

Firtell v 173-175 E. 91 Realty Corp.

2014 NY Slip Op 31799(U)

July 9, 2014

Supreme Court, New York County

Docket Number: 158299/2012

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
JAYNE FIRTELL,

Plaintiff,

Index No. 158299/2012
Motion Seq. 001 and 002

-against-

DECISION/ORDER

173-175 EAST 91 REALTY CORP., TPEC CORP.,
CVS PHARMACY, INC. and CVS ALBANY, LLC,

Defendants.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendant CVS Albany, LLC, incorrectly sued herein as CVS Pharmacy, Inc. (“CVS”) moves (seq. 001) for summary judgment dismissing the complaint of the plaintiff Jayne Firtell (“plaintiff”), and for judgment on its indemnification and breach of contract claims against its co-defendant 173-175 East 91 Realty Corp. (“173” or the “landlord”).

By separate motion (seq. 002), the landlord moves for conditional summary judgment on its cross claim for indemnification against CVS, and a hearing on the amount to be reimbursed.

In turn, plaintiff cross moves for summary judgment against the landlord under Adm. Code 7-210. All motions are consolidated for joint disposition herein.

Factual Background

Plaintiff alleges that on August 20, 2012, she tripped and fell as a result of a raised metal frame of a sidewalk cellar door located in front of a building located at 173-177 East 91st Street, New York, New York, which is owned by 173. As a result, plaintiff commenced this action against the landlord and CVS, a tenant of the building, alleging negligence and violations of sections 7-210 and 19-152 of the Administrative Code of the City of New York (“Adm. Code”),

and 2-09 of the Rules and Regulations of the City of New York (“Regs.”).

In support of dismissal, CVS argues that the deposition testimonies of its store manager, Amadou Ndiyae (the “CVS manager”) and one of the owners of 173, Joe Pecora (“Pecora”), and CVS’s lease with from the landlord, show that it was not in possession or control of the sidewalk or metal cellar doors, and not responsible for the maintenance or repair of such cellar doors. The testimony indicates that CVS employees and the CVS store manager were not aware of any issues or defects with the cellar door, and that CVS did not use the cellar doors for deliveries or access to the leased premises. Further, since Adm. Code 7-210 applies only to owners, CVS, a commercial tenant, cannot be held liable for violation of this section. And, even if CVS were found to be in control of the sidewalk and cellar doors, there is no evidence that CVS either created or had actual or constructive notice of the alleged defective doors. Further, CVS seeks common law and contractual indemnification from the landlord based on the terms of the lease agreement. The lease obligates the landlord to maintain and repair the subject sidewalk and cellar doors (§§57, 84), and obligates the landlord to indemnify CVS for injuries sustained in the portions of the subject building under the control of the landlord (§52(B)).

In opposition, the landlord argues that CVS’s motion is procedurally defective in that CVS failed to submit the amended complaint, which superceded the original complaint plaintiff submitted. Further, CVS cannot seek relief against the landlord on cross claims that have not been formally asserted. And, CVS failed to show that the lease obligates the landlord to indemnify CVS; instead, CVS is obligated to indemnify the landlord. The landlord argues that plaintiff’s accident did not occur in the portion of the building under its control, but occurred “about” the “Demised Premises.” The landlord’s indemnification obligation under Article 52(B)

of the rider to the lease was not triggered because the accident did not arise from the landlord's use, repair or maintenance of the portions of the building under its control, an act or omission of the landlord or its employees, or the landlord's breach of the lease. Instead, Article 52(A) applies to trigger CVS's indemnification obligation because the accident occurred in an area CVS was obligated to repair and maintain, occurred as a result of CVS's failure to maintain and repair the sidewalk, and occurred as a result of CVS's breach of its maintenance obligations. Thus, the landlord argues, it is entitled to judgment on its indemnification cross claims against CVS.

In reply, CVS argues that its inadvertent failure to attach the amended complaint is not fatal since there is no substantive difference between the original and amended complaint. Further, its failure is cured by the landlord's submission of the amended complaint with its motion, and by CVS's submission of such pleading in reply. And, the landlord is not entitled to indemnification from CVS because the evidence of repairs of the sidewalk cellar and lease shows that the landlord is the party responsible for the sidewalk cellar doors. The landlord is responsible for structural repairs to the public areas, which includes the sidewalk and cellar doors. And, although not previously asserted, CVS appends its cross claims for defense and indemnification against the landlord.

