Harnden v Lentzos
2017 NY Slip Op 33142(U)
October 6, 2017
Supreme Court, Ulster County
Docket Number: 16-0623
Judge: Richard L. Mott

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

----------X

LAURA HARNDEN,

Plaintiff,

-against-

NIKOLAOS LENTZOS and ELIZABETH LENTZOS,

Defendants.

----------X

NIKOLAOS LENTZOS and ELIZABETH LENTZOS,

Third-Party Plaintiffs,

-against-

FS & GK, LLC,

Third-Party Defendant.

----------X

DECISION/ORDER

Index No. 16-0623
R.J.I. No. 15-16-0400
Richard Mott, J.S.C.

FILED
2 H 51 M
OCT 19 2017
Nina Postupack
Ulster County Clerk

Index No. 16-1208

Motion Return Date: August 11, 2017

APPEARANCES:

Plaintiff:
Alfred B. Mainetti, Esq.
Mainetti, Mainetti & O'Connor, PC
130 N. Front Street
Kingston, NY 12401

Defendants/Third-Party Plaintiffs:
Melissa Smallacombe, Esq.
Burke Scolamiero, Mortati & Hurd, LLP
437 East Allen Street
Hudson, NY 12534
For Nikolaos Lentzos and Elizabeth Lentzos

Third-Party Defendant:
Brady J. O'Malley, Esq.
Smith, Sovik, Kendrick & Sugnet, PC
250 South Clinton Street, Suite 600
Syracuse, NY 13202
For FS & GK, LLC

Mott, J.

Third-Party Defendant FS & GK, LLC, (hereinafter, "LLC") moves for summary judgment dismissing the third-party complaint which seeks indemnification in this premises-liability personal-injury action or, alternatively, dismissing the complaint for lack of negligence. Defendant Third-Party Plaintiffs Nikolaos and Elizabeth Lentzos (hereinafter, "Lentzos") oppose dismissal of the third-party complaint and cross-move to dismiss the complaint and for conditional indemnification from LLC. Plaintiff opposes dismissal of the complaint and cross-moves to amend it, to add LLC as a direct defendant. LLC opposes conditional indemnification to Lentzos and amendment of the complaint.

Background

On December 21, 2015, at 7:40 AM, after exiting the main entrance to LLC's bagel shop and opening the hatch to her car, Plaintiff ascended the building's rear ramp leading to the kitchen to receive delivery of her order, as directed by LLC's employee. She opened the kitchen door for Richard Clint Heathwood, (hereinafter, "Heathwood") an LLC employee who was exiting with her order. After descending approximately two-thirds of the ramp, she lost traction, her right foot slipped and she turned and fell, landing in a sitting position on the ground facing the ramp. Plaintiff had used the kitchen ramp on prior occasions during the years she frequented this shop to receive bulk purchases and sometimes an employee would carry the bagels to her car.

The ramp has no railing, an approximate slope of 20% and ends in a railed landing 19 inches above the ground. In addition, to the rear ramp the building has a code-compliant main entrance and handicap access ramp. However, LLC employees and the shop owner-lessee routinely use the ramp to access the shop.

LLC is the owner of the bagel shop and is the sole lessee of the premises owned by Lentzos. The lease provides that LLC accepts the premises in as-is condition and that LLC is responsible for interior and exterior repairs, but that any changes to the property must be approved in writing by Lentzos. LLC agrees to "take good care of the premises," and is specifically responsible for snow removal from the sidewalks and maintenance of the parking lot. In addition, LLC agrees to indemnify Lentzos for its negligent acts or that of its agents, employees, customers or invitees. Finally, the lease rider states that:

> "except to the extent specifically otherwise provided in the Lease, the Landlord shall keep and maintain the building and lot in and upon which the Leased Premises is located, in good operating order and repair and available for use by the Tenant at all times."

Summary Judgment

A movant is entitled to summary judgment where there are no triable issues of fact and the movant submits sufficient competent evidence demonstrating that it is entitled to a favorable determination as a matter of law. *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]. Only when the movant satisfies this obligation does the burden shift to the nonmovant to present evidence demonstrating the existence of a triable issue of fact. *Lacasse v Sorbello*, 121 AD3d 1241, 1241- 1242 [2014].

