Ouellette v 303 Merrick LLC
2016 NY Slip Op 30127(U)
January 7, 2016
Supreme Court, Suffolk County
Docket Number: 11-37480
Judge: Jr., Andrew G. Tarantino

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SHORT FORM ORDER

INDEX No. 11-37480
CAL. No. 14-02107OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 3-3-15
ADJ. DATE 6-30-15
Mot. Seq. # 001 - MD
002 - XMD

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LINDA A. OUELLETTE,

Plaintiff,

- against -

303 MERRICK LLC and CAPITAL ONE, N.A.,

Defendants.

----------X

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11, 12 - 26; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 38; Replying Affidavits and supporting papers 39 - 40, 41 - 42, 43 - 44; Other memorandum of law 14; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant Capital One, N.A. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and granting contractual indemnification in its favor against the defendant 303 Merrick LLC is denied; and it is further

ORDERED that so much of the motion (incorrectly designated a cross motion) by the defendant 303 Merrick LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of the plaintiff is denied; and it is further

ORDERED that so much of the motion by the defendant 303 Merrick LLC for an order denying that portion of defendant, Capital One, N.A's motion for contractual indemnification is denied as academic.

This action arises out of a personal injury claim by the plaintiff Linda A. Ouellette (the plaintiff) for injuries she allegedly sustained on January 19, 2011 as a result of a trip and fall accident that occurred on the driveway of a commercial office building located at 303 Merrick Road, Lynbrook, New York (the premises). In her complaint, the plaintiff alleges, among other things, that the defendants failed to properly operate, manage, control, inspect, repair, and maintain the driveway, allowed a portion of the concrete driveway to become "uneven", causing a dangerous condition to exist, resulting in her injuries.

It is undisputed that the defendant 303 Merrick LLC (LLC) is the owner of the premises, and that the defendant Capital One, N.A. (Capital One) operates its banking business from the first floor of this five-story building. It appears that Capital One occupies the first floor, and operates a drive-through automated teller machine (ATM) in a kiosk located on the premises, pursuant to a written lease agreement dated August 11, 2000 (the Lease).

Capital One now moves for summary judgment dismissing the complaint and all cross claims against it. 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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, Capital One submits, among other things, the complaint and its answer, a copy of the Lease, photographs of the scene of the alleged fall, and the transcripts of the deposition testimony of the parties. In opposition to the motion, the plaintiff contends that this motion should be denied pursuant to CPLR 3212(b), which requires that motions for summary judgment be supported by a copy of the pleadings, as the movant has failed to attach a copy of the answer served by the LLC. However, CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced." Thus, it has been held that where the record is sufficiently complete, and there is no proof that a substantial right of a party has been impaired by the failure of a movant to submit copies of the pleadings, that a court may address the merits of the motion (***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 996

NYS2d 162 [2d Dept 2014]; *see also* ***Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello***, 97AD3d 611, 948 NYS2d 377 [2d Dept 2012]). Here, no substantial right of the plaintiff is prejudiced as all of the pleadings were submitted and served upon all parties in the motion made by the LLC, and the record is more than sufficiently complete.

At her deposition, the plaintiff testified that she and her husband were attending a wake at a funeral home near the premises on the day of this incident, and that a group left the funeral home to walk to a nearby restaurant. She stated that she and her husband walked along the sidewalk behind others going to the restaurant, that her husband was walking next to her, and that the group left the sidewalk to walk "through the banking parking lot" to the restaurant. She indicated that she was "looking ahead" to see where she "needed to go," that she walked over a drain in the pavement and tripped over an "uneven ledge of pavement that was at the beginning or end ... of the drive-through," and that she did not see any other person step up over the ledge before her fall. The plaintiff further testified that she did not see the ledge before her fall, that after her fall she observed that the ledge was not "marked or colored yellow or something so that you could see it," and that the difference in height between the pavement and the ledge was two to three inches. She stated that she had never been to the area where the premises is located prior to the date of this incident, that she did not know whether any complaints regarding the ledge had been made to Capital One, and that she did not report the incident to Capital One or the LLC. She indicated that she had marked the location of her fall with an "X" on a photograph of the scene marked as Exhibit "A", and that all of the photographs marked as exhibits accurately reflected the scene on the date of her accident.

