Harper v Mitchell Holding

2014 NY Slip Op 33189(U)

November 5, 2014

Supreme Court, Bronx County

Docket Number: 303983/2009

Judge: Mary Ann Brigantti

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NEW YORK SUPREME COURT - COUNTY OF BRONX

12-1-2014

PART 15

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
---X

KHALIL HARPER,

Index №. **303983/2009**

-against-

Hon..**MARY ANN BRIGANTTI**

MITCHELL HOLDING AND MANAGEMENT CORPORATION, et als.

Justice.

---X

The following papers numbered 1 to __10___ Read on this motion, **SUMMARY JUDGMENT**
Noticed on March 28, 2014 and duly submitted as No. 1,2,3 on the Motion Calendar of **AUGUST 11, 2014**

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affidavits Annexed	1,2	
Answering Affidavit and Exhibits	3,4	5,6
Replying Affidavit and Exhibits	7,8	9,10
___________________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Respectfully Referred to: ________
Dated: ________

Upon the foregoing papers, the defendant Mitchell Holding and Management Corporation ("Mitchell") moves for summary judgment, dismissing all claims asserted against it. Defendant 900 Tree Corp. ("900 Tree") moves for summary judgment with respect to its claims of contractual indemnification and breach of contract asserted against Inspiration Design Furniture, Inc. ("Inspiration") and Marilyn Fernandez ("Fernandez"). The motions are opposed by Plaintiff and Inspiration/Fernandez.

I. Background

This matter arises out of an alleged slip / trip and fall incident that allegedly occurred on the side walk in front of the premises located at 900 East Tremont Street in the Bronx, New York. According to Plaintiff's Bill of Particulars, he was caused to fall because, *inter alia*, the defendants were negligent in performing ice removal operations at the premises.

900 Tree and Mitchell assert that, while Plaintiff commented on the condition of the actual concrete of the sidewalk, he later confirmed that it was ice, and not a crack or other defective condition, that caused

FILED Dec 01 2014 Bronx County Clerk

him to fall. He testified that the sidewalk was covered with a "few inches" of snow and ice. He described the sidewalk as "cracked up" or "broken up" but acknowledged that the area was a "flat surface" and "at the same level" as the surrounding sidewalk. When asked what actually caused his foot to slip, he testified that it was ice, and he did not "trip." After he fell he observed "ice chippings" in the area. 900 Tree and Mitchell stress that, although Plaintiff talked about cracks in the sidewwalk, he "made it clear" that those "imperfections" were not a proximate cause of this accident.

900 Tree was the owner of the premises at all relevant times, and had leased the premises to a furniture store, co-defendant Inspiration. The movants note that the lease with Inspiration incorrectly names the former owner, an entity called "900 East Tremont Associates, L.P." as the owner at the time the lease was signed. Originally, the premises was leased to co-defendant Fernandez, individually, but shortly thereafter, Fernandez formed a corporation under which she intended to operate her business and the parties entered into a revised lease that identified "Inspirations Designs Furniture/Marilyn Fernandez" as the tenants. This second lease, dated July 1, 2007 (the "Lease"), was in effect on the date of this alleged accident.

The movants state that the Lease provided that the tenant was responsible for maintaining the sidewalks, including snow removal, as well as all structural and non-structural repairs (Lease at Par. 4). The lease further provided that the tenant agreed to maintain general public liability insurance in standard form in favor of the owner, and tenant shall indemnify and save harmless the owner against and from all liabilities ... as a result of any breach by tenant.. (Lease at Par. 8). The rider to the Lease stated that the tenant agreed to indemnify and hold harmless the owner against any and all claims arising out of the premises, except such claims as may be the result of negligence of the owner. The rider also provided that the tenant agreed to keep in force during the leasehold a comprehensive policy of liability insurance protecting the owner and tenant. If the owner is made a party to litigation, the tenant agreed to pay all associated costs and expenses, as well as reasonable attorneys' fees. The tenant agreed to accept the demised premises in an "as is" condition.

Fernandez testified that she was responsible for snow/ice removal on the sidewalk, but believed that this only applied during the store's hours of operation. She could not cite to any lease provision or conversation with the landlord as to the basis for that belief. Fernandez added that if snow or ice had been removed at any time in 2008, it would have been performed by one of her employees and no one else.

Mitchell Mekles, president of defendant Mitchell and Vice President of defendant 900 Tree, testified at deposition that Mitchell has no connection with the subject premises. Mitchell has no employees, no ownership interest in the premises, and is not involved with the maintenance of the property.

900 Tree now moves for summary judgment on its claims for contractual indemnification and breach of contract against Inspiration and Fernandez. Inspiration/Fernandez agreed to maintain and performed snow and ice removal on the subject sidewalk, and to indemnify 900 Tree from any claims arising out of

FILED Dec 01 2014 Bronx County Clerk

[* 3]

their alleged breach of that duty. 900 Tree also contends that Fernandez/Inspiration failed to procure insurance. 900 Tree/ Mitchell were not added to the policy until August 2008, some 6 months after this accident occurred. With respect to Mitchell, the movants contend that they owed no duty to Plaintiff as they had no ownership interest in the premises, or obligation to maintain the premises.