In turn, plaintiff argues that she is entitled to summary judgment against the landlord under Adm. Code 7-210. Plaintiff contends the evidence shows that the raised portion of the cellar door, which was more than one-half inch in height, was a substantial defect, for which the landlord had a non-delegable duty under Adm. Code 7-210 to repair.

In opposition, the landlord argues that deposition transcripts of the plaintiff, Percora, and the CVS manager are unsigned, and thus, are inadmissible and cannot support her motion. Nor

does plaintiff submit an affidavit in support of her motion. Further, there is no expert evidence that the defect was “substantial” or the result of the landlord's negligence. And, plaintiff failed address the landlord's affirmative defense that plaintiff’s injuries were caused by her own comparative fault.

In reply, plaintiff contends that Pecora’s deposition transcript was served and never returned within the time period set forth in CPLR 3116(a), and is thus admissible. Also, the photographs show that the cellar door defect was not trivial. Under Adm. Code 19-152, and Reg. 2-09, any differential equal to or greater than one-half of an inch is considered a substantial defect. And, there is no evidence that plaintiff did anything wrong, which is defendant’s burden to demonstrate.

Discussion

Since each side seeks summary judgment, each side bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Bellinson Law, LLC v. Iannucci*, 35 Misc 3d 1217(A), 951 NYS2d 84 (Sup. Ct., New York County 2012), *affd*, 102 AD3d 563, 958 NYS2d 383 [1st Dept 2013], *citing Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, [1985]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*Bellinson Law, LLC v. Iannucci*, 35 Misc 3d 1217, *supra*, *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986], *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980] and *Santiago v. Filstein*, 35 AD3d 184 [1st Dept 2006]).

At the outset, the Court finds that the record is sufficiently complete in order to assess the merits of the parties’ motions for summary relief. “Although CPLR 3212(b) requires that a

motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is ‘sufficiently complete’” (*Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 AD3d 675, 964 NYS2d 137 [1st Dept 2013], *citing Ayer v. Sky Club, Inc.*, 70 AD2d 863, 864, 418 NYS2d 57 [1st Dept 1979] [the parties were permitted to supplement the record by submitting a copy of the pleadings], appeal dismissed 48 NY2d 705, 422 NYS2d 68, 397 NE2d 758 [1979]). “The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted” (*Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 AD3d 675, *supra*, *citing Studio A Showroom, LLC v. Yoon*, 99 AD3d 632, 952 NYS2d 879 [1st Dept 2012] [the pleadings were filed electronically and were available for the court's consideration], *Pandian v. New York Health and Hospitals Corp.*, 54 AD3d 590, 591, 863 NYS2d 668 [1st Dept 2008] [the pleadings were attached to the reply papers]; *Welch v. Hauck*, 18 AD3d 1096, 1098, 795 NYS2d 789 [summary judgment properly granted to plaintiff on cross motion where pleadings were attached to defendant's motion for summary judgment]). Otherwise, the failure to include pleadings renders the motion procedurally defective (*Washington Realty Owners, LLC v. 260 Washington Street, LLC*, 105 AD3d 675, *supra*). Here, the amended complaint was submitted in CVS's reply and in connection with the landlord's motion. Therefore, CVS's motion is not fatally defective.