Anthony Pistilli (Pistilli) was deposed on March 6, 2013, and testified that he is a principal in the LLC which owns the premises, that Capital One occupies the first floor of the building and a "one-story ... drive-up kiosk," and that there was a lease in effect between the LLC and Capital One on the date of this incident. He stated that the Lease was entered into with North Fork Bank, that it is his understanding that Capital One purchased North Fork Bank, and that the Lease was in effect on the date of this incident. He indicated that the LLC acts as the management company for the premises, that the LLC has an employee responsible for maintenance of the premises, and that he did not know if that employee had any responsibilities with regard to the parking lot at the premises. Pistilli further testified that he would visit and walk the premises, but not the parking lot, a few times a month, that he did not know if anyone from the LLC inspected the parking lot, and that the curbs along the side of the subject driveway were repainted yellow by the LLC's employee. He stated that the drain in the driveway, and everything shown in the photograph marked as Exhibit "A" except the kiosk was present when the LLC purchased the premises approximately ten years ago. He indicated that some years prior to this incident, either North Fork Bank or Capital One "broke through and repaired the concrete" in the area of the kiosk, and that there was no construction in the area of the "X" marked by the plaintiff on Exhibit "A." He acknowledged that the LLC owns the area where the plaintiff indicates that she fell but that Capital One controls that portion of the driveway as it is the exit from the kiosk. Pistilli further testified that he believes that Capital One is responsible for all parking lot surfaces at the premises, and that the driveway or the area where the plaintiff allegedly fell is part of the parking lot at the premises.

Scott Hannon (Hannon) was deposed on May 15, 2013, and testified that he is employed by Capital One as its property manager for Nassau and Suffolk Counties, and that he is familiar with the

premises. He indicated that, prior to this incident, he had been to the bank branch at the premises in 2010 to check in with the branch manager, that he had inspected the ATM at the kiosk, and that he had not inspected the driveway. Neither had he walked in the area where the plaintiff allegedly fell. He stated that snow removal, the sealing and striping, and repairs of the parking lot was the responsibility of the LLC pursuant to Section 7.1(a) of the Lease, and that if he had ever seen the ledge that he would have contacted the LLC as landlord for the premises. Hannon further testified that the kiosk is not attached to the five-story building at the premises, that he was not aware of any work performed on the concrete area around the kiosk, and that he was not aware of any work or structural changes made to the drive-up area near the kiosk prior to this incident. He stated that he did not know if anyone from Capital One inspected the parking lot at the premises in the two years prior to this incident.

Capital One contends that it is entitled to summary judgment on the grounds that the LLC, as landlord, was charged with the responsibility of maintaining the sidewalks and parking lot at the premises. That is, that it did not owe a duty to the plaintiff. In addition, Capital One contends that it did not create the allegedly dangerous condition or have actual or constructive notice of said condition, that the plaintiff was the sole proximate cause of her accident, and that the complaint must be dismissed as the plaintiff does not know why she fell. Capital One further contends that it is entitled to summary judgment on its cross claim against the LLC for contractual indemnification.

The Lease provides, in relevant part:

> 7.1 Repairs, Maintenance and Operation.
>
> a. During the Term, Landlord shall keep and maintain in good condition and repair ... as well as in a clean and safe condition (reasonably free of snow and ice), the sidewalks and curbs appurtenant to the Building (including, without limitation, the sidewalks and curbs appurtenant to the Premises) and the Parking Areas, all in compliance with the ADA and all other applicable legal requirements ...
>
> * * *
>
> During the Term, Tenant shall keep and maintain the Premises in good condition and repair, as well as in a clean, tenantable and safe condition, *excluding, however,* those items that are Landlord's responsibility to maintain and/or repair pursuant to the terms of Section 7.1(a) hereof. Tenant's maintenance and repair obligation hereunder shall include ... :
>
> * * *
>
> (ii) all repairs to, as well as any required maintenance of; the Drive Up Kiosk, whether structural or non-structural, ordinary or extraordinary; foreseen or unforeseen.

