

Soto v J.C. Penney Corp., Inc.
2015 NY Slip Op 32147(U)
October 30, 2015
Supreme Court, Bronx County
Docket Number: 306634/2012
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART _____ IA - 5 _____

LUIS SOTO,

INDEX NUMBER: 306634/2012

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

J. C. PENNEY CORPORATION, INC. and
MACERICH QUEENS GP CORP.,

Defendants.

J. C. PENNEY CORPORATION, INC.,

Third-Party Action

INDEX NUMBER: 83816/2013

Third-Party Plaintiff,

-against-

BOVIS LEND LEASING LMB,

Third-Party Defendants.

LEND LEASE (US) CONSTRUCTION LMB INC.
f/k/a BOVIS LEND LEASE LMB, INC. i/s/h/a
BOVIS LEND LEASING LMB,

Second Third-Party Action

INDEX NUMBER: 83847/2014

Second Third-Party Plaintiff,

-against-

METRO-TECH CONTRACTING CORP.,

Second Third-Party Defendants.

J.C. PENNEY CORPORATION, INC.

Third Third-Party Action
INDEX NUMBER: **8393/2014**

Third-Party Plaintiff,

-against-

METRO-TECH CONTRACTING CORP.,

Third Third-Party Defendants.

The following papers numbered 1 to 9,

Read on this Defendants' Motions for Summary Judgment

On Calendar of 4/20/15

Notices of Motion-Exhibits and Affirmation 1, 2, 3

Affirmations in Opposition 4, 5, 6

Reply Affirmations 7, 8, 9

Upon the foregoing papers, defendant Macerich Queens GP Corp.'s (hereinafter "Macerich") motion for summary judgment; defendant/third-party plaintiff/third third-party plaintiff J.C. Penney Corporation, Inc.'s (hereinafter "J.C. Penney") motion for summary judgment; and, third-party defendant/second third-party plaintiff Lend Lease (US) Construction LMB, Inc. f/k/a Bovis Lend Lease LMB, Inc., i/s/h/a Bovis Lend Leasing LMB (hereinafter "Bovis") are consolidated for the purposes of this decision. For the reasons set forth herein, Macerich's motion is denied; J.C. Penney's motion is denied; and, Bovis' motion for summary judgment is granted.

The within action involves plaintiff's claim that he was injured on May 20, 2012 as he walked on

the sidewalk adjacent to the entrance to a J.C. Penney store located in the Queens Center Mall when he was allegedly caused to trip and fall on an alleged defective condition, a “lifted” part of the sidewalk. Plaintiff testified at his deposition that at the time of the accident, he was walking with a friend known as “Rubio” when he was caused to trip and fall. He did not initially know what caused him to fall. However, after he fell, Rubio showed plaintiff that area of the sidewalk that allegedly caused him to trip and he observed that “[t]he sidewalk lifted.” He did not know how far it was lifted. At his deposition, plaintiff was shown photographs depicting the sidewalk adjacent to the J.C. Penney store entrance. He testified that the photographs showed the location of his accident and he drew a circle on the photograph identified as Defendant’s Exhibit “B” to show where he tripped. Plaintiff testified that he was looking directly in front of him as he walked on the sidewalk prior to his accident, but he did not see the “lifted” condition prior to tripping and falling.