In their affirmation in opposition, co-defendants Inspiration/Fernandez take no position on that portion of the motion seeking summary judgment dismissing all claims against Mitchell.

The co-defendants note that, according to the bill of particulars, the theory of liability appears to encompass both a "trip and fall" and a "slip and fall." They argue that there are ambiguities with the Lease that warrants denial of summary judgment on the owners' contractual claims.

First, the landlord/owner named in the two leases is 900 East Tremont Associates, LP, and not 900 Tree. The property was transferred to 900 Tree in 1997, some ten years prior to the date of the instant Lease. Since 900 Tree is not a party to the Lease, its motion for summary judgment on contractual grounds should be denied.

Next, Fernandez testified that the owner performed repairs on the sidewalk on two separate occasions around the time of this accident. Fernandez was not billed for these repairs. The co-defendants argue that this raises a factual issue as to whether the Owners' course of conduct altered or waived the portions of the agreement requiring the tenant to make structural / non-structural repairs. The co-defendants further note that they were not responsible for "reasonable wear and tear" on the sidewalk, and such wear and tear appears to be depicted in the photographs of the sidewalk.

Fernandez/Inspiration next contends that the indemnification language contains an exception that is "arguable applicable herein" – as the tenant was not responsible for damages arising out of the owner's own negligence. In light of the owner's previous repairs on the sidewalk, the co-defendants argue there is a question of fact as to the adequacy of the repairs.

Finally, the Lease provides that the tenant shall indemnify/save harmless the owner against and from all liabilities .... for which the owner shall not be reimbursed by insurance. The co-defendants point out that the owner here, however, is represented by its own liability insurer.

Plaintiff also opposes the motion. Plaintiff argues that the moving papers do not establish prima facie that Mitchell is entitled to summary judgment. In their answer, Mitchell admits that the property is owned by East Tremont Associates LP d/b/a Mitchell Holding and Management Corporation. In an amended answer, the movants deny that "Mitchell" owned the premises, but admit 900 Tree owned it. The affidavit of Mr. Popper in support fails to address that the Lease names the wrong owners. Plaintiff therefore argues that Mitchell's relationship with the premises "has not been clarified."

Regarding the remaining branches of the motion, Plaintiff argues that the movants have "mischaracterized" his testimony and there remains an issue of fact as to whether the cracked or broken sidewalk caused this accident.

FILED Dec 01 2014 Bronx County Clerk

The movants have submitted affirmations in response to the opposition papers.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Mitchell's Motion for Summary Judgment

The motion for summary judgment with respect to co-defendant Mitchell is granted. Contrary to the assertions of the Plaintiff, the movants have submitted admissible evidence in the form of deposition testimony, the bargain and sale deed to the property, and the controlling lease agreement, all of which established prima facie that Mitchell had no ownership interest or control over the property (*see Lemay v. Hush Bar & Lounge, Inc.*, 103 A.D.3d 854 [1st Dept. 2013], citing *Borelli v. 1051 Realty Corp.*, 242 A.D.2d 517 [2nd Dept. 1997]). In opposition, Plaintiff has failed to raise a genuine issue of fact. The moving defendant filed an Amended Answer denying ownership of the premises, and Plaintiff has submitted no admissible evidence to warrant denial of Mitchell's motion. Accordingly, any and all claims asserted against Mitchell are dismissed with prejudice.

900 Tree's Motion for Summary Judgment

The co-defendants and plaintiff contend initially that there are material issues of fact as to the viability of 900 Tree's contractual claims because it is not listed as the "owner" of the premises on either of the 2007 leases. Instead, the owner is an entity called "900 East Tremont Associates, LP." The movants,

FILED Dec 01 2014 Bronx County Clerk

[* 5]

however, have produced a copy of a bargain and sale deed dated February 12, 1997, conveying the premises from 900 East Tremont Associates, LP, to 900 Tree. Mitchell Mekles , who was subjected to an examination before trial, testified that 900 Tree owned the premises at relevant times. Moreover, the lease defined "owner" in paragraph 33 as the "owner... or the mortgagee in possession" of the land and building, including their successors in interest. Paragraph 39 of the lease provides that its conditions were binding on the owner and tenant's successors/distributees and assigns. Considering all of the admissible evidence, it is clear that 900 Tree owns the premises and is the intended beneficiary of the lease agreement provisions.

That branch of 900 Tree's motion for summary judgment with respect to its claims against Fernandez and Inspiration for breach of contract for failure to procure insurance is granted. The applicable Lease and Rider provisions required the tenant to maintain general liability insurance in favor of the owner during its tenancy. The movants have produced evidence that the owner was not added to the Fernandez/Inspiration insurance policy until August 4, 2008, over five months after this alleged accident, and therefore the tenant's insurer disclaimed coverage to the movant/owner. Accordingly, the movants met their burden of establishing that the tenant failed to procure liability insurance and therefore breached the controlling lease agreement. Fernandez/Inspiration does not substantively dispute this branch of the motion in opposition papers, and has therefore failed to raise a triable issue of fact. The appropriate measure of damages for this breach will be determined at the time of trial (*see Cucinotta v. City of New York*, 68 A.D.3d 682, 684-85 [1st Dept. 2009]).

