Camacho v Broadway Plaza Ctr. Inc.
2018 NY Slip Op 30833(U)
May 3, 2018
Supreme Court, New York County
Docket Number: 151909/2017
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

JOSE CAMACHO,

Plaintiff,

- v -

BROADWAY PLAZA CENTER INC.,

Defendant.

(and a third-party action)

INDEX NO. 151909/2017

MOTION DATE 4/26/18

MOTION SEQ. NO. 002

NYSCEF Doc Nos. 31–37 and 49–54 were read on this motion for leave to amend the complaint.

Motion by Plaintiff Jose Camacho ("Camacho") pursuant to CPLR 3025 (b) for an order granting him leave to file a supplemental summons and amended verified complaint naming Japp Business Inc. d/b/a Pick and Eat ("Pick and Eat") and Japp Drink Corp. as additional direct defendants is granted.

BACKGROUND

The instant actions arise from Camacho's alleged fall on the sidewalk abutting 4179 Broadway, New York, New York 10033, at the corner of 177th Street and Broadway (the "Premises"), on February 27, 2017. In the instant motion, Camacho now moves for an order granting him leave to file a supplemental summons and amended verified complaint naming Japp Business Inc. d/b/a Pick and Eat and Japp Drink Corp. as additional direct defendants. Plaintiff argues that it has learned through additional discovery that Pick and Eat and Japp Drink Corp. are proper direct defendants. Plaintiff alleges that Defendant Broadway Plaza Center Inc. ("Broadway") is the owner of the Premises and that Pick and Eat and Japp Drink Corp. operate out of the Premises pursuant to leases between Broadway, as owner/landlord, and Pick and Eat and Japp Drink Corp., as tenants. Plaintiff then argues that, because Pick and Eat and Japp Drink Corp. are already in the case as third-party defendants, they will not be prejudiced by the proposed supplemental summons and amended verified complaint.

Plaintiff's proposed supplemental summons and amended complaint submitted with the instant motion add Pick and Eat and Japp Drink Corp. as direct defendants. The proposed amended verified complaint alleges four causes of action, each sounding in negligence. The first, second, third, and fourth causes of action relate to the alleged negligence of Broadway, Pick and Eat 2, Pick and Eat, and Japp Drink Corp., respectively.

Counsel for Pick and Eat and Pick and Eat 2, Inc. has submitted opposition to the instant motion. Insofar as the opposition relates to Pick and Eat 2, Inc., in an order dated May 3, 2018, this Court granted motion seq. 001 by former defendant Pick and Eat 2, Inc. pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint and third-party complaint as against it. As such, the second cause of action in Plaintiff's proposed amended verified complaint is moot and shall not appear in the amended verified complaint. Further, Pick and Eat 2, Inc. shall not appear in the supplemental summons or any new caption as the instant actions were dismissed as against it. As such, the Court need not consider counsel's opposition to the instant motion relating to Pick and Eat 2, Inc.

Counsel for Pick and Eat argues, in opposition to that branch of the instant motion which seeks to add Pick and Eat as a direct defendant, that Administrative Code of the City of New York § 7-210 does not apply to a commercial tenant. Pick and Eat further argues that Broadway had an absolute duty to maintain the sidewalk abutting the Premises. Pick and Eat then argues that *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136 [2002]) is inapplicable.

Pick and Eat argues first that it did not launch a force or instrument of harm. Pick and Eat states that the proposed amended verified complaint alleges a broken, depressed, uneven, and mis-leveled sidewalk. Pick and Eat then states that Camacho does not allege any action by Pick and Eat that would have caused such a condition.

Pick and Eat argues second that Camacho had no knowledge of the contractual duties, if any, by and between Pick and Eat and Broadway, and therefore could not have relied on Pick and Eat's continued performance of its contractual duties to his detriment.

Pick and Eat argues third that Pick and Eat "cannot be deemed to have entirely displaced [Broadway's] duty to maintain the sidewalk, as Broadway owns several buildings on the very same block and can therefore not claim to be an out of possession landlord or to have bestowed upon Pick and Eat an[] exclusive property agreement." (Affirmation of Talcovitz ¶ 26.)