Further, the Court finds that the unsigned transcripts may be considered in support of the motions. CPLR §3116 (a) requires the deposed party's signature on a deposition transcript before it can be used as a deposition (*Morchik v. Trinity School*, 257 AD2d 534, 684 NYS2d 534 [1st Dept 1999], *citing Zabari v. City of New York*, 242 AD2d 15, 17, 672 NYS2d 332 [1st Dept

1998]). However, “[I]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed” (CPLR 3116 [a]).¹ Here, the record establishes that plaintiff’s and Pecaro’s transcripts were forwarded to their counsel for the witnesses’ execution, but executed copies were never returned. Further, no party challenged the accuracy of the testimony of the deposition transcripts submitted, which were transcribed and certified as accurate by the respective court reporters (*see Morchik v. Trinity School*, 257 AD2d 534, 684 NYS2d 534 [1st Dept 1999] (noting that “this court has even found a deposition transcript admissible as such when it was certified but not signed [*Zabari v. City of New York*, 242 AD2d 15, 17, 672 NYS2d 332]”). And, an “unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion (*Morchik v. Trinity School*, *supra* citing *R.M. Newell Co. v. Rice*, 236 AD2d 843, 844, 653 NYS2d 1004, lv. denied 90 NY2d 807, 664 NYS2d 268, 686 NEJuly 9, 20142d 1363).

CVS’s Motion

To establish a *prima facie* case of negligence, plaintiff must prove that the defendants owed him or her a duty of care, and breached that duty, and that the breach proximately caused his or her injury (*Solomon v. City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v. Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). In a premises liability case, as here, plaintiff must also demonstrate that the defendant created the dangerous condition which caused plaintiff’s injury or had actual or constructive

¹ CPLR §3116 (Signing deposition [. . .]) provides in relevant part as follows:

“(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes [. . .] which the witness desires to make shall be entered [. . .] The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed.”

notice of the condition, which it failed to remedy within a reasonable amount of time (*Rosado v. Home Depot*, 4 AD3d 204, 772 NYS2d 268 [1st Dept 2004], citing *Gordon v. American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

The record establishes that plaintiff was walking on the sidewalk on 91st Street, adjacent to the CVS store, and fell when her right shoe got “caught” on “the frame of the cellar door,” which was raised above the sidewalk surface. (Plaintiff EBT, pp. 17-18). Plaintiff testified that a woman walking on her left “shifted” toward her, “away from the cone” on the sidewalk, causing plaintiff to “shift over” to the right “over the cellar door” (EBT, pp. 13-16). “All of a sudden” plaintiff fell (EBT, p. 17). Plaintiff also identified photographs depicting the cellar door and the condition which allegedly caused her to fall (EBT, pp. 21-22).

On its motion, CVS established, through the testimony of its store manager, that CVS “never” used the cellar doors or took deliveries through the cellar doors, but took deliveries through an entirely different “receiving door” “on the other side” (EBT, pp. 12, 14). The store manager did not know who was responsible for fixing or maintaining the cellar doors, and to his knowledge, CVS did not repair or maintain the cellar door. (EBT, pp. 14, 17-18). When shown photographs of the cellar doors, the store manager stated that there was a difference in height, but that he did not notice it before the date of the accident (EBT, p. 22). Other than sweeping the sidewalk area, no one at CVS checks or inspects the condition of the sidewalk (EBT, pp. 28-29). However, if he had seen the condition of the cellar door depicted in the photograph, he would have called “the super” because “this can hurt somebody” and CVS would not fix such condition (EBT, pp. 30-31). Pecora likewise testified that the cellar doors did not service or lead to CVS,

but was an emergency exit for the adjacent karate school, which did not have any responsibility to maintain or fix the vault doors (EBT, pp. 14, 21-22). Percora also testified that the landlord hired a “family friend” to “change” “the actual vault” “metal doors” (EBT, pp. 15-17). And, CVS’s lease describes the demised premises as “the store front space and partial basement as shown on Exhibit A attached hereto.”

With regard to the obligation to repair the cellar doors, unless a lease specifically obligates a commercial tenant to be responsible for structural repairs, and identifies what structural repairs are covered, such an obligation will not be implied nor imposed by the courts (*Remusat v. East End Associates, LLC*, 2013 WL 6815171 [Sup. Ct., New York County; *Langston v. Gonzalez*, 39 Misc.3d 371, 958 NYS2d 888 [Sup. Ct., Queens County 2013] *citing Cucinotta v. City of New York*, 68 AD3d 682, 892 NYS2d 352 [1st Dept 2009]). Furthermore, repairs to a public sidewalk are considered structural, not non-structural repairs (*Langston, supra citing Cucinotta v. City of New York, and Wolfe v. Gallery Partners, LLC*, 2012 N.Y. Slip Op. 32301[U], 2012 WL 4029790 [Sup. Ct., New York County]).