Premises Liability

Parties' Contentions

LLC claims that the accident was not a result of any negligence on its part because it had no notice of a dangerous condition. In support, it proffers the affidavit of Wayne Mahar, a meteorologist, stating that there was no precipitation during the three days

preceding the accident, that the temperature was above freezing with partial sunshine on December 19, 20 and 21, 2015 and that the weather conditions on the accident date would likely not have created morning dew that would have resulted in a slippery condition. Further, it cites Heathwood's affidavit stating that he observed the ramp free from ice or wet substances on the date of the accident at 5:50 AM when he arrived at work and two hours later when Plaintiff fell and that Plaintiff denied seeing any ice when she first went up the ramp. Finally, it maintains that the absence of a handrail was not a proximate cause of Plaintiff's injury since it occurred when she slipped and rolled her ankle, before hitting the ground. In support, LLC cites Plaintiff's medical records indicating she told hospital staff her ankle rolled and popped.

Lentzos claim entitlement to summary judgment because Plaintiff was unable to identify what caused her fall and, as an absentee landlord, they had no notice of any alleged slippery condition. Further, they claim that Plaintiff cannot establish that the absence of a handrail contributed to the accident or that one was required. In support, they proffer the affidavit of Ernest J. Gailor, a physical engineer, (hereinafter, "Gailor") who states that the Building Code does not require a handrail for utility ramps where there are two other code compliant means of ingress and egress. Lentzos cite their affidavits stating that they did not use the ramp as a means of ingress and egress when they operated the shop previously and had no knowledge that LLC did. Further, Gailor states that even if a handrail were required, there was no building code violation because Plaintiff fell from the bottom third of the ramp, at a height that does not require a handrail.

Plaintiff claims that defendants had actual and constructive notice that the ramp was not safe for patrons and that the glazed icy-wet condition on the ramp and/or its non-

code compliant construction caused the accident. She cites her testimony that her foot slipped because the ramp was slippery, that "it was icy on my car. I think it was icy under my foot" She also states, "I would say it was ice - icy" based on the feeling underfoot. Further she cites her affidavit stating that she would have used a handrail had one been available and that it might have avoided her stepping on the slippery area or prevented her injury after slipping. Finally, she relies upon the reports of Howard Altschule, (hereinafter, (Altschule") a meteorologist, and of Paul Economos (hereinafter, "Economos"), a state certified Building Code professional.

Altschule states there was trace snow (unmeasurable or less than .01) two days before the accident that melted as it fell, causing wet surfaces to form that melted and froze thereafter. He concludes that patches of melt/freeze ice were present on untreated and undisturbed surfaces, approximately 35 minutes prior to the accident. Further, he notes that the temperature at the time of the accident was 34 degrees causing it to melt. Economos inspected the ramp and states that it is hazardous because it far exceeds the 10 per cent slope threshold for requiring a handrail per the New York State and Uniform Building Codes. Further, he states that same is exacerbated because the ramp was not constructed with non-slip decking material, per the American National Standards Institute's Standard for the Provision of Slip Resistance on Walking/Working surfaces.

Discussion

In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff. *Mayorga v Berkshire Farm Ctr. and Services for Youth*, 136 AD3d 1262 [3d Dept 2016]. Liability for a dangerous condition on real property is predicated upon ownership, occupancy, control or special use thereof.

Creutzberger v County of Suffolk, 140 AD3d 915, 916 [2d Dept 2016]. Defendants have the threshold burden of establishing that they maintained their property in a reasonably safe condition, did not create the condition that caused the accident or have actual or constructive notice thereof. *Bedell v Rocking Horse Ranch Corp.*, 94 AD3d 1389, 1390 [3d Dept 2012].

