

Stevens v 680 St. Nicholas, LLC
2016 NY Slip Op 31289(U)
July 11, 2016
Supreme Court, New York County
Docket Number: 154103/12
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32**

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JOHN STEVENS and MARTHA STEVENS,

**Index No. 154103/12
Motion Sequence: 003 & 004**

Plaintiffs,

-against-

**680 ST. NICHOLAS, LLC, and ARKAR, INC. and
DUNKIN DONUTS,**

**DECISION/ORDER
ARLENE P. BLUTH, JSC**

Defendants.

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680 ST. NICHOLAS, LLC and ARKAR, INC.,

Third-Party Plaintiffs

-against-

145th STREET DONUTS, LLC,

Third-Party Defendant.

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Motion sequence 3 and 4 are consolidated for disposition.

This action arises out of an injury allegedly sustained by plaintiff John Stevens when he tripped on a raised area on the sidewalk adjacent to 680 St. Nicholas Avenue, New York, NY, in front of a Dunkin' Donuts shop, at approximately 8 a.m. on November 19, 2010. Plaintiff claims that fall caused him to twist his foot and knee and that it led to his eventual knee replacement.

The branch of the motion for summary judgment (Mot Seq 3) by defendants/third party plaintiffs 680 St. Nicholas, LLC and Arkar, Inc. (the "Owners") for contractual defense and

contractual indemnification against their commercial tenant defendant Dunkin Donuts a/k/a third-party defendant 145th Street Donuts LLC and defendants 136 Street Donuts LLC and Lenox Avenue Donuts (collectively, “Dunkin”¹) is granted. That branch of the motion to dismiss the plaintiffs’ claims against Owners is denied.

The motion by Dunkin (Mot Seq 4) for summary judgment dismissing plaintiff’s direct action and all cross claims against the defendant/third-party defendant and to dismiss the third-party complaint is granted only to the extent that the claim for common law indemnification is dismissed; the remainder of Dunkin’s motion is denied.

Discussion

To be entitled to the 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 Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s

¹ Counsel has appeared for all these parties, even though the caption has not been amended.

task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Contractual Defense and Indemnification

“In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The Owners claim that they are entitled to defense and indemnification pursuant to the lease with third-party defendant 145th Street Donuts LLC, which obligated Dunkin to take good care of the sidewalks and make all necessary non-structural repairs (Mot Seq 3). The Owners further allege that Dunkin was responsible for making structural repairs as well. The Owners claim that the lease contains an insurance and indemnity clause that obligates Dunkin to indemnify them for any liabilities occurred as a result of tenant’s breach of the lease.

In opposition to Owners’ motion and in support of its own motion (Motion Sequence 4), Dunkin claims that no repairs of the sidewalk were necessary, Dunkin did not breach the lease agreement and, therefore, the cross-claims for contractual indemnification should be dismissed. Dunkin further claims that there is a question of fact regarding who was responsible for making

repairs to the sidewalk and asserts that it never made any prior or subsequent repairs to the sidewalk. Dunkin claims that photographs taken after the accident show that repairs were made, and speculates that if the repair was made by the landlord, then it shows that Dunkin (as the tenant) was not required to repair the sidewalk.

Dunkin maintains that Article 8 of the lease provides for indemnification only for amounts not covered by insurance, while Article 50 is limited to conduct arising from the operation of the tenant's business, meaning that an accident on the sidewalk is inapplicable. Dunkin further claims that Article 65 limits indemnification for accidents that occurred on the sidewalk involving someone who is entering or leaving the Dunkin Donuts store. Here, Dunkin claims that plaintiff testified that he was not entering or exiting the Dunkin Donuts store at the time of the accident.

In reply, the Owners claim that Dunkin has avoided discussion of Article 65(c), which obligates Dunkin to indemnify and hold them harmless.

In reply to its motion, Dunkin claims that Article 17 of the lease required the landlord to notify the tenant if the tenant is in default of any of the lease provisions.

