

| |
|--|
| Hand v City of New York |
| 2015 NY Slip Op 30076(U) |
| January 16, 2015 |
| Supreme Court, New York County |
| Docket Number: 650134/11 |
| Judge: Kathryn E. Freed |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
FRANCINE HAND,

Plaintiff,

-against-

THE CITY OF NEW YORK, RAINBOW HOLDING CO.,
LLC, THE PENSION CORP. and 1667 FIRST GOTHAM
PIZZA INC.,

Defendants.
-----X

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

DECISION AND ORDER

Index No 650134/11

Mot. Seq. Nos. 002 and 003

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

| Papers | E-Filing Document Numbered |
|---|----------------------------|
| NOTICE OF MOTION (002) AND AFF. with EXHIBITS, MEMO OF LAW..... | 35, 36, 38-67 |
| AFFIRMATIONS IN OPP with EXHIBIT..... | 71, 74, 82-84 |
| REPLY AFF. with EXHIBIT..... | 90, 92 |
| NOTICE OF MOTION (003) AND AFF. with EXHIBITS..... | 77-80 |
| AFF. IN OPP. with EXHIBIT..... | 85, 87 |

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

In this personal injury action, defendant 1667 First Gotham Pizza Inc. (Gotham) moves, under motion sequence number 002, for an order, pursuant to CPLR 3212, granting summary judgment: (1) dismissing plaintiff's action as against it; (2) dismissing the cross claims asserted against it by co-defendants Rainbow Holding Co., LLC (Rainbow) and The Pension Corp. (Pension); and (3) on its cross claims against Rainbow and Pension, and awarding Gotham costs and expenses incurred in its defense of this matter. Under motion sequence number 003, plaintiff Francine Hand moves for an order, pursuant to CPLR 3403 (a), granting her a special trial preference on the basis of her age. The motions, brought under motion sequence numbers 002 and 003, are consolidated for disposition.

Plaintiff alleges that, on March 24, 2010, at about 5:15 p.m., while walking southward on the west side of First Avenue in Manhattan, she was caused to trip, fall and sustain serious injuries to her right ankle due to the dangerous and defective condition of the sidewalk and/or curb at the southwest corner of East 87th Street. The property nearest that corner has a street address of 1667 First Avenue, New York, New York. It is a mixed-use corner building (Building) which, at all relevant times, was owned by Rainbow and managed by Pension.¹ The commercial storefront adjacent to the corner was leased to Gotham.

Plaintiff timely filed a notice of claim against the City based on the circumstances of her accident (*see* General Municipal Law [GML] § 50-e) and appeared for the requisite GML § 50-h hearing. She then commenced the instant action by filing a summons and complaint on or about January 19, 2011, naming the City, Rainbow and Pension as defendants and claiming that they breached their statutory obligations to maintain the public curbs and abutting sidewalks in a reasonably safe condition. *See* Administrative Code of the City of New York §§ 7-210, 19-101 (d). After issue was joined by service of the defendants' respective answers, the parties pursued discovery, including the exchange of documentary evidence and depositions. In February of 2013, plaintiff commenced a separate negligence action, under New York County index No. 151768/13, against Gotham based on the same underlying facts and circumstances. By order dated July 29, 2013, this Court (Chan, J.), granted plaintiff's motion to consolidate the two actions. Judge Chan also struck the note of issue in the action against Gotham, originally filed on June 13, 2013, permitted additional discovery, and extended the note of issue deadline until December 31, 2013.

¹ According to the property manager, Rainbow and Pension have unity of interest and/or ownership in that nonparty Edward Pension is both the president of Rainbow and the owner of Pension (Barbera tr., at 9).

Id. On September 18, 2013, the parties entered into a so-ordered stipulation which, *inter alia*, ordered Gotham's deposition, set a compliance conference date of January 22, 2014, and extended the note of issue deadline until January 31, 2014.

On or about November 22, 2013, Gotham served cross claims against Rainbow and Pension seeking defense, indemnification, and/or contribution with respect to the alleged accident. Plaintiff filed a note of issue on or about December 2, 2013. Almost two months later, on or about January 29, 2014, Rainbow and Pension served their own cross claims against Gotham seeking defense, indemnification and/or contribution. On or about April 1, 2014, Gotham served the instant motion for summary judgment.

Gotham supports its motion with copies of the pleadings; the notice of claim; plaintiff's 50-hour hearing and deposition transcripts; photographic evidence; transcripts of defendants' deposition witnesses; the Big Apple map of the subject sidewalk (with legend); the "Standard Form of Store Lease" with Rider, effective August 31, 2009, pursuant to which Rainbow leased the storefront to Gotham; the note of issue; insurance information; and correspondence between the parties.

