintiff." (*Id.*, at 180, citing to *Tucciarone v. Windsor Owners Corp.*, 306 A.D.2d 162, 761 N.Y.S.2d 181 [1<sup>st</sup> Dept., 2003]). Even if a lease places the obligation to maintain sidewalks on a tenant, Section 7-210 imposes on a landlord a non-delegable duty to maintain sidewalks (*Reyderman v. Meyer Berfond Trust*, 90 A.D.3d 633, 935 N.Y.S.2d 28 [2<sup>nd</sup> Dept., 2011]).

Here, LLC has a non-delegable duty to maintain the sidewalk abutting the Premises and as such, may be liable for any personal injuries sustained that were proximately caused by the failure of LLC to maintain such sidewalk in a reasonably safe condition. Under the Administrative Code of the City of New York § 7-210, Citi, as a tenant, does not owe a duty to a third-party such as plaintiff, unless Citi created the condition.

Citi establishes through the EBT testimony of Rene Mondol (the Citi branch manager of the Premises), and through plaintiff's EBT testimony, that Citi neither created the defective condition or made special use of the sidewalk. Mondol testified that during the last two years of employment as branch manager at the Premises, he has not seen anyone working on, or fixing the sidewalk. Plaintiff testified that in the 10 years she's lived near the Premises, she has never seen the sidewalk abutting the Premises being repaired, and that she recalls seeing the defect in the sidewalk when she moved into the area, 10 years prior.

LLC does not produce contrary evidence, in admissible form, proving that Citi created the condition or made special use of the abutting sidewalk. Citi has no duty under the Administrative Code of the City of New York § 7-210 to maintain the abutting sidewalk. Citi makes prima facie showing of entitlement to judgment as a matter of law, and LLC does not rebut that prima facie showing. Plaintiffs Complaint and LLC's cross-claim as against Citi are dismissed.

On the issue of LLC's cross-claim for contractual indemnification as against Citi, the Lease provides that LLC "shall maintain and repair the structural elements of the Premises, both exterior and interior," and that Citi shall "repair and maintain in good condition the Building's systems and the non-structural elements of the interior of the Premises (see Lease, sections 9.1 and 9.2). Citi has met its burden of showing that the Lease does not shift responsibility for the defect in the sidewalk from LLC to Citi (see *Cucinotta v. City of New York*, 68 A.D.3d 682, 892 N.Y.S.2d 352 [1<sup>st</sup> Dept., 2009]). Citi is entitled to Summary Judgment dismissing LLC's cross claims for contractual indemnification against it premised on the indemnities provision of the Lease (*Id.*).

LLC has a statutory duty to maintain the sidewalk abutting the Premises pursuant to Administrative Code of the City of New York § 7-210. The Lease does not impose a contractual duty on Citi, as a tenant, to maintain the sidewalk abutting the Premises. The language in the Lease does not sustain LLC's claim for contractual indemnification as against Citi.

LLC's cross-motion for Summary Judgment dismissing the Complaint as against it, is denied. LLC argues it did not create the alleged condition, and did not have notice of the condition. To meet its prima facie burden in support of summary judgment on the issue of negligence the defendant is required to prove it had no actual or constructive knowledge of a dangerous defect or condition (*Burko v. Friedland*, 62 A.D. 3d 462, 878 N.Y.S. 2d 64 [N.Y.A.D. 1<sup>st</sup> Dept., 2009]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Luzinski v. Kenvic Associates*, 242 A.D.2d 246, 662 N.Y.S.2d 27 1<sup>st</sup> Dept., 1997] citing to, *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986]).

There is no evidence proving that LLC created the condition. However, in plaintiff's EBT, she testifies that the defect has been present for at least 10 years. The EBT testimony from plaintiff and Mondol establish that no work has been done for at least two years prior to the fall. Here, Summary Judgment is improper, as issues of fact remain as to whether LLC has actual or constructive notice of the alleged defect in the abutting sidewalk.

LLC argues that the alleged defect is de minimis and not actionable. "There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489 [1997]). The court will examine "facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance' of the injury." (*Id.* at 978). "However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (*Zelichenko v 301 Oriental Blvd., LLC*, 2014 N.Y. App. Div. LEXIS 3819, 2014 NY Slip Op 3829 [2<sup>nd</sup> Dept., 2014]).

As the moving party, LLC fails to make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence. LLC does not submit any evidence to show the defect was trivial and not actionable, such as expert testimony or a report from an expert examining the alleged defect. LLC relies solely on self-serving conclusions drawn by their counsel, which is insufficient to make a prima facie showing of entitlement to judgement as a matter of law.

On the issue of Citi's cross-claim for contractual indemnification as against LLC, contractual indemnification involves the parties agreeing to allocate risk and shift liability amongst themselves for injuries caused by one of the parties' negligent acts that proximately causes plaintiff's injuries. Pursuant to Section 12.5 of the Lease, Citi is entitled to contractual indemnification and reasonable attorneys fees "in connection with any occurrence in, or about the Premises (i) if arising out of a breach of Landlord's obligations under this Lease, or (ii) if caused by any act of Landlord or Landlord's agents or contractors." If LLC is found to be liable for plaintiff's injuries, Citi is entitled to indemnification and reasonable attorneys fees pursuant to the Lease. Citi's cross-motion for Summary Judgment seeking contractual indemnification is granted, to the extent awarding conditional Summary Judgment on the contractual indemnification cross-claim, pending a determination of LLC's liability.

Accordingly, it is ORDERED that CITIBANK'S Motion seeking Summary Judgment dismissing the Complaint as against it is granted, and it is further,

ORDERED, that CITIBANK's Motion for Summary Judgment on contractual indemnification as against JCNYC, LLC is granted, to the extent of awarding conditional summary judgment on the cross-claims for contractual indemnification against JCNYC, LLC, and it is further,

ORDERED that JCNYC, LLC's Motion for Summary Judgment dismissing the Complaint as against it is denied, and it is further,

ORDERED, that JCNYC, LLC's Cross-Motion for Summary Judgment as against CITIBANK is denied, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

**FILED**  
JUN 06 2014  
NEW YORK ENTER  
COUNTY CLERK'S OFFICE

*[Faint signature and stamp]*

Dated: June 3, 2014

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST       REFERENCE