* * *

12.2 Landlord's Indemnity

> Subject to ... Section 10.1 hereof, Landlord shall indemnify, hold harmless and defend Tenant from and against any and all claims, proceedings, injuries, damages, losses, costs and expenses ... suffered or incurred by Tenant (whether directly or by reason of any claim, suit, or judgment brought by, or awarded in favor of, any person or persons) for damages, losses, costs, and/or expenses due to, but not limited to, personal injury... .that arise out of, is occasioned by, or is in any way attributable to the ownership, operation, and/or management of the Property (including without limitation, the Parking areas) by Landlord and/or others, as well as the acts or omissions of Landlord and/or Landlord's employees, agents, or contractors, except to the extent that the same is caused by the acts, omissions, or negligence of Tenant and/or Tenant's employees, agents or contractors while in the Premises.

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Ruffino v New York City Tr. Auth.***, 55 AD3d 817, 865 NYS2d 667 [2d Dept 2008]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). Where these elements are not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (***Ruffino v New York City Tr. Auth.***, *supra*; ***Noia v Maselli***, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]; ***Minott v City of New York***, 230 AD2d 719, 645 NYS2d 879 [2d Dept 1996]).

Here, Capital One has failed to establish its prima facie entitlement to summary judgment dismissing the complaint against it on the ground that it owed no duty to the plaintiff. "The best evidence of what parties to a written agreement intend is what they say in their writing" (***Slamow v Del Col***, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]; *see* ***Goldman v White Plains Ctr. for Nursing Care , LLC***, 11 NY3d 173, 867 NYS2d 27 [2008]). "When the language of a contract is ambiguous, its construction presents a question of fact that may not be resolved by the court on a motion for summary judgment" (***Shadlich v Rongrant Assoc., LLC***, 66 AD3d 759, 760, 887 NYS2d 228 [2d Dept 2009]; *see also* ***Five Corners Car Wash, Inc. v Minrod Realty Corp.***, ___ AD3d ___, 2015 NY Slip Op 0806 [2d Dept 2015]). Here, it is determined that there is a question of fact whether the Lease provision regarding maintenance and repair governs the area

of the plaintiff's fall as it uses the term "parking lot" and it appears that the alleged defect is present in the driveway out of the kiosk operated by Capital One. That is, said provision is ambiguous. The question of the scope of the indemnification provision raises the additional issue of fact whether Capital One is making special use of said driveway.

In addition, Capital One's submission, including Pistilli's testimony and the photographs submitted, reveals that there is an issue of fact whether the ledge was present for a sufficient time to constitute constructive notice in the event that Capital One is deemed to owe a duty to the plaintiff. In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier***, 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986], *citing* ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). Viewing the evidence in a light most favorable to the plaintiff and resolving all reasonable inferences in her favor, the photographs of the sidewalk and the conflicting testimony raise an issue of fact as the existence of constructive notice of the alleged defect (*see* ***Batton v Elghanayan***, 43 NY2d 898, 403 NYS2d 717 [1978]; ***Taylor v New York City Tr. Auth.***, 48 NY2d 903, 424 NYS2d 888 [1979]). "Photographs may be used to prove constructive notice of an alleged defect if the photographs are taken reasonably close to the time of the accident, and if there is testimony that the conditions at the time of the accident were similar to the conditions shown in the photographs" (***Salvia v Hauppauge Route 111 Assoc.***, 47 AD3d 791, 791-792, 849 NYS2d 630 [2d Dept 2008]; *see* ***Batton v Elghanayan,*** 43 NY2d 898, 403 NYS2d 717 [1978]).