With respect to the negligence claims against it, Gotham contends that it was not responsible for the defective sidewalk pavement, nor did it become responsible for repairing and maintaining the structural condition of the sidewalk pavement by virtue of the lease, or based upon obligations imposed by statute, code, or ordinance. Gotham also contends that the sidewalk and curb were in poor condition when it leased the storefront from Rainbow, and that it had made several complaints to the property manager about the condition. Gotham maintains that, because it was not the party responsible for the condition of the sidewalk or curb, it owed no duty to plaintiff and is not liable for her injuries.

Gotham offers plaintiff's sworn testimony as conclusive evidence of the location and cause of her alleged accident. During her GML § 50-h hearing, and again, during her deposition, plaintiff consistently testified that she fell on the curb and sidewalk adjoining the intersection of East 87th Street and First Avenue. GML § 50-h tr., at 14, 15, 18; Pltf. tr., at 26, 28, 32 - 35.

When questioned about how her accident occurred, Hand stated that she had just crossed from the north side to the south side of East 87th Street, and that "[u]pon stepping onto the sidewalk, I put my right foot onto the sidewalk, fairly close to the curb, and fell down." Pltf. tr., at 26. When asked to be more specific about where her foot was at the time of the incident, plaintiff stated "within a foot of the curb" (*Id.*, at 27), and then said "okay, well, my heel would be on the curb, and then my foot would be forward from the curb." *Id.*, at 28. And when questioned about the condition of the pavement over which she tripped, plaintiff stated "the sidewalk was broken up, in disrepair, cracked . . ." and "the surface was uneven, in disrepair, broken up." *Id.*, at 33. Plaintiff placed a circle on a photograph of the subject corner to show where the accident occurred. She confirmed that the area of defective pavement inside the circle abutted the intersection, where the street met the curb and sidewalk. Gotham's Exhibit T; Pltf. tr., at 34-36. When asked where she stepped in relation to certain crack lines in the surface pavement, plaintiff pointed to what her attorney described as "the juncture between the stress line and the crack that you had referred to." Pltf. tr., at 38. Plaintiff then stated "I believe - - that when my heel touched the sidewalk, I went down." *Id.*, at 39.

Next, Gotham offers a copy of the lease. The "Witnesseth" clause on the first page of the lease states, in relevant part:

Owner [Rainbow] hereby leases to Tenant [Gotham] and Tenant hereby hires from Owner a portion of the ground floor and basement as approximately shown hatched on the floor plan annexed hereto as Exhibit A (hereinafter called the "demised premises") in the building known as 1667 First Avenue, New York, New York (hereinafter called the "building")

Gotham points out that the lease defines the parameters of the "demised premises," or space, it rented for use as a pizzeria, and that nowhere does the definition of "demised premises" include any portion of the abutting sidewalk. Furthermore, Administrative Code § 7-210 provides, in relevant 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 be limited to, the negligent failure to . . . repair or replace defective sidewalk flags

Since the alleged accident occurred on a public sidewalk and/or curb the City was responsible to maintain (*see* Administrative Code § 19-101 [d]), and not within the demised premises, Gotham contends that Rainbow's statutorily imposed, nondelegable duty to repair and maintain the sidewalk abutting its building precludes Gotham from being held liable for plaintiff's injuries to the extent that they were caused by the condition of the sidewalk.

Gotham further relies on lease ¶ 4, asserting that Rainbow was contractually liable for structural repairs to the public sidewalk. This clause provides, in relevant part:

Owner shall maintain and repair the public portions of the building, both exterior and interior, except that if Owner allows Tenant to erect on the outside of the building a sign or signs, or a hoist, lift or sidewalk elevator for the exclusive use of Tenant, Tenant shall maintain such exterior installations in good appearance Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto and at its sole cost and expense make all non-structural repairs thereto, as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted.

Based on this language, Gotham argues that, because the cracks, breaks and elevations in the subject sidewalk pavement are structural in nature, they fall within the purview of Rainbow and/or Pension's responsibilities. Moreover, even if the lease obligated Gotham to maintain and/or repair the sidewalk, "[p]rovisions of a lease obligating a tenant to repair [a] sidewalk do not impose on the tenant a duty to a third party, such as plaintiff." *Collado v Cruz*, 81 AD3d 542 (1st Dept 2011).

