Suarez v Shapiro Family Realty Assoc., LLC
2014 NY Slip Op 32835(U)
October 31, 2014
Supreme Court, New York County
Docket Number: 155825/2013
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Dolores S. Suarez,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 155825/2013

Shapiro Family Realty Associates, LLC,
Kern 90, LLC, Rose Associates, Inc., and
Duane Reade, Inc.,

Defendants.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-8
Answering Opposition Affirmations and Exhibits	9-20
Reply Affirmations	21-23

In this personal injury action, defendant Duane Reade, Inc. (Duane Reade) moves for an Order, pursuant to CPLR §3212, dismissing the complaint. Defendant also seeks summary judgment on its claim against co-defendants Shapiro Family Realty Associates, LLC, Kern 90, LLC, and Rose Associates, Inc., (co-defendants/Shapiro) for indemnity and attorney's fees.

Factual Background

On May 26, 2011, plaintiff Dolores Suarez (Suarez) tripped and fell over an alleged defect in a sidewalk located outside a Duane Reade store located at 40 East 89th Street, New York, New York (the premises). Shapiro Family Realty Associates, LLC and Kern 90, LLC own the subject premises. Rose Associates, Inc., is the managing agent. Duane Reade is the ground floor commercial tenant.

Plaintiff served a summons and complaint dated June 14, 2013, naming Shapiro Family Realty Associates, LLC, Kern 90 LLC, Rose Associates, Inc., and Duane Reade, Inc., as

defendants. Issue was joined by Duane Reade on or about July 3, 2013, and by co-defendants on or about October 8, 2013. The case commenced with initial discovery. At the time of Duane Reade's filing of this motion for summary judgment, plaintiff had not yet served the Bill of Particulars. A preliminary conference has not yet been held. No depositions of any party have been conducted. Plaintiff did, however, provide 44 photographs of the sidewalk of the alleged defect in a discovery response dated November 18, 2013.

In support of its motion, Duane Reade relies on an affidavit by Christopher Nigro, the Facilities Asset Manager for Duane Reade. According to his affidavit, the subject Duane Reade did not perform, or hire anyone to perform, sidewalk repairs and/or maintenance. He further states that pursuant to the terms of the applicable lease, Duane Reade had no duty to make sidewalk repairs/maintenance. Additionally, he stated that there is no record of Duane Reade hiring an outside contractor to perform any repairs or maintenance, and no employees of Duane Reade performed any repairs or maintenance to the sidewalk. The affidavit also states that Duane Reade did not make use of the sidewalk for any exclusive or special business purposes.

Arguments

Defendant Duane Reade argues that this matter must be dismissed because:(1) the alleged defect in the side walk is trivial and not actionable as a matter of law; and (2) that Duane Reade has no duty to maintain the subject sidewalk. Duane Reade also contends that it is entitled to summary judgment on its claims for indemnification and attorney's fee as against co-defendants as per the written lease agreement.

Plaintiff argues that summary judgment is premature because there remain triable issues of fact as to movant's responsibility regarding the maintenance of the subject sidewalk.

Co-defendants argue that summary judgment is premature because substantial discovery is

outstanding and that there exist triable issues of fact regarding the interpretation of the lease agreement.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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 eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]). The burden is satisfied only by defendant's affirmative demonstration of the merits of the defense by submission of evidence as to when the area of the alleged accident was last inspected and/or cleaned, and a defendant does not carry its burden by pointing to gaps in its opponent's proof. (*Sabalza v. Salgado,* 85 A.D.3d 436 [1st Dept. 2011]; *Shaft v. Motta*, 73 A.D.3d 729 [2nd Dept. 2010]; *Edwards v. Great Atlantic & Pacific Tea Co., Inc., supra; Alvarez v. 21st Century Renovations LTD.,* 66 A.D.3d 524 [1st Dept. 2009]; *Bryan v. 250 Church Associates, LLC,*

60 A.D.3d 578 [1st Dept. 2009]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must prove that what caused her to fall was a dangerous condition, and that defendant had either created the dangerous condition, or had actual and/or constructive notice of the defective condition which proximately caused her accident (see *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 492 N.E.2d 774 [1986]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a hazardous condition *(Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept. 2009]; *Baez-Sharp v NYC Tr. Auth.*, 38 AD3d 229 [1st Dept. 2007]). There is no rule that pavement defects have to satisfy some minimum dimension to be actionable; instead it depends on the specific facts and circumstances of each case, 'including the width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance' of the injury." (*Trincere v. County of Suffolk,* 90 N.Y.2d 976, 978 [1997]).

Here, the movant relies only on the photographs presented by plaintiff of the alleged defect in the subject sidewalk. Initially, it is noted that the photographs have not been authenticated–they are not accompanied by any affidavit or deposition testimony. Furthermore, because no depositions have been held, there is no testimonial evidence regarding the time, place, and circumstance of plaintiff's fall, which would have bearing on whether or not the alleged defect is so trivial as to not be actionable. As such, defendant has not eliminated all issues of fact as to the nature and size of the alleged defect to warrant the defect *de minimis* as a matter of law.

The NYC Administrative Code § 7-210, titled Liability of Real Property Owner for Failure to Maintain Sidewalk in a Reasonably Safe Condition, states as follows:

> 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 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... (New York City, N.Y., Code Sec. 7-210).

The Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk" (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept. 2011]). Here, as a mere lessee of the property at the time of the accident, Duane Reade is not liable per the NYC Administrative Code.

However, in *Collado* "it was undisputed that the tenant did not create the condition or make special use of the sidewalk," (81 AD3d at 542) whereas here, it is premature to determine this issue. Duane Reade claims, based on an affidavit by Christopher Nigro, that it did not use the sidewalk for a special use, nor did it undertake any maintenance or repair of the sidewalk. In opposition, plaintiff and co-defendants argue that such a determination is premature because they have not had the opportunity to complete discovery that could lead to evidence proving otherwise. Accordingly, at this point, without any deposition testimony from any party or any additional discovery, it is simply premature to decide whether a special use was made of the sidewalk or any maintenance duties undertaken by Duane Reade, which would affect the duty owed to plaintiff.

Common law indemnification is available to one who has "committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party" (*Glaser v. Fortunoff of Westbury*, 71 N.Y.2d 643 [1988] quoting

D'Ambrosio v. City of New York, 55 N.Y.2d 454, 461 [1982]). At this juncture, it is premature to decide the liability of Duane Reade since discovery has not yet been completed. Without a finding of negligence as against any party, and order for indemnification is premature.

Accordingly, it is hereby

ORDERED, that defendant Duane Reade's motion for summary judgment, dismissing the complaint, and its application for contractual indemnification against co-defendants, is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation/trial forthwith.

Dated: October 31, 2014

ENTER:

Joan M. Kenney, J.S.C.