The lease rider provides that “Landlord shall make . . . all necessary repairs, maintenance or replacements to, *the exterior* (excluding Tenant’s storefront as set forth below [which is on the Third Avenue]²) *and the structural portions* of the Demised Premises . . . so as to keep the same in good condition and repair . . .” (Rider, ¶84 (emphasis added)). Thus, contrary to the landlord’s contention, the lease does not limit the landlord’s obligation concerning sidewalks solely to the area “located directly between the street and the public entrance way to the Building” (which is on Third Avenue) (Rider, ¶57). Section 4 of the lease also states that the

² See landlord opposition papers, page 8.

tenant is required to make “*non-structural repairs*” to the sidewalk and to keep them in “good working order and condition.” And, not inconsistent therewith, paragraph 57 of the rider, entitled cleaning, removal of snow and garbage, obligates the “Tenant” CVS to keep that the “Demised Premises, including the sidewalk area . . .” “Clean and *in good repair*” (emphasis added). Thus, CVS established that it was not responsible for and did not control the subject cellar door which allegedly caused plaintiff’s accident.

Moreover, and based on the deposition testimonies, there is no indication that CVS created or had any actual or constructive notice of the alleged dangerous condition of the cellar doors prior to the date of plaintiff’s accident.

And, it is uncontested that CVS, as the commercial tenant, is not liable to the plaintiff under Adm. Code 7-210.³

Therefore, CVS established its entitlement to dismissal of plaintiff’s complaint as asserted against it.

As to CVS’s motion for summary judgment against the landlord for indemnification, it is noted that CVS’s answer did not include a cross-claim for this relief. However, the landlord fully opposed and addressed the merits of CVS’s arguments and CVS formally interposed such cross claim in further support of its motion. Therefore, since the landlord had a full opportunity to, and did oppose, CVS’s request for indemnification, the Court proceeds to address this branch of CVS’s motion (*see, e.g., Apartment Recycle Co. Of Manhattan Inc. v. AIU Ins. Co.*, 10 Misc

³ As relevant herein, New York City Code § 7-210, recites in pertinent part that “a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition. b. ... the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.”

3d 1066, 814 NYS2d 559 [Sup. Ct., New York County 2005] *citing Fiore v. Oakwood Plaza Shopping Center, Inc.*, 164 AD2d 737, 739 [1st Dept], *affd*, 78 NY2d 572 [1991], *cert denied*, 506 US 823 [1992] (acknowledging an exception to the maxim excluding arguments advanced in a movant's reply papers: where the opposing party 'availed themselves of an opportunity to oppose the claims in their surreply,' the movant's arguments may be considered on their merits")).

Here, CVS established its entitlement to contractual indemnification from the landlord.

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v. Atlantic Scaffold & Ladder Co Inc.*, 70 NY2d 774, 777 521 NYS 2d 216 [1987]; *Masciotta v. Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

Here, section 52(B) of the lease provides:

“Landlord covenants and agrees to indemnify and save tenant harmless from and against any and all claims, losses, damages or expenses or other liability arising during the term of this Lease out or in connection with (i) any use, repair or maintenance of the portions of the Building under the control of the Landlord”

The record establishes that the subject cellar doors which allegedly caused plaintiff's accident was under the control of the Landlord and that the Landlord was obligated to repair and maintain same.

Contrary to the landlord's claim, the plaintiff's injuries did not occur in an area “on or about” the demised premises so as to trigger CVS's obligation to indemnify the landlord, pursuant to section 52(A). Although the Court of Appeals in *Hogeland v. Sibley, Lindsay &*

Curr Co. (42 NY2d 153 [1977]) interpreted the phrase “in or about” to include the sidewalk area surrounding a demised premises, the Court noted that its application was “in the context of the facts of this case” and it is noted that the plaintiff in *Hogeland* fell over a concrete planter box on the sidewalk which was constructed pursuant to the department store tenant’s architectural plans and whose “presence was obscured by unremoved snow and slush.”

However, CVS failed to establish its entitlement to common law indemnification.

