

D'Angelo v JCNYC, LLC
2016 NY Slip Op 30010(U)
January 4, 2016
Supreme Court, New York County
Docket Number: 161696/2013
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

LOUISE D'ANGELO,

Plaintiff,

INDEX NO. 161696/13

-against-

MOTION SEQ. NO. 003

JCNYC, LLC, RED APPLE 79TH STREET, LLC
and CITIBANK, N.A.,

Defendants.

The following papers were read on this motion by defendant Citibank, N.A. for summary judgment, and a cross-motion by defendants JCNYC, LLC and Red Apple 79th Street, LLC for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Before the Court is a motion by defendant Citibank, N.A. (Citibank) for summary judgment dismissing all claims and cross-claims brought against it. Also before the Court is a cross-motion by JCNYC, LLC and Red Apple 79th Street, LLC for summary judgment dismissing all claims and cross-claims brought against them. Defendants JCNYC, LLC and Red Apple 79th Street, LLC state that, as of September 12, 2008, JCNYC, LLC changed its name to Red Apple 79th Street, LLC, meaning that these two defendants are one and the same. On April 9, 2008, JCNYC, LLC entered into a lease agreement (lease) with Citibank, and, to date, the lease has not been amended to reflect the name change. Hereafter, the court shall identify the defendants JCNYC, LLC and Red Apple 79th Street, LLC as "LLC".

This is an action to recover damages for personal injuries based on Louis D'Angelo's

(plaintiff) trip and fall, which occurred on November 16, 2013, on a sidewalk abutting a Citibank branch at 1512 1st Avenue, New York, New York. Plaintiff alleges that a portion of the sidewalk was slightly elevated, and that this resulted in the accident. Plaintiff also alleges that she lived near the premises for a number of years and that she had noticed the elevated portion of the sidewalk prior to the accident.

Plaintiff commenced this action against the defendants based on the allegation that they maintained the premises. Citibank is a commercial tenant of the premises, pursuant to the lease it executed with LLC, the owner. These defendants have cross-claimed against each other for indemnification based on provisions in the lease.

After extensive discovery, including deposition proceedings, the defendants move for summary judgment. Citibank moves on the ground that it owes no duty to plaintiff because it is not obligated to maintain the sidewalk, contending that LLC, as the owner, has that obligation. Citibank cites section 7-210 of the Administrative Code of the City of New York (Code), which imposes a non-delegable duty on the owner of real property to maintain the adjoining sidewalk. Citibank argues that it has no contractual obligation to maintain or repair the sidewalk, that it did not create the condition in the sidewalk, and that it did not have a special use regarding the sidewalk.

Citibank argues that it owes no indemnification to LLC, and seeks costs and legal fees against LLC pursuant to the lease. Citibank contends that all cross-claims are precluded on the ground of collateral estoppel. Citibank refers to another action, *Wahl v JCNYS, LLC*, Index No. 100662/12, which was commenced at Supreme Court, New York County. In that action, another plaintiff suffered a similar accident at the same location on the same defect, and sued the same defendants based on the same claims. Defendants also made similar cross-claims. In that case the defendants moved separately for summary judgment to dismiss the claims and cross-claims. On June 3, 2014, Justice Manuel Mendez decided in favor of Citibank, granting

its motion on the ground that the owner, LLC, had the duty to maintain the sidewalk pursuant to the Code, that there was no evidence that Citibank created the condition in the sidewalk, and that the lease did not sustain LLC's claim for contractual indemnification against Citibank.

Justice Mendez denied LLC's cross-motion for summary judgment, and also denied its motion for reargument. LLC's appeal to the Appellate Division, First Department, is pending. Citibank argues that, despite the appeal, it is entitled to summary judgment with respect to LLC based on collateral estoppel.

In its cross-motion LLC proffers that the defect on the sidewalk was *de minimis*, allegedly an inch and a half elevation, and, therefore, not actionable. LLC states that despite the collateral estoppel argument, and the pending appeal of the *Wahl* decision, this Court should consider the merits of LLC's arguments, which contend that the lease provides that Citibank has an express and unambiguous duty to maintain the sidewalk, and that its failure to do so was a actionable breach. LLC seeks dismissal based on a lack of liability, or, alternatively, seeks contractual indemnification from Citibank, pursuant to the lease.

Plaintiff opposes both the motions for summary judgment. Regarding Citibank, plaintiff argues that the *Wahl* action has no connection with her case, and collateral estoppel has no effect on her claims. She contends that Citibank, as a tenant, has a common-law duty to maintain the premises, including the sidewalk. She avers that there is sufficient evidence that Citibank had notice of the allegedly defective condition of the sidewalk, as it existed for a number of years before her accident.

Plaintiff argues that defendants failed to submit any proof that they did not have a duty to maintain the sidewalk. Specifically, plaintiff maintains that the defendants failed to submit proof that they were not negligent in their maintenance, that they did not cause the condition or had no notice of the condition, or that they inspected the premises prior to the accident. Plaintiff disputes the argument that the specific condition was *de minimis* as a matter of law.