Kevin Dolan, the witness produced on behalf of J.C. Penney, testified that he is a Resident Engineer for JCP Construction Services, Inc. (hereinafter “JCP Construction”, wholly owned subsidiary of J.C. Penney, manages construction projects for J.C. Penney. Mr. Dolan was the site representative for JCP Construction during the construction of the subject J.C. Penney store. J.C. Penney hired Bovis as the general contractor for the construction project. Mr. Dolan testified that the construction project, which included the installation of the sidewalk adjacent to J.C. Penney store, took place between the end of 2002 and the beginning of 2003. He later testified that the entire project was complete by February of 2004. Bovis did not remain at the site after the project was completed and the J.C. Penney store opened for business. The sidewalk adjacent to J.C. Penney, from the store to the curb line, was poured by two concrete subcontractors that Bovis hired: Ruttura & Sons and Metro-Tech Contracting Corp. (hereinafter “Metro-Tech”). Mr. Dolan was shown two photographs that were marked at plaintiff’s deposition as Defendant’s Exhibits “A” and “B” which depict the area where plaintiff allegedly fell. He testified that Ruttura & Sons poured that portion fo the cement sidewalk which spans from the doors to the expansion where plaintiff circled. Metro-Tech poured that portion of the cement sidewalk which span from the circle plaintiff drew on the exhibit to the curb line. Mr. Dolan testified that Ruttura & Sons poured its concrete before Metro-Tech. J.C. Penney hired Cole Consulting, an independent engineering consulting firm, to inspect the concrete work and the sidewalk during construction. Mr. Dolan testified that after the sidewalk was installed, J.C. Penney and Cole Consulting, among others, inspected the sidewalk to make sure it had a flush and even surface. J.C. Penney did not give notice to Bovis that there were defects in the

sidewalk. Mr. Dolan further testified that had he observed a height differential between sidewalk flags as depicted in the photographs marked at plaintiff's deposition, he would have rejected the work and it would have been repaired or replaced.

John Hyers, Jr., a general superintendent for Bovis, testified that during the J.C. Penney construction project, he was a senior superintendent responsible for field operations and coordinating the work performed by the subcontractors. J.C. Penney hired Bovis as a general contractor to build a new retail store at the Queens Center Mall. Bovis did not do any of the work itself and hired subcontractors to perform all of the work. Based upon the sequence of the operation for this project, the sidewalk was poured last. Mr Hyers testified that the sidewalk is one of the last things that is done in order to keep the concrete from being damaged. The project architect or engineers issued the design specifications for the sidewalk. The sidewalk would have been tested and inspected by Cole Consulting. After the cement for the sidewalk was poured and allowed to cure, J.C. Penney, Bovis and Metro-Tech inspected the sidewalk for defects and found none. Mr. Hyers was shown the photographs that were marked at plaintiff's deposition and he testified that Bovis would not have permitted a height differential between sidewalk flags as depicted in the photographs and did not exist while Bovis was at the site. He further testified that Macerich, which manages the Queens Center Mall property, never rejected the sidewalk work, gave no input to any of the trades regarding the sidewalk installation and did not inspect the sidewalks during construction.

Jeffrey Owens, a senior property manager for Macerich, testified that although J.C. Penney is part of the mall, J.C. Penney is the owner of both the store and the land it was built on. Mr. Owens testified that J.C. Penney is responsible for the maintenance of the sidewalk adjacent to the store, including the sidewalk where plaintiff's accident allegedly occurred. Nevertheless, Mr. Owens inspected the sidewalk on a daily basis during his daily walk-through of the Queens Center Mall property. If he had observed a defect on the sidewalk, he would have brought it to the attention of J.C. Penney. Mr. Owens never observed a "grade variance" or height differential between sidewalk flags adjacent to the store prior to plaintiff's accident. He testified that he never observed the height differential depicted in the photographs marked as exhibits at plaintiff's deposition. J.C. Penney was solely responsible for the construction of the store at the mall. Macerich had nothing to do with the installation of the concrete sidewalk depicted in the photographs. Since the store was constructed, Macerich has never made any repairs to any portion of the sidewalk that is depicted in the photographs. He testified that he

never received any complaints regarding the condition of the subject sidewalk.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

Bovis' motion for summary judgment must be granted. The third-party claims against Bovis for common law indemnity and contribution fail because there is no evidence that Bovis was negligent. The

deposition testimony of witnesses on behalf of J.C. Penney, Macerich and Bovis are consistent and unequivocal in that the allegedly defective sidewalk condition did not exist when the sidewalk was installed during the construction of the J.C. Penney store. The sidewalk was inspected and approved by the representative of J.C. Penney and a third-party engineering firm. Subsequent to the installation of the sidewalk, neither J.C. Penney nor any other party notified Bovis that the sidewalk was defectively constructed or needed repair. Therefore, since there is no evidence establishing negligence on the part of Bovis, the third-party complaint and the second third-party complaint are dismissed. Any other claims or cross-claims asserted against Bovis are dismissed.

