

Cottrell v F.C. Foley Square Assoc., LLC

2014 NY Slip Op 31891(U)

July 21, 2014

Sup Ct, New York County

Docket Number: 100522/2011

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 100522/2011
COTTERELL, KEVIN P.
vs.
FC FOLEY SQUARE ASSOCIATES
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JUL 22 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/21/14


HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ~~GRANTED~~ DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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 005

-----X
KEVIN P. COTTERELL and REINA COTTERELL,

Plaintiffs,

- against -

F.C. FOLEY SQUARE ASSOCIATES, LLC,
STARBUCKS CORPORATION d/b/a STARBUCKS
COFFEE COMPANY and CITY OF NEW YORK,

Defendants.

-----X
F.C. FOLEY SQUARE ASSOCIATES, LLC,
Index No. 590018/12
Third-Party Plaintiff,

- against -

STARBUCKS CORPORATION,

Third-Party Defendant.
-----X

HON. KATHRYN FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION BY STARBUCKS AND AFF. ANNEXED....	.1,2(Exs. A-M)
NOTICE OF MOTION BY FC FOLEY AND AFF. ANNEXED.....	.3,4(Exs. A-S)
ANSWERING AFFIDAVIT.....	..5(Exs. A-E)..
ANSWERING AFFIDAVIT.....6.....
AFFIRMATION IN PARTIAL OPPOSITION.....	..7(Exs. A-B)..
REPLYING AFFIDAVITS.....8,9,10.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

DECISION/ORDER

Index No. 100522/2011
Seq. No. 001

PRESENT:

Hon. Kathryn E. Freed,
J.S.C.

FILED

JUL 22 2014

**COUNTY CLERK'S OFFICE
NEW YORK**

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Motions designated Sequence Numbers 001 and 002 are consolidated for disposition. Defendants Starbucks Corporation s/h/a Starbucks Corporation d/b/a Starbucks Coffee Company (“Starbucks”) (Motion Sequence Number 001) and F.C. Foley Square Associates, LLC (“FC Foley Square”) (Motion Sequence Number 002) move, pursuant to CPLR 3212, for summary judgment dismissing the Complaint and all cross claims against them.

BACKGROUND

Plaintiffs Kevin P. Cotterell and Reina Cotterell, husband and wife, commenced this action seeking to recover damages from defendants for personal injuries allegedly sustained by Kevin P. Cotterell on February 1, 2010, when he slipped and fell on a pedestrian ramp at the northwest corner of Worth and Lafayette Streets in Manhattan. The pedestrian ramp is adjacent to the building at 111 Worth Street, New York, New York. FC Foley Square owns the building and leases a portion of the ground floor to Starbucks, which operates a retail store.

Plaintiffs essentially claim that Kevin P. Cotterell slipped on ice on the pedestrian ramp adjacent to 111 Worth Street, sustaining serious injury. Climatological Data for January 2010 reveals that .09 inches of snow fell in Manhattan on January 28, 2010, during the last snowfall before the alleged incident (Affirm in Opp, Exh B).

The original Complaint alleged a claim against FC Foley Square and defendant City of New York (the “City”) for negligence in the removal of ice from the pedestrian ramp (first cause of action), and a claim for loss of consortium on behalf of Reina Cotterell (second cause of action). In its answer, FC Foley alleged crossclaims for contribution and indemnification against the City.

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FC Foley Square also commenced a third-party action against Starbucks, alleging claims for contribution, indemnification, and breach of contract based upon Starbucks' failure to procure insurance covering FC Foley Square. Starbucks' answer includes counterclaims for negligence and contractual indemnification against FC Foley Square.

Thereafter, plaintiffs filed an amended Complaint, adding Starbucks as a named defendant, and alleging claims for negligence and loss of consortium. Defendants' answers include general denials, affirmative defenses, and cross claims against co-defendants for contribution and indemnification.

Starbucks and FC Foley Square now seek summary judgment dismissing the amended Complaint and all cross claims against them.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See Zuckerman v City of New York, supra*. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

As stated, plaintiffs seeks to recover damages from defendants for negligence. Kevin P. Cotterell testified at a 50-h hearing held on May 18, 2010 and an examination before trial (“EBT”) held on September 27, 2012, that he slipped and fell on the pedestrian ramp in front of 111 Worth Street, as he walked east on the north side of Worth Street and attempted to cross Broadway to get to Lafayette Street to attend a meeting at 125 Worth Street. Tr of 50-h Hearing, Affirm in Opp, Exh A, pp. 19-21; EBT of Cotterell, Not of Mot (Seq. No. 001), Exh G, pp. 17-19). Non-party Amy Hoffman testified at an EBT held on November 28, 2012, that she, too, walked along Worth Street to attend the same meeting, and that although she did not see plaintiff fall, she heard the sound of someone hitting the pavement, and turned to see plaintiff on the ground with his rear end at the top of the pedestrian ramp and his legs at the bottom of it. EBT of Hoffman, Not of Mot, Exh K, pp. 17, 20-22.

