Abbaticchio v CVS Pharm.
2019 NY Slip Op 30433(U)
January 10, 2019
Supreme Court, Richmond County
Docket Number: 150545/2016
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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PEGGY ABBATICCHIO,

Plaintiffs,

- against -

CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053 and BLOCK PROPERTIES SI, LLC,

Defendants.

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BLOCK PROPERTIES SI, LLC,

Third-Party Plaintiff,

- against -

NEW LOOK MAINTENANCE, LLC,

Third-Party Defendant.

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HON. THOMAS P. ALIOTTA

DECISION & ORDER

Index No.: 150545/2016
Motion Seq.: 3140-003
3466-004
3601-005

Recitation, as required by CPLR 2219(a) of the following papers numbered were fully submitted on the 5th day of December 2018.

	Papers Numbered
Notice of Motion to Strike (MS003) and Affirmation with Exhibits (NYSCEF DOC. 49 - 64)	1
Affirmation in Opposition with Exhibit (MS003) (NYSCEF DOC. 63 – 64)	2
Notice of Motion and Affirmation (MS004), with Exhibits, By BLOCK PROPERTIES SI, LLC for summary judgment (NYSCEF DOC. 65 – 84)	3
Affirmation in Opposition (MS004) by defendants, By CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053 (NYSCEF DOC. 95)	4

Affirmation in Opposition to MS004 & 005, with Exhibits, by Plaintiff (NYSCEF DOC. 99 – 105).....5

Reply Affirmation (MS004) (NYSCEF DOC. 107).....6

Notice of Motion and Affirmation (MS005), with Exhibits by CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053 (NYSCEF DOC. 85 – 94).....7

Affirmation in Opposition (MS005) by BLOCK PROPERTIES SI, LLC (NYSCEF DOC. 98).....8

Affirmation in Opposition to MS004 & 005, with Exhibits, by Plaintiff (NYSCEF DOC. 99 – 105).....5

Reply Affirmation (MS005).....9

Upon the foregoing papers, the motion by defendant BLOCK PROPERTIES SI, LLC, to strike this action from the calendar and vacate plaintiff's note of issue is granted in part and denied in part; the motion for summary judgment by defendant, BLOCK PROPERTIES SI, LLC is denied, and the motion by defendants, CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053, for summary judgment is granted, all in accordance with the following:

This is an action for personal injuries allegedly sustained by plaintiff on March 1, 2015. The accident occurred on the sidewalk adjacent to the CVS Store located at 2045 Forest Avenue, Staten Island, New York – a corner property at the intersection of Forest Avenue and Union Avenue. The property was owned by defendant Block Properties LLC (hereinafter "Block") and leased to defendants CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053 (hereinafter "CVS"). Plaintiff fell while walking to her car which was parked on Union Avenue. She had intended to enter the passenger side of the vehicle which was adjacent to the sidewalk

and the CVS Store. Based on the photograph marked at her deposition (NYSCEF #104),[1] it is plaintiff's testimony that she fell on snow and ice in the area between the path on the sidewalk and her vehicle. Prior to the accident, defendant Block alleges that it contracted with third-party defendant, New Look Maintenance, for snow removal in the parking areas, but not the sidewalk.

Each defendant, relying on the lease agreement, has moved for summary judgment arguing that neither owed a duty to plaintiff for snow removal. Defendants also argue that neither one created the condition nor had actual or constructive notice of the snow and ice condition on the sidewalk. CVS relies upon paragraphs 33 and 50 in the lease which affirmatively place the responsibility for snow removal on Block. Block in support of its motion relies on an email correspondence from CVS to Block dated December 15, 2016 (NYSCEF #79, p.33) stating that CVS is the party responsible for snow removal on the sidewalk.[2] In opposition, CVS, relying upon paragraph 51(h) of the lease, contends that the email is irrelevant as it does not comport with the terms of the lease that an amendment shall be in writing and it is dated more than one year after plaintiff's accident. Defendant Block has also moved to strike this action from the trial calendar for plaintiff's failure to provide a duly executed Medicaid authorization and color photographs pursuant to a letter dated February 23, 2018 and co-defendant's failure to provide a response to a demand for discovery and inspection dated February 5, 2018, which was incorporated into a court ordered stipulation dated March 22, 2018.