Gotham also submits the deposition testimony and sworn affidavit of its secretary, Michael Shamilov, president of Gotham, who, along with his wife, who, as president of Gotham and the person who executed the Lease with Rainbow, were the sole shareholders of the company. Shamilov's sworn statements are offered to demonstrate that Rainbow and Pension had notice of the defective sidewalk condition prior to plaintiff's accident because: (1) he had complained to Pension's property manager, Melissa Barbera, about the condition one week after the lease was signed, and again about a month later, and (2) he personally showed her the areas of pavement which concerned him. Shamilov tr., at 66-69.² The sworn statements are also offered to show that Barbera, on behalf of Pension and Rainbow, never denied being the party responsible for fixing the defective pavement, and that Barbera had promised Shamilov, on more than one occasion prior to plaintiff's alleged

² At her own deposition, Barbera stated that, as the property manager, she visited the building about once per week, but was unable to recall much about the condition of the sidewalk, or how it looked on March 24, 2010. Barbera tr., at 12, 19-20.

accident, that she would speak with the owner about the problem. *Id.*, at 67; Shamilov aff., at ¶¶ 5, 6.

When Shamilov was questioned about what appear to be cement patches in the subject sidewalk, he stated that he remembered someone, whom he thought was the superintendent, doing patchwork in the subject sidewalk prior his opening the pizzeria. However, he was not sure whether this occurred before or after March 24, 2010. *Id.*, at 96, 98-99. Shamilov testified that his contractors did a lot of work to prepare the premises to open as a pizzeria, but that none of that work involved repairs to the sidewalk. *Id.*, at 54. He also stated that Barbera never told him it was Gotham's responsibility to perform any repairs to the sidewalk. *Id.*, at 92.

Finally, to show that the City was also aware of the defective condition, Gotham submits: (1) a copy of the Big Apple Map containing hand-drawn symbols indicating the presence of cracked sidewalk and broken, misaligned or uneven curb in and about the subject corner (Ex. A to Gotham's motion); and (2) the deposition transcript of the City's record searcher, Abraham Lopez, who conducted a record search for the period of March 24, 2008 to March 24, 2010, for the location of East 87th Street between First and Second Avenues. Lopez tr., at 13. Lopez located several permits, applications and violations pertaining to the subject location (*Id.*, at 14, 16), and said that four complaints had been called into 311 about the condition of that location. *Id.*, at 20.

Gotham contends that this evidence establishes, as a matter of law, that it neither created, nor was it responsible for, the defective condition of the sidewalk and/or curb that allegedly caused plaintiff to fall. With respect to Rainbow and Pension's cross claims, Gotham argues that, because there is no evidence that it was negligent, and no basis for finding it liable for plaintiff's accident and injuries, the cross claims seeking defense, indemnification and contribution must be dismissed.

Gotham's motion is opposed by plaintiff as well as by its co-defendants. Despite offering no evidence to support its argument, the City contends that a question of fact exists as to whether Gotham performed any work on the sidewalk that may have caused the defective condition. Plaintiff asserts that Gotham knew of the defective condition prior to her accident and that Gotham's duty to maintain the sidewalk outside its storefront can be implied from the terms of the lease. Rainbow and Pension oppose the motion on procedural grounds and on substantive grounds raised by plaintiff and the City.

Rainbow and Pension's procedural argument is based on the fact that Gotham did not move for summary judgment within 60 days of the filing of the note of issue, a requirement set forth in the initial case scheduling order dated January 12, 2012. In support of this argument, Rainbow and Pension rely on *Brill v City of New York*, 2 NY3d 648 (2004). They assert that, because the note of issue was filed on December 2, 2013, and Gotham's motion was not served until April 1, 2014, almost 60 days late, Gotham's motion must be denied as untimely.

Brill requires New York courts to deny untimely motions for summary judgment unless a satisfactory explanation, or "good cause," for the delay is demonstrated to the court's satisfaction. *Id.*, at 652. For the following reasons, this Court finds that such good cause exists in this matter, and thus it refuses to deny Gotham's motion as untimely.

As noted above, by so-ordered stipulation dated September 18, 2013, Justice Chan directed the parties to the recently consolidated action to conduct discovery. This included the scheduling of depositions, the designation of physicians to perform defense medical examinations of the plaintiff, the exchange of insurance information, a note of issue filing deadline (December 31, 2013), and a directive that the parties to appear for a compliance conference in January of 2014. The order,

an updated and abbreviated version of the original case scheduling order, is silent with respect to dispositive motions. It is unclear, given the addition of Gotham as a party and the need for further discovery, whether the previously ordered 60-day time limit was intended as the deadline for dispositive motions. The order transferring the action to Part 5, dated August 14, 2014, was silent as to whether the parties were permitted additional time to move for summary judgment.