Negligence is the breach of a duty, resulting in injury. *See Pulka v Edelman*, 40 NY2d 781, 782 (1976). The gravamen of the amended complaint is that defendants breached a duty to keep the pedestrian ramp free from snow and ice, resulting in injury to plaintiffs.

Plaintiffs claim that §7-210 of the Administrative Code of the City of New York (“Administrative Code”) imposes a duty on FC Foley Square to maintain the sidewalks around its premises, including removing snow and ice. Plaintiffs also assert that the lease between Starbucks and FC Foley Square created a duty for Starbucks to remove snow and ice from the sidewalk.

In seeking summary judgment, Starbucks and FC Foley Square deny breaching any duty to plaintiffs. Starbucks argues that any obligation to remove ice and snow arising under the lease would run from it to FC Foley Square and, in any event, would not extend beyond the sidewalk

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to the pedestrian ramp where Kevin P. Cotterell allegedly fell. Starbucks further asserts that FC Foley Square assumed full responsibility for removing all snow and ice from the sidewalk surrounding the premises.

FC Foley Square also denies owing any duty to remove snow and ice from the pedestrian ramp where plaintiff fell. Instead, FC Foley Square asserts that the City is responsible for snow and ice removal from pedestrian ramps.

FC Foley Square further argues that the alleged ice upon which plaintiff fell was a transient condition, for which it cannot be held liable and, in any event, it did not have any notice of the alleged icy condition.

In addition, FC Foley Square adopts plaintiffs' argument that the lease requires Starbucks to remove snow and ice from the sidewalk of the premises. Defendant further asserts that the lease required Starbucks to maintain a \$5 million commercial liability insurance policy naming it as an additional insured against any liability arising out of Starbucks' use, occupancy, or maintenance of the premises, and to defend and indemnify it against any liability arising from Starbucks' negligence, unlawful conduct, or breach of the lease.

Defendants offer EBT testimony of the parties and witnesses, and their lease to support their positions.

In fact, the commercial lease, dated April 17, 2002, between FC Foley Square and Starbucks states, in part, that Tenant must keep the premises, including the store front, in good order and repair. Commercial Lease, Not of Mot(002), Exh K, ¶6.2. Furthermore, Exhibit F to the lease, entitled Rules and Regulations, states that "[a]ny tenant whose premises are situate on

the ground floor of the Building shall, at said tenant's own expense, keep the sidewalks and curb directly in front of said premises clean and free from ice and snow." id., Exh F to Lease, ¶1.

However, Anthony Mota, an employee of FC Foley Square and superintendent of the residential building owned by FC Foley Square at 111 Worth Street, testified at an EBT held on October 4, 2012, that FC Foley Square alone undertakes snow and ice removal from the sidewalks around its premises. EBT of Mota, Not of Mot, Exh I. Mr. Moto stated that he supervises a maintenance staff of approximately nine people, whose responsibilities include sidewalk snow and ice removal. id., pp. 10-11. He further testified that he and his staff are responsible for removing snow and ice from the entire sidewalk around the premises owned by FC Foley Square, including the sidewalk in front of Starbucks. id., pp. 27-28.

Furthermore, at an EBT held on October 11, 2012, Nicole Matulewich, the Starbucks store manager, corroborated Mr. Mota's statements that FC Foley Square alone undertook snow and ice removal from the sidewalks around its premises. EBT of Matulewich, Not of Mot, Exh J. Ms. Matulewich testified that Starbucks did not perform any maintenance outside the store, except cleaning the outer windows. id., Exh J, p. 9. She also testified that Starbucks did not have any snow removal program in place (id., p. 14), and that on occasions where there was snow on the sidewalk in front of Starbucks and it needed to be removed, the building maintenance staff would remove it. id. She also testified that she has observed building maintenance personnel removing snow from the sidewalk. id., p. 17.

While the lease between Starbucks and FC Foley Square called for Starbucks to remove snow and ice from the sidewalk in front of the its retail store, it did not require Starbucks to remove snow and ice from the pedestrian ramp where the alleged incident occurred.

Furthermore, the evidence presented amply demonstrates that FC Foley Square assumed the responsibility for snow and ice removal by undertaking a course of action upon which Starbucks reasonably relied. *See Heard v City of New York*, 82 NY2d 66, 72-73 (1993). As such, Starbucks satisfactorily establishes the absence of any duty to do so. Without a duty, there can be no breach. *See Pulka v Edelman, supra*. Thus, Starbucks is entitled to summary judgment dismissing the negligence claim against it.

Moreover, FC Foley Square's claims against Starbucks for contribution or indemnification must fail. FC Foley Square asserts that the lease requires Starbucks to maintain a commercial general liability insurance policy naming FC Foley Square as an additional insured (*id.*, ¶8.1), and to defend, indemnify, and hold FC Foley Square harmless from all liabilities stemming from any third party claims arising out of Starbucks' negligence. *id.*, ¶8.5.