The Court finally turns to that branch of 900 Tree's motion for summary judgment on the issue liability on its cross-claims for contractual indemnification.

There is no dispute in this case that, according to the controlling Lease, the tenant Fernandez/Inspiration was responsible for performing snow removal on the sidewalk at relevant times. This Court initially finds, however, that the moving papers do not conclusively resolve the issue of what proximately caused Plaintiff's alleged slip/trip and fall. It is well settled that there can be more than one proximate cause of an accident, and that a plaintiff need not exclude every other possible cause apart from the landowners' alleged breach of duty owing to the plaintiff (*Hagensen v. Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, 108 A.D.3d 410 [1st Dept. 2013], citing see *Lopez v. 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 232, 750 NYS2d 44 [1st Dep't 2002]; *see, e.g., Romero v. ELJ Realty Corp.*, 38 A.D.3d 263 [1st Dept. 2007]).

Plaintiff testified that he was walking around piles of snow on the sidewalk trying to avoid them when he "slipped, tripped, and fell." The fall was "real quick." He did say that he didn't "kick" anything "to trip over" but later described the sensation as "sliding and tripping at the same time." He described the portion of the sidewalk near his fall as "broken up" and "cracked up." The portion of the sidewalk where his foot slipped had a "crack, a real big one." That part of the sidewalk had been "clear" of snow, and that is why he walked that way. The crack was approximately the size of two legal pads side by side, but it was

FILED Dec 01 2014 Bronx County Clerk

still a "flat surface." At the deposition, Plaintiff identified photographs of the accident location and circled an area near a crack where he allegedly fell. When asked simply what caused his foot to slip, Plaintiff testified that "I'm gonna believe it was ice" and he's "not going to say that [he] tripped..." After he fell, he noticed ice chippings in the area. Viewing this testimony in a light most favorable to the non-movants, the plaintiff did not eliminate the broken or cracked condition of the sidewalk as a contributing factor to his accident. Moreover, the defendants have not removed all genuine issues of fact, as they offer no inspection of the accident site or further evidence to support their contention in reply papers that any defect on the sidewalk was "de minimus" and not actionable.

900 Tree contends that, nevertheless, it was the tenant who assumed responsibility for any structural or non-structural defects on the subject sidewalk, pursuant to Paragraph 4 of the controlling Lease. Fernandez, however, testified at deposition that workers hired by the landlord/owners performed certain repairs on the sidewalk shortly after her leasehold commenced, and then again some time after this accident. The Fernandez testimony is sufficient to raise an issue of fact as to whether the parties' course of conduct modified the agreement regarding responsibility for sidewalk repairs and maintenance (*see Echevarria v. 158th St. Riverside Dr. Hous. Co., Inc.*, 113 A.D.3d 500 [1st Dept. 2014]). In reply, 900 Tree does not provide a sufficient evidentiary basis for its counsel's contention that these repairs were performed so the parties could "move forward with the lease" or were "part of the lease negotiation process." In any event, the testimony that the landlord performed repairs after the accident belies this argument and raises a further issue of fact as to whether the parties' course of conduct modified the lease. Evidence of subsequent repairs is admissible when there is an issue of control (*see Fernandez v. Higdon Elevator Co.*, 220 A.D.2d 293 [1st Dept. 1995]).

900 Tree also argues in reply that the subject Lease could only be modified in writing and therefore that parties' course of conduct is irrelevant. This argument is unavailing since it is "abundantly clear in New York that, even where a contract specifically contains a nonwaiver clause and a provision stating that it cannot be modified except in writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct' (*Aiello v. Burns Intern. Sec. Services Corp.*, 110 A.D.3d 234, 245 [1st Dept. 2013], citing *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96 [2006]).

For the foregoing reasons, 900 Tree's motion for summary judgment on the issue of liability with respect to its cross-claims for contractual indemnification is denied.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant Mitchell's motion for summary judgment is granted, and any claims asserted against that defendant are dismissed with prejudice, and it is further,

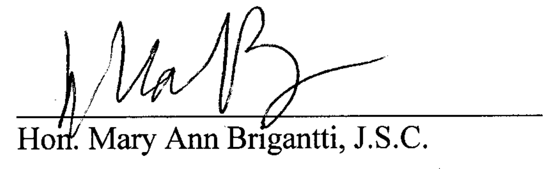
FILED Dec 01 2014 Bronx County Clerk

ORDERED, that 900 Tree's motion for summary judgment on its cross-claims for contractual indemnification against Inspiration/Fernandez is denied, and it is further,

ORDERED, that 900 Tree's motion for summary judgment on its cross-claims for breach of contract against Inspiration/Fernandez is granted, an assessment of damages to occur at trial.

This constitutes the Decision and Order of this Court.

Dated: 11/5, 2014



Hon. Mary Ann Brigantti, J.S.C.

FILED Dec 01 2014 Bronx County Clerk