Defendants J.C. Penney and Macerich argue that they should be awarded summary judgment. Both argue that the defect was open and obvious and de-minimus. With respect to the de-minimus argument, there is no longer any requirement that a defective condition be of certain size before it can give rise to liability in a slip and fall action. Bernstein v. Red Apple Supermarkets, 642 N.Y.S.2d 303 (1st Dept. 1996). The question of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is question of fact for jury. Id. Even a trivial defect may constitute a snare or trap which will support recovery. Argenio v. Metropolitan Transportation Authority, 716 N.Y.S.2d 657, (1st Dept. 2000). Factors which make a premises defect difficult to detect present a situation in which an assessment of the hazard in view of the peculiar facts and circumstances is appropriate, In Argenio, the plaintiff tripped and fell over a depression in a highly traveled pedestrian walkway. Defendant argued that the defect was trivial in nature. The court denied summary judgment holding that a genuine issue of material fact existed as to whether depression in the floor of the railroad terminal, which was two inches wide, two inches long, and one-quarter inch deep, constituted a dangerous condition on the premises. Id. In another similar action, defendants moved for summary judgment and the court granted it on the ground that an alleged defect, 3/16 of an inch, was so slight and trivial that it bore no resemblance to a trap or nuisance and, thus, could not constitute a dangerous condition as a matter of law. Tineo v. Parkchester South Condominium, 759 N.Y.S.2d 9, (1st Dept. 2003). The First Department reversed holding that “whether a sidewalk defect is sufficiently hazardous to impose liability is generally a question for a jury to resolve on the particular facts of each case”. Id. citing Trincere v. County of Suffolk, 90 N.Y.2d 976 (1997). See also, Nin v. Bernard, 683 N.Y.S.2d 237 (1st Dept. 1999)(The issue of whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury. The precise dimensions of the defect, be they in feet or inches,

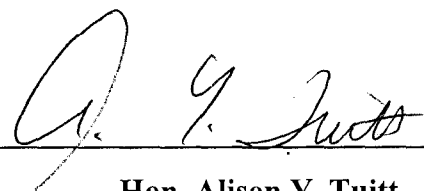
are not dispositive.”)

In the color photographs submitted, it is not apparent that the alleged defect was de-minimus, or trivial in nature. It is for a jury to decide whether this alleged defect is actionable. Moreover, the photographs and the area identified by plaintiff as where the accident occurred create an issue of fact as to whether defendants J.C. Penney as the owner and Macerich as the manager of the premises knew or should have known of the defective condition. Mr. Owens testified that part of his responsibilities included doing a walk-through of the entire premises, including the subject sidewalk. Thus, there is a question of fact as to whether he should have seen the alleged defect during one of his walk-through inspections of the premises. There is a question of fact as to whether the condition depicted in the photographs existed long enough for defendants to have known about it. The jury will be the ultimate decider of this fact.

Moreover, defendants’ argument that plaintiff is speculating on what caused his fall is without any merit. Plaintiff testified that immediately prior to his accident, he was looking straight ahead to the doors of the J.C. Penney store where he was going when he was caused to trip and fall. He further testified that after he fell, “Rubio” pointed out the part of the sidewalk that caused his fall and he himself observed the condition that caused his fall, the “lifted” part of the sidewalk.

Accordingly, defendants’ J.C. Penney and Macerich’s motions for summary judgment are denied. This constitutes the decision and Order of this Court.

Dated: 10/30/15



Hon. Alison Y. Tuitt