What is clear, however, is that Rainbow and Pension, the parties which challenge the timeliness of Gotham's summary judgment motion, waited until January 29, 2014, almost 60 days after the note of issue was filed, to cross claim against Gotham. Given the totality of the foregoing circumstances, this Court finds that Gotham had good cause for filing its motion for summary judgment after the expiration of the 60-day period set forth in the original case scheduling order, but prior to the expiration of the 120-day limit set forth in CPLR 3212(a). Should this Court hold otherwise, it would, at a minimum, unfairly preclude Gotham from seeking summary judgment dismissing the cross claims asserted by Rainbow and Pension at almost the exact time the 60-day period to move for summary judgment was to have expired.³

With respect to the substantive issues, Rainbow and Pension insist that Gotham is misreading the lease terms, and that, pursuant to rider ¶ 46, Gotham knowingly accepted responsibility for the condition of the abutting sidewalk when it executed the Lease. Rider ¶ 46 provides that:

³ Even if this court were to find that the motion was only timely with respect to the cross claims, it is well settled that, in deciding a summary judgment motion, the court may search the record and grant judgment in favor of any party, entitled to judgment on any issue, even if the appropriate motion had not been made. *See* CPLR 3212(b); *Maheshwari v City of New York*, 2 NY3d 288, 293 n 2 (2004). Accordingly, it would not be error for this court to address the balance of Gotham's motion.

Tenant has examined the demised premises and agrees to accept the same in their as-is condition and state of repair existing as of the date hereof and understands and agrees that Landlord shall not be required to perform any work, supply any materials or incur any expense to prepare the demised premises for Tenant's occupancy.

Rainbow and Pension assert that the language of this clause, coupled with that of lease § 4, as quoted above, requiring Gotham to "make all non-structural repairs," and to maintain the sidewalk in good condition, preclude this court from granting summary judgment, since they insist that sidewalk repairs are non-structural in nature. Alternately, Rainbow and Pension argue that the question of whether sidewalk repairs are structural or non-structural is one of fact, best left for the trier of fact to resolve.

This Court finds that Gotham's motion for summary judgment dismissing plaintiff's allegations against it must be granted. "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk." *Collado v Cruz*, 81 AD3d, *supra* at 542. In order to shift responsibility to a tenant, such as Gotham, which "has no statutory obligation to maintain the public sidewalk adjacent to its store" (*O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]), and impose liability for the defective condition of an abutting sidewalk, there must be evidence that the tenant created the defect, or made special use of the sidewalk "such as when an appurtenance [is] installed for its benefit or at its request (*Kaufman v Silver*, 90 NY2d 204, 207 [1997]), contemplating a purpose different from that of the general public (*Otero v City of New York*, 213 AD2d 339, 340 [1st Dept 1995])." *Thomas v Triangle Realty Co.*, 255 AD2d 153 (1st Dept 1998). Here, the fact that Gotham's contractors renovated the demised premises, which by definition did not include the abutting exterior

sidewalk, for use as a pizzeria, does not establish that such work created or exacerbated a defective sidewalk condition. Not only have the opponents to the motion failed to offer proof that Gotham was responsible for the allegedly defective pavement, they have also failed to submit competent evidence that the sidewalk conferred a special benefit on Gotham, which had not even opened its store as of the time of plaintiff's accident. The mere fact expectation that Gotham's customers would use the abutting sidewalk to enter and exit the pizzeria is insufficient to establish a special use. *See Jordan v City of New York*, 23 AD3d 436, 437 (2d Dept 2005).

The argument by Rainbow and Pension that lease § 4 and rider ¶ 46 required Gotham to repair and maintain the abutting sidewalk is without merit. Neither of these provisions creates a specific obligation on the part of the tenant to supplant the property owner's statutorily imposed responsibility to maintain the sidewalk in a safe condition. The attempt by Rainbow and Pension to read additional obligations into Gotham's responsibilities regarding the sidewalk are not only speculative, but rider ¶ 56 (b) (ii) makes it clear that Gotham's responsibilities are limited to keeping the sidewalk clean and clear. Rider ¶ 56 (b) provides, in relevant part, that Gotham:

covenants and agrees that it will . . . (ii) at Tenant's expense, keep the demised premises clean, and in a sanitary condition . . . bag and remove all rubbish and other debris from the demised premises daily . . . and keep the sidewalks in front of the demised premises clean and free from obstruction and free from snow and ice.

Notably absent from the lease and rider is any obligation on the part of Gotham to repair a cracked, broken or uneven sidewalk.