The relevant provisions of the lease are as follows. Article 8 provides that:

“Owner . . . shall not be liable for . . . any injury or damage to persons or property resulting from any cause of whatsoever nature unless caused by or due to the negligence of Owner . . . Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises . . . 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, including reasonable attorneys' fees, paid, suffered or incurred as a result of any breach by Tenant . . . of any covenant or condition of this lease . . . In case any action or proceeding is brought against Owner by reason of any such claim,

Tenant, upon written notice of Owner will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Owner in writing "

Article 4 (titled Repairs) provides that:

"Owner shall maintain and repair the public portions of the building, both exterior and interior . . . 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 it its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition"

Article 30 (titled Elevators, Heat, Cleaning) provides in part that:

"Tenant shall at Tenant's expense, keep the demised premises clean and in order, to the satisfaction to Owner, and if the demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks free from snow, ice, dirt, and rubbish"

Article 40 (titled Rider Provisions Prevail) states that:

"The rider provisions of this Lease shall be read in conjunction with the printed standards form of Lease annexed thereto. If there should be any inconsistency or ambiguity between the terms fo the rider portions of the Lease and the standard form of Lease, then the rider portions of this Lease shall prevail"

Article 50 (titled Liability Insurance and Indemnification: Supplementing the provisions of Article 8) provides that the Tenant must maintain insurance:

"[A]gainst all claims demands or actions with respect to damage, injury or death made by or on behalf of any person or entity, arising from or related to the conduct and operation of Tenant's business. . . It is expressly agreed that the Tenant shall indemnify and hold the Landlord harmless from any claims for damages to inventory, personal property or improvements or injury to persons caused by any water damage, lack of heat, or any condition or event at the Premises or the Building. . . Notwithstanding the limits of the insurance specified in this Article, Tenant agrees to indemnify Landlord against all damage, loss or liability resulting from any of the risks referred to in this Article."

Article 65 (titled Indemnification of Landlord) provides that:

“Tenant agrees to indemnify and hold harmless Landlord, any Superior Lessee, or Mortgagee from and against any and all claims of whatever nature against Landlord arising from (a) any act omission or negligence of Tenant . . . (b) any accident, injury or damage whatsoever caused to any person or to the property of any person and occurring during the term of this Lease in or about the demised Premises and the public areas of the Building (relating solely to accidents involving persons coming to, or leaving, the Tenant’s Premises which may occur on the sidewalk and the street in front of the Premises), the Building, and the other units and stores in the Building, (c) any breach, violation or non-performance of any term, covenant, condition or agreement in this lease . . . This indemnity and hold harmless agreement shall include indemnity from and against any and all liability, loss, cost, damage and expense of any kind or nature incurred in or in connection with any such claim or proceeding brought thereon and the defense thereof including without limitation, reasonable attorneys’ fees and disbursements”

“[I]nterpretation of a contract is a question of law for the court” (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs.*, 257 AD2d 1, 11, 691 NYS2d 35 [1st Dept 1999]). “Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence” (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD3d 191, 192, 626 NYS2d 174 [1st Dept 1995]). “Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact” (*id.* at 193). “The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings” (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 60-61, 851 NYS2d 551 [1st Dept 2008]). “In construing a contract, one of a court’s goals is to avoid an interpretation that

would leave contractual clauses meaningless” (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Assocs.*, 63 NYS2d 396, 403, 482 NYS2d 465 [1984])

In determining this branch of the motion, the Court must consider the conglomeration of relevant provisions, which includes three separate indemnification provisions. Article 30 clearly demonstrates that Dunkin, as tenant, had an obligation to make all repairs to the sidewalk. If plaintiff proves that there was a dangerous condition on the sidewalk, then by not making any repairs (*see* affirmation of Dunkin’s counsel in partial opposition ¶ 9), Dunkin breached a covenant of the lease. The combination of Articles 8 and 65(c) provides that the tenant will indemnify and provide defense for a lawsuit arising out the breach of tenant’s obligations under the lease. In other words, if the landlord is sued because the tenant’s failure to honor its obligation to maintain the sidewalk resulted in someone’s injury, then the tenant must provide a defense for the landlord if it is named in the suit; the tenant must also indemnify the landlord if the injured person gets a judgment against the landlord. Therefore, according to the plain meaning of the lease, Dunkin must provide a defense to the Owners in the instant action and, if plaintiff is awarded damages against the Owners, then Dunkin must indemnify the Owners.

While Dunkin is correct that Article 65(b) limits its liability for “any accident, injury or damage ... in or about the demised Premises and the public areas of the Building (relating solely to accidents involving persons coming to, or leaving, the Tenant’s Premises which may occur on the sidewalk and the street in front of the Premises), the Building, and the other units and stores in the Building,” Dunkin is incorrect in its conclusion that the clause exempts it from liability for accidents due to defective sidewalks unless plaintiff was a Dunkin customer. Paragraph (b) merely points out a specific type of occurrence where the tenant must indemnify the owner.

Nowhere in Article 65 does it state that this is the *only* liability that could arise from an injury allegedly caused by a defect in the sidewalk. There may be other incidents where Paragraph (b) applies – it might apply if there is a fight between Dunkin customers that spills into the street; it might apply if a Dunkin customer leaves the Dunkin store and vandalizes other stores in the building. But that is not the case here, and Paragraph (b) does not apply. Here, Dunkin agreed to be responsible for the sidewalk and someone, not a Dunkin customer, alleges injuries due to a dangerous condition on that sidewalk. Therefore, it is not inconsistent to hold that Dunkin must provide indemnification for breaching a covenant of the agreement that required the tenant to make repairs to the sidewalk.

Dunkin's additional argument, that Article 17 required the landlord to send notification of a default, is also misplaced. Article 17 sets forth a process by which the landlord, after calling a default, can cancel the lease if a default is not promptly cured. It does not state that indemnification provisions are nullified if the landlord does not serve a notice to cure.

In the instant lease, Article 40 makes clear that the rider provisions should be read in conjunction with the lease rather than to exclude previous provisions. Articles 30 and 65 make clear that Dunkin had an obligation to maintain the sidewalks. There is no ambiguity or inconsistency.

Common Law Indemnification

Dunkin also moves for summary judgment dismissing the Owners' claim for common law indemnification. Dunkin claims that the Sidewalk Statute of the City of New York imposes a

statutory duty upon the Owners, and specifically defendant 680 St. Nicholas LLC, to maintain the sidewalk.

In opposition, the Owners do not address the specifics of Dunkin's arguments and only offer a general denial.

While a tenant may be liable for damages resulting from a failure to repair a sidewalk in violation of a lease (*see Collado v Cruz*, 81 AD3d 542, 542, 917 NYS2d 178 [1st Dept 2011]), that does not set forth a basis for liability of a tenant under a theory of common law indemnification. The Owners fail to explain how they would be entitled to common law indemnification, *as opposed to contractual indemnification*, where plaintiff allegedly tripped over an alleged defect in the sidewalk. The Owners did not raise an issue of fact. Accordingly, the Court grants Dunkin summary judgment on the common law indemnification claim.

Trivial Defect

“It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). Circumstances “include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk” (*id.*).

“[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “Of course, in some instances, the trivial

nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury” (*id.*). A court must examine “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

“A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). “The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances” (*id.* at 80).

Both the Owners and Dunkin move for summary judgment dismissing plaintiff’s complaint on the ground that the alleged defect was trivial and not actionable.

The Owners argue that “On November 19, 2015 [sic] at 8:00 a.m., the sidewalk where plaintiff John Stevens stumbled was sufficiently illuminated to allow plaintiff to observe the sidewalk and the trivial defect that he stumbled on” (memorandum of law of the Owners’ counsel at 19). The Owners argue that plaintiff’s view of the alleged defect was not obstructed by other pedestrians and it was not raining or snowing at the time of the accident.

Dunkin makes similar arguments and offers the affidavit of Andrew Yarmus, an engineer, who concludes that the alleged defect was trivial. Mr. Yarmus asserts that the elevation difference between the sidewalk slabs was 3/4 of an inch.

In opposition, plaintiff claims that the alleged defect is a substantial defect and trip hazard within the meaning of the Administrative Code of the City of New York. Plaintiff argues that the affidavit of Mr. Yarmus establishes that the alleged defect was a substantial defect pursuant to the Administrative Code. Plaintiff further argues that the overall condition of the sidewalk, evidenced in photos attached to his attorney's affirmation, demonstrate that summary judgment is not warranted.

In reply, Dunkin argues that plaintiff John Stevens admitted in his deposition that the defect was trivial, that he had taken this route numerous times before the accident, and that plaintiff only determined that the height differential between the sidewalk flags was 3/4 of an inch when plaintiff visited the site with an investigator. Dunkin claims that under *Trincere v County of Suffolk*, (90 NY2d 976 [1997]), there is no specific height that makes an alleged defect substantial or trivial.

In reply, the Owners assert that the Court should disregard Mr. Yarmus' conclusions because the photographs he reviewed were from plaintiff and the site of the accident had been changed (and repaired) since the date of the accident, which prevented Mr. Yarmus from providing his own measurement. The Owners further claim that Mr. Yarmus was offered as an expert by Dunkin and not the Owners. The Owners assert that Mr. Yarmus' affidavit should be disregarded because he was not disclosed as an expert until after the note of issue was filed.

Although "a violation of a statute promulgated by the State Legislature constitutes negligence as a matter of law, the rules of an administrative body or even the ordinances of a municipality lack the force and effect of a substantive legislative enactment and, therefore,

violations thereof are merely evidence of negligence” (*Bjelicic v Lynned Realty Corp.*, 152 AD2d 151, 154, 546 NYS2d 1020 [1st Dept 1989] [internal quotations and citations omitted]). The Administrative Code of the City of NY defines a substantial defect in a sidewalk to include “a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch or where a sidewalk flag contains one or more surface defects of one inch or greater in all horizontal directions and is one half inch or more in depth” (Administrative Code of City of NY § 19-152[a][4]) (emphasis supplied).

Plaintiff has raised an issue of fact. The photographs submitted and the affidavit of Mr. Yarmus suggest that, under the totality of the circumstances, the defect was not trivial as a matter of law. The fact that the defect was approximately 3/4 of an inch raises an issue of fact regarding whether there was an Administrative Code violation.

Mr. Yarmus concluded that “plaintiff reportedly tripped over a height differential between two adjacent slabs, which was apparently 3/4 [of an inch] (less than one inch in height)” (Yarmus affidavit ¶ 8). While the Owners may not agree with Mr. Yarmus’ conclusion, they did not submit evidence from their own expert or any evidence at all to suggest that the alleged grade differential between the sidewalk flags was less than one half inch. The Court cannot ignore this affidavit because it is unhelpful for the Owners. Further, Dunkin acknowledges that the photographs “exchanged by plaintiff demonstrate that the measured height differential was approximately 3/4 of an inch. Since the area was subsequently repaired, these photographs are the ‘best evidence’ of the nature and height differential of the purported defect” (memorandum of law of Dunkin’s counsel in support at 5).

Notice

Dunkin also moves for summary judgment dismissing plaintiff's complaint on the ground that there was no notice of the alleged defect on the sidewalk. Dunkin maintains that it had no notice and its District Manager never spoke with the Owners about the sidewalk prior to the accident.

The Owners also move for summary judgment on the notice issue and argue that plaintiff John Stevens never observed the alleged defect despite having previously walked in this area. The Owners further claim that there were no complaints made about the sidewalk and that they had no knowledge of prior falls.

In opposition, plaintiff claims that the photographs it submitted depict how the sidewalk looked in 2010 and suggest that the alleged defect was not a recently-created condition. Plaintiff further claims that all defendants failed to offer testimony from witnesses that could establish lack of notice.

“In order to make out a prima facie case of negligence in cases involving defective or dangerous conditions present on property, a plaintiff must demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition” (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006] [internal quotations and citation omitted]). “A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to

discover and remedy the condition” (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 904 NYS2d 367 [1st Dept 2010] [citation omitted]).

The photographs submitted by plaintiff, which purportedly depict the sidewalk as it looked in 2010, raise an issue of fact regarding whether the alleged defect existed for a sufficient length of time to allow defendants to discover and remedy the alleged hazard.

Accordingly, it is hereby

ORDERED that the motion by the Owners is granted to the extent that it seeks summary judgment on cross-claims for contractual defense and contractual indemnification, and all defense fees and costs incurred; and it is denied to the extent that it seeks to dismiss plaintiff’s complaint in its entirety; and it is further

ORDERED that the motion by Dunkin is granted to the extent that it sought summary judgment dismissing the Owners’ claim for common law indemnification, and the claim for common law indemnification is severed and dismissed; and the remainder of the motion is denied.

This is the Decision and Order of the Court.

Dated: July 11, 2016

New York, New York



HON. ARLENE P. BLUTH, JSC