The relevant language of the lease agreement (NYSCEF Nos. 79, 94, and 101) between Block and CVS that forms the basis of defendants' respective motions read as follows:

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[1] Annexed as Exhibit "E" to plaintiff's affirmation in opposition is a photograph depicting an "X" marked with plaintiff's initials. This photograph was marked as Defendant's Exhibit "D" on September 8, 2017. To avoid confusion, the Court is referring to the NYSCEF document numbers as each party used letter exhibits.

[2] This email was marked as Plaintiff's Exhibit "3" on 1/29/2018 at defendant Block's deposition.

LANDLORD'S INDEMNITY

46. Except that such liability is caused by the negligence or tortious act or omission of Tenant, its agents, contractors or employees and subject to Article 12, Landlord shall defend, indemnify and hold Tenant harmless from all costs, expenses, claims or demands of whatever nature arising from the following: (i) any willful, negligent or tortious act or omission on the part of Landlord, its agents, contractors, or employees; or (ii) any failure on the part of the Landlord to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in the Lease on its part to be performed or complied with.

MAINTENANCE OF PARKING AND OTHER EXTERIOR AREAS

33. (a) With regard to the parking and other exterior areas of the Premises, Landlord shall perform the following pursuant to good and accepted business practices throughout the term; repairing, resurfacing, repaving, re-striping and resealing of the parking areas' repair of all curbing, sidewalks and directional markers; landscaping; and provision of adequate lighting during all hours of darkness that tenant shall be open for business;...

As use in this article, the term "repair" or "repairing" shall include maintenance, repair, replacement and the removal of snow and ice from the parking and exterior areas of the Premises, but shall not include: (i) cleaning; or (ii) the obligations of the tenant set forth in Article 50.

GARBAGE AND RECYCLING

50. (a) Tenant, at its sole cost and expense, shall: (i) keep the interior of the Premises clean and in a neat, orderly safe and sanitary condition; (ii) clean the interior and the exterior of the windows, glass, plate glass, storefront and doors (including, in each case, the Frames thereof) in the Premises; and (iii) store all garbage, rubbish, debris or other refuse within the Premises or in a dumpster or compactor outside the Premises until the days the carting contractor(s) retained by the Tenant will remove Tenant's garbage from the Premises.

MISCELLANEOUS

51. (h) This Lease and the referenced exhibits set forth the entire agreement between the parties and may not be changed or terminated orally or by any agreement unless such agreement shall be in writing and signed by the party against whom enforcement of such change or termination is sought.

It is well settled that since summary judgment is the procedural equivalent of a trial (see *Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), it is a drastic remedy that should only be granted when the proponent establishes as a matter of law there are no triable issues of fact (see *Alvarez v. Prospect Hosp.* 68 NY2d 320 [1986]). Once the proponent has

made its prima facie showing of its right to judgment, it is incumbent on the party opposing the motion to come forward with proof in evidentiary form establishing the existence of triable issues of fact (see *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Thus, the presence of any significant doubt as to whether there is a material issue of fact, or where an issue of fact is "arguable", the motion must be denied (see *Phillips v. Kantor & Co.*, 31 NY2d 307, 311 [1972]).

Here, the Court finds that Block has failed to establish as a matter of law that it did not retain the responsibility for snow removal from the parking and exterior areas of the premises as set forth in paragraphs 33 and 50 of the lease agreement. This is evidenced by the fact that Block, not CVS, entered into a separate contract for snow removal at the premises. Further, Block has not tendered proof that on the day of plaintiff's accident, a valid amendment to the lease agreement was in effect whereby Block's responsibility for snow removal on the sidewalk was completely displaced and exclusively vested in CVS (*Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579, 589 [1994]). Although Block argues that the contract with third-party defendant, New Look Maintenance,[3] did not include snow removal on the sidewalk, a copy of this contract was not tendered in support of their motion to rebut the plain language of the lease and testimony of CVS (NYSCEF No. 77 & 92, pp.12-19). The witness on behalf of CVS testified that she would place work orders through the CVS computer system if the sidewalks were not properly shoveled by a separate company [for which she did not know the name] (NYSCEF No. 77 & 92, pp.12 and 18). The plain language of the lease exclusively places the responsibility for snow removal on Block and does not place an affirmative duty on CVS to

[3] The third-party defendant has defaulted in this action.

inspect the sidewalk and notify Block of the existence of snow and ice conditions (see *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 142 [2002]). However, assuming arguendo a working relationship between CVS and Block existed with respect to such notice, this duty standing alone would be owed to Block, not a third-party such as plaintiff (*Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 140).

