Harvey v 42/9 Residential, LLC
2017 NY Slip Op 31855(U)
September 5, 2017
Supreme Court, New York County
Docket Number: 151842/2015
Judge: Erika M. Edwards

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TONI G. HARVEY,

Plaintiff,

-against-

42/9 RESIDENTIAL, LLC and FBRM CORP.
d/b/a AMERICAN HOME HARDWARE & MORE,

Defendants.

Index No.: 151842/2015

DECISION/ORDER

Motion Sequences 001 and 002

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memo of Law annexed	3 (both)
Reply Affidavits/Affirmations/Memos of Law annexed	4, 5

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Toni G. Harvey ("Plaintiff"), brought this action against Defendants 42/9 Residential, LLC ("Owner") and FBRM Corp. d/b/a American Home Hardware & More ("Hardware Store") (tenant) for injuries she sustained on February 3, 2014, at approximately 4:00 p.m., when she fractured her ankle by slipping and falling on ice while walking on a sidewalk located in front of the Defendant Hardware Store, located at 590 9th Avenue, New York, New York. The adjacent building is owned by Defendant Owner and Hardware Store is a commercial tenant pursuant to a lease. Defendant Owner moves for summary judgment dismissal of Plaintiff's amended complaint and all cross-claims, or in the alternative for summary judgment in its favor as to all cross-claims against Hardware Store for contractual and common law indemnification. Defendant Hardware Store moves for dismissal and summary judgment dismissal of Plaintiff's amended complaint and all claims and cross-claims against it. For the foregoing reasons, the court denies both motions with prejudice.

At the time of Plaintiff's accident, it was snowing, the temperature was below freezing and Plaintiff slipped and fell on an area of the sidewalk where there was a colorless, icy, 24-inch path which had been shoveled or created by a 24-inch snow blower. Plaintiff testified that she did not see any sand or salt in the area where she fell. Witnesses for both Defendants testified in substance that in the past, their employees removed snow from the sidewalk and placed down salt or calcium chloride while the snow is ongoing, but they did not know whether they did it immediately prior to Plaintiff's accident. The witness for the Hardware Store testified in

substance that its employees remove snow and ice on the sidewalk in front of the store by shoveling and salting the area, but when they do it, they usually clear the entire sidewalk in front of the store. He never saw any of Owner's employees removing the snow and ice on the sidewalk in front of the store. The Owner's witness testified that its employees use shovels, a snow blower, which is 24 inches wide, and a salt spreader to remove snow and ice on the other side of the building, but not on 9th Avenue, where Plaintiff fell. The commercial tenants on 9th Avenue shovel the sidewalk adjacent to the building on that side and as a courtesy to the tenants, Owner's employees put salt down on the sidewalk on 9th Avenue.

The relevant portions of the lease between Owner and Hardware Store indicate in substance that the Hardware Store is responsible for cleaning and removing snow and ice from the sidewalk directly in front of the store. Hardware Store is also required to name Owner as an additional insured on Hardware Store's comprehensive general liability and property damage insurance policies. Additionally, Hardware Store agreed to indemnify and hold harmless Owner from and against all claims against Owner during the term of the lease for Hardware Store's negligence, including any claims arising from Owner's negligence, and for any accident, injury or damage caused to any person which occurred outside of the premises on the property.

Defendants argue in substance that their duty to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while a storm is in progress. Additionally, each Defendant argues that there is no evidence that their employees did anything to create a dangerous condition or exacerbate the hazardous conditions created by the storm. Hardware Store argues that the court should not consider Plaintiff's expert affidavit because it is untimely and prejudicial because Plaintiff failed to disclose its expert during discovery and it is incompetent and speculative.

Defendant Owner further argues that if the actions of co-Defendant Hardware Store's employees in removing the snow and ice during the ongoing snowstorm created a more dangerous condition, as alleged by Plaintiff, then Defendant Owner is entitled to common law indemnification and contractual indemnification, pursuant to the lease between Owner and Hardware Store. The lease required Hardware Store to be responsible for snow and ice removal on the sidewalk area in front of the store, so Hardware Store is liable for any negligence in the performance of its duty and Owner should receive summary judgment on its claims for common law and contractual indemnification.

Plaintiff opposes the motions and argues that Defendants have not demonstrated their entitlement to summary judgment as a matter of law and that material questions of fact exist to preclude summary judgment. Plaintiff argues in substance that there are questions as to whether one or both Defendants cleared the snow with shovels, whether Owner's snow blower created the 24-inch path, whether one or both Defendants placed salt or calcium chloride down during the snow storm, whether they created or exacerbated the dangerous condition because the salt or calcium chloride melted the existing snow or ice and the below freezing temperatures caused it to freeze and create the slick icy condition on the sidewalk which caused Plaintiff's injury. Also, Defendants' failure to use sand or other traction material contributed to their negligence.