Neither the City, Rainbow, nor Pension have submitted any proof that Gotham worked on the sidewalk, or that any of its renovation work at the demised premises caused the alleged defects. Nor do Rainbow and Pension offer any evidence to support their argument that repairing cracked and

broken sidewalk pavement is considered nonstructural work, especially since, under New York case law, “repairs to a public sidewalk are considered structural, not nonstructural” (*Langston v Gonzalez*, 39 Misc 3d 371, 383 [Sup Ct, Kings County 2013]; *see also Cucinotta v City of New York*, 68 AD3d 682 [1st Dept 2009]), and that “[u]nless a lease specifically obligates the tenant to be responsible for structural repairs and identifies what they are, such obligation will not be implied nor imposed.” *Wolfe v Gallery Partners, LLC*, 2012 NY Slip Op 32301(U) (Sup Ct, NY County 2012). Moreover, even if the lease did contain such a provision, that agreed-upon provision “do[es] not impose on the tenant a duty to a third party, such as plaintiff.” *Collado v Cruz*, 81 AD3d, *supra* at 542.

This Court now turns to that branch of Gotham’s motion seeking summary judgment on its cross claims against Rainbow and Pension for defense, indemnification, and contribution, as well as an award for costs and expenses incurred in its defense of this matter, and finally for dismissal of the claims against it by Rainbow and Pension.

In support of their cross claims, Rainbow and Pension rely on lease paragraph 8, which provides, in relevant part, that:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance. . . as a result of any breach by Tenant . . . of any covenant on [sic] condition of this lease, or the carelessness, negligence or improper conduct of the Tenant

They also rely on rider paragraph 49, which, in pertinent part, requires Gotham to provide Rainbow with comprehensive general liability insurance coverage with a contractual liability endorsement protecting it and Rainbow “against any liability whatsoever, occasioned by any occurrence on or about the demised premises.” Noting Shamilov’s acknowledgment that such coverage was not acquired until the day after plaintiff’s alleged accident, they contend that summary

judgment must be denied because Gotham breached its contract.

Rainbow and Pension's arguments are without merit. The cross claims by Rainbow and Pension seeking defense, indemnification, and contribution are dependent on their leasehold relationship with Gotham. However, since Gotham was not responsible for the condition of the subject sidewalk, which condition allegedly caused plaintiff's injuries, Gotham cannot be liable to plaintiff. Since Gotham was not negligent, the cross claims against it by Rainbow and Pension must fail. Furthermore, because plaintiff's allegations of negligence pertain only to the public curb and sidewalk, and do not involve the demised premises, any failure by Gotham to procure the requisite liability insurance is not relevant in this matter. *See Ali v Sequins Intl., Inc.* 31 Misc 3d 1244(A), 2011 NY Slip Op 51106(U) (Sup Ct, Queens County 2011).

That branch of Gotham's motion seeking summary judgment on its cross claims against Rainbow and Pension seeking defense, indemnification, contribution and the cost of defending this matter is denied, since Gotham failed to establish its entitlement to such relief. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Gotham has failed to demonstrate any contractual or statutory basis entitling it to costs or expenses beyond those ordered below.

Finally, plaintiff's motion, under motion sequence 003, for a special trial preference based on age, together with documentary proof that she has reached the age of 70 years old, is not meaningfully opposed, and is granted. *See CPLR 3403(a)(4)*.

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

ORDERED that the motion of 1667 First Gotham Pizza, Inc., under motion sequence number 002, for summary judgment is granted to the extent that the complaint and all cross claims against it are dismissed with costs and disbursements to the said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of the said defendant; and it is further,

ORDERED that the action is continued against the remaining defendants; and it is further,

ORDERED that the caption is amended to reflect the dismissal of the claims against defendant 1667 First Gotham Pizza Inc. and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that the caption of this action shall hereafter read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
FRANCINE HAND,

Plaintiff,

-against-

THE CITY OF NEW YORK, RAINBOW HOLDING CO.,
LLC, AND THE PENSION CORP.,

Defendants.
-----X

And it is further,

ORDERED that counsel for defendant 1667 Gotham Pizza Inc. Shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Trial Support Office (Room

158), who are directed to mark the court's records to reflect the change in the caption; and it is further,

ORDERED that the plaintiff's motion under motion sequence number 003, is granted on the ground that she has reached the age of 70 years; and it is further,


ORDERED that the Clerk of the Trial Support Office is hereby directed to place this case on the trial calendar at the head of said calendar except for actions in which a preference was previously granted; and it is further,

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

Dated: January 16, 2015

ENTER:

JAN 16 2015



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