Regardless of any alleged duty owed by CVS to Block, Block's motion for summary judgment on its "cross-claims for defense and indemnity from CVS" is also denied. Block's answer annexed to its motion as Exhibit "B" (NYSCEF No. 53) has not asserted such a cross-claim. The cross-claims set forth in the answer are asserted only as against the City of New York [previously dismissed from this action] and premised upon the negligent ownership and operation of a motor vehicle.

With respect to summary judgment on the issue of notice, it is for a jury to determine whether Block failed to inspect the exterior area of the property within a reasonable time for the foreseeable harm resulting from snow removal activities and to thereafter remedy the snow and ice condition depicted in the photographs (see *Kaehler-Hendrix v. Johnson Controls, Inc.*, 58 AD3d 604, 607 [2d Dept. 2009]). Absent express terms in a contract, a snow removal contractor is not under a continuing obligation to monitor the weather for melting and refreezing as any such duty to inspect and maintain the property in a safe condition remains with the property owner (see *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 142).

For the reasons stated above, CVS' motion is granted in its entirety as the Court finds as a matter of law that said defendants did not owe a duty to plaintiff under the lease agreement on the day of the accident and a valid cross-claim has not been asserted by Block for contribution or contractual indemnification.

The motion to strike this action from the trial calendar is also denied. The Certification Order dated June 21, 2018 (NYSCEF #61) directed plaintiff to serve a Medicaid authorization within 15 days of the order. Therefore, plaintiff is directed to serve the authorization within 30 days of entry of this order if not already provided. The remedy for any failure to provide the authorization is referred to the trial court. As to photographs, Defendant Block neither served a motion to compel a response to their letter (NYSCEF #59) demanding additional copies of photographs previously served and marked as exhibits at plaintiff's deposition on September 8, 2017,[4] nor included this demand in the Court ordered stipulation (NYSCEF #60) and the Certification Order (NYSCEF #61) with the demand for a Medicaid authorization. On March 12, 2018, defendants CVS served an objection (NYSCEF #63) to Block's demand for discovery and inspection (NYSCEF #57). The Court Ordered Stipulation dated March 22, 2018 (NYSCEF #60) agreed that a response was to be served "to extent not provided." This language did not affirmatively waive defendants CVS' prior objection. Defendant Block did not move to compel a response over CVS's formal objection (NYSCEF #63) prior to the Certification Conference and then waived their right to a response by failing to raise this issue at the Certification Conference or include it in the Certification Conference Order.

Accordingly, it is hereby

ORDERED, the motion to strike this action from the trial calendar or compel plaintiff and co-defendants to provide discovery by defendant BLOCK PROPERTIES SI, LLC (MS_003) is granted only to the extent that plaintiff shall provide the Medicaid authorization within 30 days of entry of this order and the balance of the motion is denied in its entirety; and it is further

[4] These photographs are annexed as exhibits to the current motions for summary judgment as NYSCEF documents numbered 76, 81, 91 and 104.

ORDERED, that the motion for summary judgment by defendant BLOCK PROPERTIES SI, LLC (MS_004) is denied in its entirety; and it is further

ORDERED, that the motion for summary judgment by defendants, CVS PHARMACY, CVS, CVS HEALTH, CVS STORE #06053 (MS_005), is granted in its entirety and this action is dismissed as against said defendants; and it is further

ORDERED, that the caption of this action shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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PEGGY ABBATICCHIO, Index No.: 150545/2016

Plaintiffs,

- against -

BLOCK PROPERTIES SI, LLC,

Defendant.

----------X

and it is further

ORDERED, that defendants shall serve a copy of this Order with Notice of Entry upon all parties, the Clerk of the Court and the Calendar Clerk who shall amend their records accordingly; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 10, 2019

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.