Hardware Store opposes Owner's summary judgment motion for indemnification and argues in substance that Owner is not entitled to contractual indemnification because the

indemnification provision in the lease violates General Obligations Law § 5-321 because it exempts Owner from liability for its own negligence. Therefore, the provision is void as against public policy and unenforceable. Additionally, Hardware Store argues that Owner is not entitled to common law indemnification because there has been no finding of liability. Owner argues that the indemnification clause is valid and does not violate the General Obligation Law because a landlord may be indemnified for its own negligence when, as with this lease, there is a broad indemnity provision in the lease, accompanied by an insurance procurement clause on the part of the tenant.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). Under the "storm in progress" doctrine, it is well established that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended (*Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007] [internal citations omitted]). Once a defendant demonstrates that a plaintiff's accident occurred during a snowstorm, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact concerning defendant's negligence (*id.*). Although a defendant has no obligation to remove any snow or ice during the storm, liability may result if the efforts it did take created a hazardous condition or exacerbated the natural hazards created by the storm (*Wheeler v Grande'Vie Senior Living Community*, 31 AD3d 992, 992 [3d Dept 2006] [internal citations omitted]).

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms [internal quotation marks and citations omitted]" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary [internal quotation marks and citations omitted]" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted]" (*id.* at 367). The shifting of loss under common law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

In applying these legal principles to the facts of this case, the court determines that Defendants met their initial burden of establishing that Plaintiff's alleged accident occurred while the snow storm was ongoing. It is uncontroverted that Plaintiff testified that it was snowing at the time of her accident and the weather reports and other evidence indicate that there was 8.0 inches of snow on the date of Plaintiff's accident, it was snowing at the time of the accident and the temperature was below freezing. Therefore, the burden shifted to Plaintiff to demonstrate that Defendants elected to engage in snow removal activities and failed to act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm.

Here, the court accepts the expert affidavits submitted by Plaintiff and Owner and considers the other evidence submitted by the parties. Based on the evidence, Plaintiff met its burden and raised material factual issues to defeat these motions, including whether either or both Defendants took steps to remove the snow and ice during the storm by shoveling and/or using a snow blower to create a path in the area where Plaintiff fell, whether one or both placed salt or calcium chloride down in the area where the snow was removed and whether they were negligent in doing so by causing the snow to melt and freeze which caused or exacerbated the dangerous icy condition, or that they were negligent in failing to place sand or other traction material on the area (*see*, *Pipero v New York City Tr. Auth.*, 69 AD3d 493, 493 [1st Dept 2010] [internal citations omitted]; *Bauman v Dawn Liquors, Inc.*, 148 AD3d 535 [1st Dept 2017]).

Additionally, the court denies Owner's motion for contractual or common law indemnification at this time, as material questions of fact exist regarding whether Owner or Hardware Store is negligent for attempting to remove the snow and ice during the storm by creating a hazardous condition, or exacerbating the dangerous, icy condition. There are issues

regarding whether Owner's employees removed the snow by using its snow blower based on the two-foot wide path in the snow on the sidewalk, whether they were negligent in placing salt or calcium chloride down on the path or in failing to place sand on the area. As such, Owner has not demonstrated the absence of negligence on its part and negligence on Hardware Store's part to entitle it to summary judgment on its contractual and common law indemnification claims.

Therefore, for the foregoing reasons, this court denies both motions in their entirety. Defendants' summary judgment motions as to dismissal of Plaintiff's amended complaint are denied with prejudice and Owner's summary judgment motion regarding Hardware Store's indemnification is denied without prejudice.

As such, it is hereby

ORDERED that the court denies Defendant FBRM Corp. d/b/a American Home Hardware & More's summary judgment motion to dismiss and summary judgment motion to dismiss Plaintiff's amended complaint and all claims and cross-claims against it with prejudice and without costs; and it is further

ORDERED that the court denies Defendant 42/9 Residential, LLC's summary judgment motion to dismiss Plaintiff's amended complaint and all cross-claims with prejudice and denies its alternative motion for summary judgment in its favor as to all cross-claims against Defendant FBRM Corp. d/b/a American Home Hardware & More for contractual and common law indemnification without prejudice.

Date: September 5, 2017

HON. ERIKA M. EDWARDS