Plaintiff claims that there are sufficient issues of fact to preclude defendants' requests for summary judgment.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; see also *Scafe v Schindler El. Corp.*, 111 AD3d 556, 556 [1st Dept 2013]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]; CPLR § 3212(b)). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

The court's function on a motion for summary judgment is "issue-finding, rather than issue-determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], rearg denied 3 NY3d 941 [1957] [internal quotation marks omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court

views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

The court will first consider the summary judgment motions as they regard the defendants' cross-claims. The Court notes that by stipulation submitted to the Court dated December 14, 2015, the defendants LLC and Citibank withdraw on consent their motions for summary judgment as to their cross-claims only. As such, these portions of their respective summary judgment motions are permitted to be withdrawn.

With respect to plaintiff, who was not a party in the *Wahl* action, and is not effected by the outcome of the *Wahl* decision, it is settled that liability for a tenant like Citibank arises only if it created the defect or used the sidewalk for a special purpose, which would give rise to maintenance responsibility (see *Thomas v Triangle Realty Co.*, 255 AD2d 153 [1st Dept 1998]). Despite plaintiff's evidence of Citibank having prior notice of the sidewalk condition, this is not sufficient to demonstrate liability. Plaintiff has not shown a basis which creates a duty from Citibank to third parties like her. The court shall grant Citibank's motion for summary judgment with respect to plaintiff's claims.

The court will now consider the portion of LLC's cross-motion which seeks to dismiss plaintiff's claims against it. LLC's primary argument against liability is that the defect in the sidewalk is so insignificant that it is not actionable as a matter of law. LLC refers to photographs marked at plaintiff's deposition, and plaintiff's deposition testimony, where the defect is depicted as being an elevation of an inch and a half between two sidewalk flags.

Despite the fact that plaintiff tripped over the incline, LLC contends that the condition is trivial enough to require a dismissal of this action.

In her opposition, plaintiff argues that all circumstances surrounding the accident must be considered before dismissing this action. She claims that there is an issue as to whether the condition could be shown to be a snare or trap, particularly when this incident occurred in a heavily trafficked area. Plaintiff states that LLC failed to submit evidence indicating that the condition was not a possible trap.

“There is no per se rule that a sidewalk defect must be of a certain minimum elevation or width differential in order to be actionable; rather, it depends on the particular facts and circumstances of each case” (*Herrera v City of New York*, 262 AD2d 120, 120 [1st Dept 1999], citing *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Generally, a sidewalk defect presents an issue of fact for a jury, unless the defect is so trivial as to warrant disposition on summary judgment (*see Herrera* 262 AD2d at 120; *see also Ochoa v Walton Mgt. LLC*, 19 Misc3d 1131[A], 2008 NY Slip Op 50960 [Sup Ct, Bronx County 2008] [for a discussion on what courts have found to be trivial defects, as opposed to situations which raise a question of fact]).

The Court finds that LLC has not taken in all the circumstances surrounding this particular event, and has not shown that the condition of the sidewalk is not actionable as a matter of law, and as such the portion of LLC’s cross-motion for summary judgment dismissing plaintiff’s claims is denied.

CONCLUSION

Accordingly, it is

ORDERED that the portion of Citibank, N.A.’s motion for summary judgment seeking dismissal of the cross-claims asserted against it is permitted to be withdrawn by Stipulation dated December 14, 2015; and it is further,

ORDERED that the portion of Citibank, N.A.’s motion for summary judgment seeking

dismissal of the claims asserted against it by the plaintiff is granted and the complaint is dismissed as asserted against it with costs and disbursements to Citibank, N.A. as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the portion of defendants JCNYC LLC and/or Red Apple 79th Street, LLC's cross-motion for summary judgment seeking dismissal of the cross-claims asserted against it is permitted to be withdrawn by Stipulation dated December 14, 2015; and it is further,

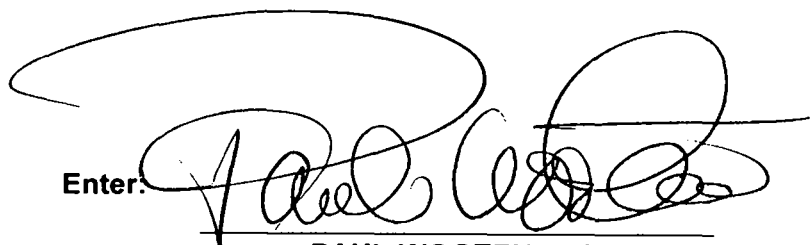
ORDERED that the portion of defendants JCNYC LLC and/or Red Apple 79th Street, LLC's cross-motion for summary judgment seeking dismissal of the claims asserted against it by the plaintiff is denied; and it is further,

ORDERED that the action is severed and continued against the remaining defendants JCNYC LLC and/or Red Apple 79th Street, LLC's; and it is further,

ORDERED that counsel for Citibank is directed to serve a copy of this Order with Notice of Entry upon all parties, and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/4/16

Enter: 

PAUL WOOTEN, J.S.C

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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