For an absentee landlord to be liable based upon constructive notice of a defective condition, said condition must have been visible and apparent and existed for a sufficient time to permit the landowner or operator to discover it and take corrective action. *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473 [2d Dept 2004]; *Uhlinger v Gloversville Enlarged School Dist.*, 19 AD3d 780 [3d Dept 2005]; *Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 560 [1987]; *Torosian v Bigsbee Vil. Homeowners Ass'n*, 46 AD3d 1314 [3d Dept. 2007].

Here, LLC and Lentzos have met their initial burden demonstrating the absence of actual or constructive notice of a dangerous condition on the ramp through Heathwood's and Mahar's affidavits establishing the absence of any visible evidence of snow or ice, recent measurable snowfall or conditions likely to create dew. In rebuttal, Plaintiff has failed to raise a triable issue of fact where her testimony is equivocal as to whether it was icy. Mere slippery or wet conditions alone are insufficient to constitute a dangerous condition. *Clarke v Verizon New York, Inc.*, 138 AD3d 505 [1st Dept 2016], lv to appeal denied, 28 NY3d 906 [2016] (claimed defect of slipperiness, mere wetness on walking surface due to rain did not constitute dangerous condition where no prior complaints or injuries had been reported to owner). Further, Altschule's opinion relates only to undisturbed surfaces, ignoring the evidence that the ramp was used routinely by shop staff and owners.

Further, even had an icy condition existed, there is no evidence that it was visible and apparent for sufficient time to permit discovery and corrective action. *Ravida v Stuyvesant Plaza, Inc.*, 101 AD3d 1421, 1422 [3d Dept 2012] (proof that the area had been inspected at least twice on the date of the accident and no ice was observed required a showing of the size of alleged patch of ice with respect to its potential visibility); *Cantwell v Rondout Sav. Bank*, 55 AD3d 1031 [3d Dept 2008] (no constructive notice where defendant's representative established that area was maintained in reasonably safe condition and had no notice of ice on which plaintiff slipped and plaintiff testified that ice was very small and he did not notice it when entering bank).

However, LLC has failed to meet its burden of establishing that the ramp was reasonably safe for Plaintiff's use. Indeed, Gailor states only that the ramp was safe for ingress to make deliveries and issues of fact exist upon the parties' contradictory deposition testimony as to whether Plaintiff was invited by LLC's employee to use it. Further, it can be reasonably inferred that a less sloped, non-slip surface with a handrail, as required for use as an egress, would have prevented Plaintiff from slipping in a manner causing injury to her ankle. *Jones-Barnes v Congregation Agudat Achim*, 12 AD3d 875 [3d Dept 2004] (direct evidence of causation not necessary but must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone); cf., *Reiff v Beechwood Browns Rd. Bldg. Corp.*, 54 AD3d 1015 [2d Dept 2008] (summary judgment granted to defendants where plaintiff unable to identify a code defect that caused his fall).

Notwithstanding, a landlord who retains the right to enter the leased property to make repairs may only be liable for injuries to third parties due to a significant structural

or design defect that is contrary to a specific statutory safety provision. *Boice v PCK Dev. Co., LLC*, 121 AD3d 1246, 1248 [3d Dept 2014].

Here, while Lentzos installed the ramp they had no knowledge of its use other than for delivery ingress, for which it is code compliant. Therefore, they cannot be held liable to Plaintiff for LLC's improper use thereof. *Boice v PCK Dev. Co., LLC*, 121 AD3d 1246. Accordingly, the complaint is dismissed as to Lentzos.

Motion to Amend
Parties' Contentions

Leave to amend a pleading is freely given absent prejudice or surprise resulting directly from the delay. *O'Halloran v Metro. Transp. Auth.*, 2017 WL 3594921 (1st Dept, August 22, 2017); CPLR § 3025(b). Such a motion is addressed to the sound discretion of the court and, in the absence of a clear abuse of such discretion, the determination will not be disturbed on appeal. *Bailey v Vil. of Saranac Lake, Inc.*, 100 AD3d 1089, 1090 [3d Dept 2012].

Here, while the motion to amend comes after the note of issue, there is no unfair surprise, no new claims are alleged, all the same defenses remain available in this action that commenced in March, 2016, and the limitations period as to LLC has not expired.