The third cause of action in the proposed amended verified complaint alleges that Pick and Eat's negligence included:

> "negligently, carelessly, and recklessly allowing the [] sidewalk area to remain in a depressed, uneven, misleveled [sic], broken, cracked and defective condition, thereby creating an unreasonably dangerous and hazardous nuisance trap and condition to exist thereat; [] failing to take appropriate and reasonable curative measures or otherwise restore and/or repair said [] portion of the subject sidewalk despite having prior actual written and/or constructive notice of same; [] failing to maintain the public sidewalk in a reasonably safe manner; [] failing to keep said sidewalk area reasonably safe for pedestrians and passers-by such as plaintiff; [] failing to keep said sidewalk area free of defect; [] negligently and carelessly owning, operating, maintaining, managing and controlling the [] sidewalk []; [] allowing and continuing to allow for an unreasonable period of time after [] notice a dangerous and hazardous condition to remain at the [] sidewalk []; [] carelessly

> and negligently permitting ineffective and/or inadequate repair measures to be undertaken upon the public sidewalk at the aforestated location of this incident; [] failing to undertake reasonable efforts to repair and/or restore the [] sidewalk; [] failing to prudently and carefully perform and complete any repair and/or restoration measures; [] failing to keep said sidewalk area free from dangerous, defective, and hazardous conditions; . . . violating various rules, regulations, ordinances, code provisions and statutes; [] violating various provisions of the Administrative Code [] including § 7-210; [] failing to keep said sidewalk vicinity and premises in good repair; and [] causing, creating and allowing to remain thereat a dangerous, defective and hazardous nuisance trap and defective condition upon the aforesaid sidewalk."

(Altman affirmation, exhibit E ¶ 55.)

DISCUSSION

CPLR 3025 provides

> "(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

"As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611 [1st Dept 2017] [holding that leave should be granted "absent . . . surprise resulting therefrom"].) "To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment." (*Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017].) "[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010].)

Administrative Code § 7-210, liability of real property owner for failure to maintain sidewalk in a reasonably safe manner, provides that

> "a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

> "b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
>
> "c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
>
> "d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions."

The Appellate Division, Second Department has recently analyzed the applicability of Administrative Code § 7-210 to commercial tenants in the context of a motion pursuant to CPLR 3211 (a) to dismiss. In *Torres v City of New York* (153 AD3d 647, 649 [2d Dept 2017], the court held that

> "As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party. However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party."

(Internal citations and quotation marks omitted.) The court also noted that

> "As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control or special use of the property. A tenant of property abutting a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or

> ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty."

(*Torres*, 153 AD3d at 648 [internal citations and quotation marks omitted].)

In *Torres*, the court found that the defendant had failed to submit establish that the plaintiff had no cause of action. In the instant motion, Pick and Eat fails to submit any documentary evidence or affidavit of merit to establish conclusively that Camacho has no cause of action against it. The Court finds that Pick and Eat's submission does not sufficiently address Plaintiff's proposed third cause of action. The Court finds further that Pick and Eat has failed to address sufficiently for the purposes of the instant motion that it did not create the alleged defect, make some special use of the sidewalk, or enter into a lease that was so comprehensive and exclusive as to sidewalk maintenance as to entirely displace Broadway's duty to maintain the sidewalk. (*See Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept 2010].) As such, the Court finds that Pick and Eat has not demonstrated an absence of a duty of care owing to Camacho from which it would flow that Plaintiff has no cause of action against it.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Jose Camacho pursuant to CPLR 3025 (b) for an order granting him leave to file a supplemental summons and amended verified complaint naming Japp Business Inc. d/b/a Pick and Eat and Japp Drink Corp. as additional direct defendants is granted; and it is further

ORDERED that the action shall bear the following caption:

----------X
JOSE CAMACHO,

Plaintiff,

- against -

BROADWAY PLAZA CENTER INC., JAPP BUSINESS INC. d/b/a PICK AND EAT, and JAPP DRINK CORP.

Defendants.
----------X
BROADWAY PLAZA CENTER, INC.,

Third-Party Plaintiff,

- against -

JAPP BUSINESS INC. and JAPP DRINK CORP.

Third-Party Defendants.
----------X

And it is further

ORDERED that Plaintiff serve a supplemental summons and amended verified complaint upon all above-captioned parties per the CPLR within 20 days of the entry of this order; and it is further

ORDERED that, within 10 days of entry of this order, Plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption herein; and it is further

ORDERED that all defendants named in the supplemental summons and amended verified complaint shall serve an answer to the amended verified complaint or otherwise respond thereto within 20 days from the date of service of the supplemental summons and amended verified complaint upon them; and it is further

ORDERED that the parties in the newly captioned matter are directed to appear either by counsel or pro se for a preliminary conference in Part 29, located at 71 Thomas Street, Room 104, New York, New York 10013-3821, on Tuesday, July 3, 2018, at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: May 3, 2018
New York, New York

, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE