

Palladino v Yellowbird Inv. Corp.

2017 NY Slip Op 30095(U)

January 18, 2017

Supreme Court, New York County

Docket Number: 154490/2014

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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STEPHANIE PALLADINO,

Plaintiff,

-against-

YELLOWBIRD INVESTMENT CORP.,
YELLOWBIRD INVESTORS INC.,
ANDREW M. HAN, SIERRA ASSETS GROUP LTD.,
and ORIENTAL CAFÉ DUMPLING KING,

Defendants.
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Index No. 154490/2014
Motion Sequence # 002

DECISION & ORDER

KELLY O'NEILL LEVY, J.:

Plaintiff Stephanie Palladino brought this personal injury action against Yellowbird Investment Corp., Yellowbird Investors Inc., Andrew M. Han, Sierra Assets Group LTD., and Oriental Café Dumpling King after she fell on the sidewalk abutting Oriental Café Dumpling King, located at 1580 First Avenue in Manhattan on January 1, 2013.

Plaintiff alleges that a raised sidewalk cement flag outside the restaurant caused her to fall and claims the defendants were negligent in the maintenance, ownership, operation, control and repair of the sidewalk. Yellowbird Investment Corp., Yellowbird Investors Inc., and Andrew M. Han (together "Landlord") are the owners of the Premises. Oriental Café Dumpling King ("Tenant Restaurant") is the ground floor tenant of the Premises. Sierra Assets Group LTD. ("Property Manager") is the property manager for the Landlord.

Plaintiff moves, pursuant to CPLR 3212, for summary judgment. Both Landlord and Tenant Restaurant oppose the motion. Additionally, Tenant Restaurant cross-moves for summary judgment dismissing the Plaintiff's complaint and all claims and cross-claims against it.

On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 AD2d 129, 130 (1st Dep't 1997). If there is "any doubt as to the existence of triable issues of fact," the motion must be denied. *See Hammond v. State of N.Y.*, 157 AD2d 391, 393 (1st Dep't 1990), *citing Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223 (1978).

Plaintiff's Motion

Here, plaintiff has failed to meet its prima facie burden in that there are several factual issues to be determined including the very existence of the defect at the time of the accident, whether the owner had notice of the alleged defect, and whether plaintiff was negligent. While it is clear from the photographs of the sidewalk plaintiff submits, taken some time after the incident, that the pavement slab at issue is not even with one adjacent to it, the extent of the alleged defect is not clearly ascertainable. Moreover, the expert affidavit of plaintiff's professional engineer, Stanley Fein, P.E., made after an inspection of the site almost three years after the accident, does not resolve the outstanding factual issues. In addition, the deposition testimony of plaintiff, together with that of Andrew Han, owner of Yellowbird Investors, Xu Qian Dong, then manager of Tenant Restaurant, and Jason Sorkin of Sierra Assets, does not establish that the owner had notice of the alleged defect at the time in question. Accordingly,

summary judgment is not warranted here and plaintiff's motion is denied. *See Jacobsen v. Krumholz*, 41 AD3d 128, 128-29 (1st Dep't 2007).

Tenant-Restaurant's Cross-Motion

Tenant-Restaurant Tommy Sushi, Inc. d/b/a Oriental Café Dumpling King s/h/a Oriental Café Dumpling King, cross-moves for summary judgment seeking dismissal of the claims and cross-claims against it. The cross-motion is granted only to the extent that the complaint is dismissed against it for the reasons stated below.

Similar to the plaintiff here, the plaintiff in *Collado v. Cruz*, 81 AD3d 542 (1st Dep't 2011), tripped and fell on a broken sidewalk outside a store leased by tenant. The First Department, in granting the tenant's motion for summary judgment dismissing the complaint against it, held that § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, where the tenant did not create the condition or make special use of the sidewalk. *Id.* at 542. It further held that lease provisions obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party. *Id.* *See also Berkowitz v. Dayton Constr.*, 2 AD3d 764, 765 (2d Dep't 2003).

In the present case, there is no evidence that the Tenant-Restaurant created the defective condition or made special use of the sidewalk. While Owner's attorney affirmation in support alleges that there may be an issue of fact with regard to whether Tenant-Restaurant caused the defect, that assertion is not supported by the record. Therefore, the cross-motion is granted to the extent that the complaint is dismissed as to Tommy Sushi, Inc. d/b/a Oriental Café Dumpling King s/h/a ORIENTAL CAFÉ DUMPLING KING.

Tenant-Restaurant also seeks dismissal of the cross-claims Owner asserted against it for indemnity and contribution and contractual indemnification. As was the case in *Collado*, the tenant here may be liable to the owner for damages under paragraph 30 of the lease. *Collado*, 81 AD3d at 542. Also, like in *Collado*, due to the indemnity provision in paragraph 8 of the lease, “the tenant may be liable to the owner if the owner has losses which are not reimbursed by the insurance policy the owner obtained.” (*Collado*, 81 AD3d at 543). Accordingly, the court declines to dismiss the owner’s cross-claims against Tenant Restaurant.

Accordingly, it is


ORDERED, that plaintiff’s motion for summary judgment is denied; and it is further **ORDERED**, that the cross-motion of defendant Tommy Sushi, Inc. d/b/a Oriental Café Dumpling King s/h/a ORIENTAL CAFÉ DUMPLING KING is granted only to the extent that the complaint is dismissed against it and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the cross-claims against Tommy Sushi, Inc. d/b/a Oriental Café Dumpling King s/h/a ORIENTAL CAFÉ DUMPLING KING survive.

This constitutes the decision and order of the court.

ENTER:

Dated: January 18, 2017



Kelly O’Neill Levy, J.S.C.

**KELLY O’NEILL LEVY
JSC**