However, FC Foley Square offers nothing to establish negligence on the part of Starbucks which resulted in injury to plaintiffs. As stated, the submissions make clear that FC Foley Square retained control of all snow and ice removal efforts at the premises. When a landlord retains control over a portion of the demised premises, it remains liable for any alleged injuries resulting the faulty condition of said premises. *See Worth Distribs. v Latham*, 59 NY2d 231, 238 (1983). Control over the premises may be established by a course of conduct demonstrating that the landlord assumed responsibility to maintain a particular portion of the premises. *See Ritto v Goldberg*, 27 NY2d 887, 889 (1970). As such, FC Foley Square, and not Starbucks, is liable for injuries resulting from its own snow and ice removal efforts. Therefore the claims against Starbucks are dismissed.

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Plaintiff's attempt to impose liability on FC Foley Square based on § 7-210 of the Administrative Code is also insufficient as a matter of law, as that regulation does not impose a duty on real property owners to remove snow and ice from pedestrian ramps. Section 7-210 states, in part:

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, 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 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

(Administrative Code §7-210). It is well established that a pedestrian ramp is not part of the sidewalk for the purpose of imposing liability on abutting landowners pursuant to §7-210 of the Administrative Code. *See Vidakovic v City of New York*, 84 AD3d 1357, 1358, 2d Dept 2011).

Here, it is undisputed that the alleged incident occurred on the pedestrian ramp. As such, §7-210 of the Administrative cannot serve to impose on FC Foley Square a duty of snow and ice removal under the circumstances presented herein. Thus, FC Foley Square has established a prima case of entitlement to summary judgment dismissing the negligence claim.

In opposition, however, plaintiffs argue that triable issues of fact exist as to whether FC Foley Square created or exacerbated an alleged dangerous condition by undertaking snow removal efforts in the area after the last snowfall before the alleged incident. When a party, by

its affirmative acts of negligence, has created or increased a dangerous condition which is the proximate cause of plaintiff's injury, it may be held liable in tort. *See Figueroa v Lazarus Burman Assocs.*, 269 AD2d 215, 217, (1st Dept 2000). Moreover, in such a situation, a plaintiff is not required to show actual or constructive notice of the dangerous condition. *id.*

Here, plaintiffs offer the testimony of Edwin Perez, a supervisor with the City's Department of Sanitation, taken at an EBT held on September 27, 2012. EBT of Perez, Not of Mot, Exh H. Mr. Perez stated that he is assigned to Manhattan Garage 1, which is responsible for trash removal, street cleaning, and snow removal at the intersection of Worth and Lafayette Streets. *id.*, Exh. H, p. 8. Mr. Perez also testified that the Department of Sanitation engages in snow removal at catch basins, bus stops, hydrants, and corner caps or pedestrian ramps. *id.*, p. 10. However, he stated that the Department of Sanitation did not perform sidewalk snow removal following the January 28, 2010 snowfall. *id.*, p. 17.

Plaintiffs also offer the EBT testimony of FC Foley Square's superintendent, Mr. Mota, that in January and February 2010, he and his staff removed snow and ice from the pedestrian ramps around the premises, including the pedestrian ramp where plaintiff allegedly fell. (EBT of Mota, *supra.*, p. 30.

Upon review of the foregoing submissions, this Court concludes that plaintiffs have met their burden of establishing the existence of material issues of fact which require a trial. Having undertaken to clean the pedestrian ramp, FC Foley Square was required to exercise reasonable care in so doing, or be held liable in negligence where its acts created or increased the hazard in ice and snow on city sidewalks. *See Glick v City of New York*, 139 AD2d 402, 403 (1st Dept 1988). As it may reasonably be inferred that the ice on which plaintiff slipped was the residue of

defendant's incomplete or incompetent snow removal efforts, a triable issue of fact exists as to whether FC Foley Square's conduct created or increased a hazard that would not have existed but for defendant's actions. *See Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 212 (1st Dept 1988). Thus, FC Foley Square's request for summary judgment must be denied.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant Starbucks Corporation for summary judgment is granted and the complaint and cross claims against Starbucks Corporation are dismissed, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the motion by defendant F.C. Foley Square Associates, LLC's for summary judgment is denied; and it is further,

ORDERED that the action shall continue as to defendants F.C. Foley Square Associates, LLC and the City of New York; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the Court.

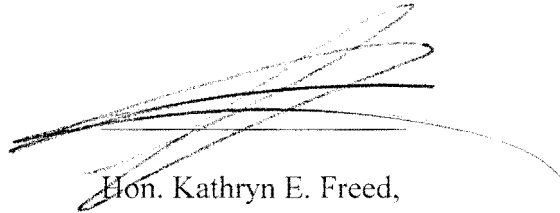
DATED: July 21, 2014

FILED

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JUL 22 2014

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Hon. Kathryn E. Freed,
J.S.C.