Turning to Capital One's contention that the complaint must be dismissed as the plaintiff was the sole proximate cause of her accident, it is determined that the claim is without merit. The sole basis for said claim is that the alleged defect was open and obvious, and that the plaintiff failed to see the ledge because she was not looking down as she walked onto the premises. Whether a hazard is open and obvious cannot be separated from the surrounding circumstances (*see* ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 864 NYS2d 554 [2d Dept 2008]). A condition that may be apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (***Mazzarelli v 54 Plus Realty Corp.***, *id.*; ***Mauriello v Port. Auth. of N.Y. & N.J.***, 8 AD3d 200, 779 NYS2d 199 [1st Dept 2004]). The plaintiff's testimony raises an issue of fact as to whether the defect posed a tripping hazard or constituted a trap or snare (*see* ***Gerber v W. Hempstead Convenience, Inc.***, 303 AD2d 212, 756 NYS2d 553 [1st Dept 2003]; ***Argeno v Metropolitan Transp. Auth.***, 277 AD2d 165, 716 NYS2d 657 [1st Dept 2000]). Moreover, a determination that the alleged defect in the driveway was open and obvious would not entitle Capital One to summary judgment as it would not foreclose the plaintiff's negligence claim, but is relevant only to a determination of the plaintiff's comparative fault herein (***Saretsky v 85 Kenmare Realty Corp.***, 85 AD3d 89, 924 NYS2d 32 [1st Dept 2011]; ***Gradwohl v Stop & Shop Supermarket Co., LLC***, 70 AD3d 634, 896 NYS2d 85 [2d Dept 2010]).

In addition, it is determined that Capital One's contention that the complaint must be dismissed as the plaintiff does not know why she fell is without merit, and that Capital One has

failed to establish its entitlement to summary judgment herein. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Matinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]).

Finally, Capital One contends that it is entitled to summary judgment on its cross claim against the LLC for contractual indemnification. The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]. Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). Here, there are issues of fact whether the language of the Lease, as well as the surrounding circumstances, result in a promise by the LLC to indemnify Capital One for claims involving the subject driveway precluding the granting of summary judgment as to the subject cross claim. These include, but are not limited to, what was the agreement between the defendants regarding the construction of the kiosk, and whether Capital One is making special use of said driveway. Accordingly, the motion is denied.

The LLC now moves for summary judgment dismissing the complaint against it on the ground that the condition that allegedly caused the plaintiff to fall "was an open and obvious condition observable by the use of one's own senses which was not inherently dangerous." In addition, the LLC seeks an order "denying that portion of defendant, [Capital One's] motion for contractual indemnification." In support of its motion, the LLC submits, among other things, the pleadings, the exhibits and deposition transcripts submitted by Capital One, and the deposition of the plaintiff's husband, George Ouellette (Ouellette). At his deposition, Ouellette testified that he was walking slightly behind his wife, following a group headed to a restaurant, that he saw the group turn onto the premises and off the sidewalk, and that he did not see the ledge prior to his wife's fall. He stated that, after her fall, he noticed the ledge was three to four inches higher than the rest of the pavement.

The LLC failed to establish, prima facie, that the ledge that allegedly caused the plaintiff to fall was open and obvious and not inherently dangerous (*see* ***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 917 NYS2d 896 [2d Dept 2011]). Generally, whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of the individual case and is properly a question of fact for the jury (***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]). For the reasons set forth above, the LLC has failed to establish its prima facie entitlement to summary judgment herein requiring a denial of the motion regardless of the sufficiency of the opposing papers (citations omitted).

In addition, that branch of the LLC's motion which seeks an order denying Capital One's request for contractual indemnification is deemed academic. Accordingly, the motion is denied.

Dated: JAN 07 2016

A.J.S.C.