“Common-law indemnification requires proof [] that the proposed indemnitor's negligence contributed to the causation of the accident and] that the party seeking indemnity was free from negligence” (*Martins v. Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] citing *Correia v. Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]; *Espinoza v. Federated Dept Stores, Inc.*, 73 AD3d 599, 904 NYS2d 3 [1st Dept 2010]). Here, it cannot be said that the landlord was negligent as a matter of law with respect to plaintiff’s accident (*see infra*, page 12). Thus, CVS is not entitled to common law indemnification from the landlord.

Further, CVS failed to set forth any arguments in support of its breach of contract claims against the landlord, and as such, its request for summary judgment on this claim is denied.

Landlord’s Motion for Summary Judgment

In light of the above findings, the landlord’s request for indemnification from CVS is unwarranted, and denied.

Plaintiff’s Cross-Motion

Plaintiff’s cross-motion for summary judgment against the landlord under Adm. Code 7-210 is denied.

The question of "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Trincere v. Cnty. of Suffolk*, 90 NY2d 976, 977, 688 NE2d 489 [1997] citing *Guerrieri v. Summa*, 193 AD2d 647 [2d Dept 1993]).

It is well settled that "[t]here 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, supra*). In determining whether a defect is trivial in nature, the court must examine the facts of each case "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Id.*; *Nin v. Bernard*, 257 A.D.2d 417, 683 N.Y.S.2d 237 [1st Dept 1999]).

Here, plaintiff failed to establish that the alleged defect was not trivial in nature, so as to constitute an actionable defect. The accident allegedly occurred during a "beautiful" day

The deposition testimonies do not firmly establish the height of the differential between the sidewalk and cellar door and the color photographs of the subject cellar door fail to show any significant height differential (*see Boynton v. Haru Sake Bar*, 107 AD3d 445, 968 NYS2d 430 [1st Dept 2013] ("an alleged hazardous one-half-inch differential between the level of the sidewalk and the frame to the cellar hatch doors fails. Photographic evidence shows that the height differential is trivial, and an insufficient basis for finding liability on the part of defendant"); *Fayolle v. East West Manhattan Portfolio L.P.*, 108 AD3d 476, 970 NYS2d 186 [1st Dept 2013] (the "alleged defect—a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs—was 'trivial' and therefore nonactionable)). The record indicates that plaintiff's accident occurred on a

“Beautiful” day, during the daylight hours (in the “early afternoon”) (EBT, p. 11) (*Riley v. City of New York*, 50 AD3d 344, 854 NYS2d 400 [1st Dept 2008]) (action dismissed where top edge of a cellar door that was *slightly elevated* above the sidewalk, and plaintiff’s deposition testimony established that the accident occurred in *daylight in an area* that he traveled on a daily basis) (emphasis added)).

That the plaintiff and Pecora testified that there was a height differential between the sidewalk and cellar door, and that the raised portion was “maybe” at least half an inch, that Pecora would have fixed, is insufficient to impose liability as a matter of law. Further, the testimony of CVS’s store manager that the height differential “could have hurt somebody” is not an admission by the landlord that the height differential was an actionable defect.

Therefore, plaintiff’s motion for summary judgment against the landlord is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant CVS Albany, LLC, incorrectly sued herein as CVS Pharmacy, Inc. (seq. 001) for summary judgment dismissing the plaintiff’s complaint, and for judgment on its indemnification and breach of contract claims against defendant 173-175 East 91 Realty Corp. is granted to the extent that the complaint is severed and dismissed as against CVS, and summary judgment on CVS’s claim for contractual indemnification against the landlord is granted; and it is further

ORDERED that the motion by defendant 173-175 East 91 Realty Corp. (seq. 002) for conditional summary judgment on its cross claim for indemnification against CVS, and a hearing on the amount to be reimbursed is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment against 173-175 East 91 Realty Corp. under Adm. Code 7-210 is denied; and it is further

ORDERED that CVS Albany, LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 9, 2014

A handwritten signature in black ink, appearing to read 'Carol Robinson Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, J.S.C.

Hon. **CAROL EDMEAD**
J.S.C.