Conditional Indemnity

Lentzos claim entitlement to conditional indemnity based upon the lease and common-law, where they have demonstrated their lack of negligence.

LLC contends that common-law indemnification is precluded because it owed no duty to Lentzos, where the lease provides that except as otherwise stated, Lentzos "shall keep and maintain the building and lot .... in good operating order and repair and available

for use by [LLC] at all times." Further, it avers that the lease, strictly construed, does not require LLC to maintain the ramp, only the parking lot and the sidewalk.

Discussion

Conditional contractual indemnification is triggered by a plaintiff's negligence claim, *Antoniak v P.S. Marcato El. Co.*, 144 AD3d 407 [1st Dept 2016] and should be granted where there is no issue of fact as to the duty to indemnify. A party seeking contractual indemnification must prove itself free from negligence, because, to the extent its negligence contributed to the accident, it cannot be indemnified. *Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772 [2d Dept 2010].

Indemnification provisions are strictly construed to avoid imputing any duties which the parties did not intend to assume and the right to contractual indemnification depends upon the specific language of the contract. *Davis v Catsimatidis*, 129 AD3d 766, 768 [2d Dept 2015]. *Tafolla v Aldrich Mgt. Co.*, LLC, 136 AD3d 1019, 1020 [2d Dept 2016] (cross-claim defendant had no duty to remove snow from the parking lot such that plaintiff's injuries were not the result of its negligence). Any ambiguities in a contract are resolved by recourse to extrinsic evidence, construing the ambiguity against the drafter. *Finch v Haynes*, 104 AD3d 1113, 1114 [3d Dept 2013].

Here, unlike *Tafolla*, any ambiguity as to the party's respective responsibilities is resolved by the extrinsic evidence demonstrating LLC's exercise of control over the subject ramp as the building's only tenant and LLC's acceptance of the premises in as-is condition. Further, the grant of summary judgment as to Lentzos entitles them to indemnity per the lease, if LLC is found to be negligent.

Accordingly, the motion to dismiss is denied; Lentzos' cross-motion to dismiss the complaint and for conditional indemnification is granted; and Plaintiff's cross-motion to amend the complaint is granted. The amended complaint must be served within 10 days of notice of entry herein. Any remaining contentions have been considered and found to lack merit, or rendered academic by this determination.

This constitutes the Decision and Order of this Court. The Court is forwarding the original Decision and Order directly to the Plaintiff, who is required to comply with the provisions of CPLR §2220 with regard to filing and entry thereof. A photocopy of the Decision and Order is being forwarded to all other parties who appeared in the action. All original motion papers are being delivered by the Court to the Supreme Court Clerk for transmission to the County Clerk.

Dated: Hudson, New York
October 6, 2017

FILED
2 H 51 M
OCT 19 2017
Nina Postupack
Ulster County Clerk

RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion, Memorandum of Law and Affirmation of Brady J. O'Malley, Esq., with Exhibits A-N, dated May 3, 2017, Affidavit of Wayne Mahar with Exhibits A-B, dated April 18, 2017 and Affidavit of Richard Clint Heathwood, dated April 28, 2017;
2. Opposition Affirmation of Alfred B. Mainetti, Esq., with Exhibits O-Q, dated July 5, 2017
3. Notice of Cross-Motion, Memorandum of Law and Affirmation of Melissa Smallacombe, Esq., with Exhibits A-J, and Affidavits of Nikolaos Lentzos with Exhibits A-B, of Elizabeth Lentzos, with Exhibits A-B, dated July 13, 2017, and of Ernest J. Gailor, P.E., dated July 10, 2013;
4. Notice of Cross-Motion of Alfred B. Mainetti, Esq., with Exhibits 1-4, dated August 4, 2017;
5. Reply Affirmation and Memorandum of Law of Brady J. O'Malley, Esq., dated August 4, 2017, in support of its motion for summary judgment;
6. Reply Affirmation of Brady J. O'Malley, Esq., with Exhibit 1, dated August 8, 2017 in opposition to Plaintiff's cross-motion to amend the complaint;
7. Reply Affirmation of Melissa Smallacombe, Esq., dated August 9, 2017.