

<b>Labiner v Jerome Florist, Inc.</b>
2019 NY Slip Op 31134(U)
April 19, 2019
Supreme Court, New York County
Docket Number: 155718/14
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

BARTLEY LABINER

INDEX NO. 155718/14

- v -

MOT. DATE

JEROME FLORIST, INC. et al.

MOT. SEQ. NO. 008

The following papers were read on this motion and cross-motion to/for summary judgment
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a personal injury action arising from a slip and fall on a sidewalk due to an snow and/or ice condition. Defendant Jerome Florist, Inc. ("Jerome") moves for summary judgment in its favor. Defendant 50 East 96th Street LLC ("50 East") cross-moves for summary judgment in its favor, and alternatively, for summary judgment on its cross-claim for contractual indemnification against Jerome. Plaintiff opposes the motion and cross-motion. Jerome and 50 East oppose the relevant portions of the cross-motion and motion, respectively, seeking relief against the other. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff claims that on February 10, 2014, at approximately noon, he slipped and fell on the sidewalk abutting the premises located at 1379 Madison Avenue, New York, New York (the "premises"). 50 East is the owner of the premises and Jerome is a commercial tenant which operates a business on the ground floor of the premises.

At his deposition, plaintiff testified that he stepped from the street of 96th Street and Madison onto the curb and sidewalk of 96th Street and Madison heading towards 95th Street and Madison. Plaintiff testified that there was snow on the sidewalk adjacent to the premises, but also "a clear path in front of the snow" on the sidewalk. Plaintiff testified that the path was approximately two feet wide. Plaintiff further stated that the path became narrower as he walked and it was "jagged". Plaintiff further testified:

A. I think maybe you're misunderstanding what I'm saying. It wasn't like there was a clear part and a snow part. Everybody was walking on what was presumed the clear part, but this whole part of the sidewalk was -

Q. Where it's shown as the wet sidewalk in Defendants' Exhibit I?

A. Yes, was filled with snow, but right next to it, it may have been wet and

Dated: 4/19/19

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

not that much snow (indicating). In other areas it came out more and there was large pieces of snow/ice, but it was still able to be walked on.

...

- A. I don't want to use the word "path" because the path was still in this area, but this wasn't completely clear (indicating). I wasn't looking down at the sidewalk to exactly see where, but I know there were big mounds of snow here and it was relatively clear here, and we're all just walking up this block until I am to step, unfortunately, on a piece of snow, ice, whatever you want to call it in this particular area where I slipped (indicating). It wasn't a high thing that I was walking into.

According to plaintiff, he believed that it last snowed a week prior to his accident. Plaintiff's wife, non-party Keri Gans, was walking with plaintiff at the time of his accident. At her deposition, she testified that immediately prior to the accident, they were walking side by side and when she realized he was no longer walking next to her, she turned around and observed plaintiff on the ground. She stated that plaintiff had fallen on a large patch of ice.

The court will first consider defendants' request for summary judgment dismissing plaintiff's complaint. In support of its motion, Jerome argues that it did not owe a duty of care to plaintiff, and assuming *arguendo* that it did, there is no evidence that Jerome "created, exacerbated, or had notice of any alleged ice condition at the subject premises." Jerome points to the testimony of its president, John Stamos, who is also an employee of the defendant. Stamos testified that generally when there was snow on the ground, he would have employees push the snow out toward the street and "make sure that there is a large enough path opened on both sides of the street so that people can walk comfortably." Stamos stated that the path would be "[a] minimum of six feet on both sides." Stamos would either shovel himself or observe his employees do so.

Stamos was at the store on the date of plaintiff's accident. According to Stamos, it was a "cold day" and he "believe[d] there were accumulations of old snow." Stamos claims that he believed it snowed a day or two prior to the date of plaintiff's accident. Stamos arrived at the store at 8:30am, examined the sidewalk and advised his staff to re-clear and re-salt the path thereon. Stamos learned of plaintiff's accident when one of his employees told him someone had fallen outside. Stamos went outside and observed plaintiff sitting on the ground close the to tree pit approximately ten feet from the store's door beyond the path of the snow. Jerome has also provided a sworn affidavit by Stamos which generally conforms to his testimony.

Plaintiff maintains that Jerome does have a duty to remove snow and ice from the sidewalk and that it failed to demonstrate as a matter of law that it did not create the icy condition nor have actual or constructive notice of it.

50 East argues that it is entitled to summary judgment because it did not create the condition which caused plaintiff's accident, nor did it have actual or constructive notice. 50 East points to its witness' testimony as evidence that it was an out-of-possession owner which only visited the premises approximately five times a year and did not perform maintenance work at the premises. Further, 50 East points to its lease with Jerome, which obligates Jerome to "take good care of the demised premises... and the sidewalk thereto", "keep said sidewalks and curbs free from snow, ice, dirt and rubbish" and "comply with all present and future, laws, orders and regulations of all state, federal, municipal and local governments... which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises." Finally, 50 East argues that Jerome's efforts were sufficient to establish that the sidewalk was in a reasonably safe condition at the time of plaintiff's accident.

Meanwhile, plaintiff maintains that 50 East's duty is nondelegable and that it did not meet its burden on the cross-motion by establishing that it did not create nor have notice of the harmful condition on the sidewalk.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Admin Code § 7-210 imposes upon owners of certain real property a duty to maintain the sidewalk adjacent to the property and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition. This duty includes an obligation to remove snow and ice from the sidewalk. There is no dispute here that § 7-210 applies to the premises. However, an out-of-possession owner is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair the subject defective condition (*Bing v. 296 Third Ave. Group, L.P.*, 94 AD3d 413 [1st Dept 2012]; see also *Scott v. Bergstol*, 11 AD3d 525 [2d Dept 2004] [owner established entitlement to summary judgment by demonstrating that it was an out-of-possession landlord with no duty to remove snow and ice from the premises]). This is because once a duty has been established, ordinary negligence principles apply, and an out-of-possession owner that does not take any steps to remove snow and ice cannot be held liable because it neither cause or created the harmful condition nor had notice of it.

Indeed, the First Department has squarely rejected the notion that an owner should be held vicariously liable for their tenants' negligent snow removal (*Feiler v. Greystone Bldg. Co.*, 302 AD2d 221 [1st Dept 2003]). Since there is no dispute on this record that Jerome was contractually obligated to maintain the subject sidewalk, including remove snow and ice therefrom, and 50 East was out-of-possession and did not perform any snow/ice removal at the premises prior to plaintiff's accident, 50 East is entitled to summary judgment dismissing plaintiff's complaint.

Ordinarily, a commercial tenant does not owe a duty to pedestrians injured because of snow or ice on a sidewalk pursuant to Admin Code § 7-210 because it only applies to property owners (see *Tucciarone v. Windsor Owners Corp.*, 306 AD2d 162 [1st Dept 2003]; see also *Locario v. State*, 90 AD3d 547 [1st Dept 2012]; *Bleich v. Metropolitan Management, LLC*, 132 AD3d 933 [2d Dept 2015]; see generally *O'Brien v. Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428 [1st Dept 2013]). However, Jerome displaced 50 East's obligations to maintain the sidewalk safely by agreeing to do so in a comprehensive provision contained in the underlying lease. Therefore, Jerome can be held liable for failing to take reasonable care to remove snow and ice from the sidewalk (see NY PJI 2:111A). Here, Jerome has come forward with sufficient evidence that it salted and shoveled the sidewalk prior to and on the date of plaintiff's accident as well as its general snow removal practices. This testimony demonstrates *prima facie* that Jerome did not create the icy condition which cause plaintiff's accident.

Plaintiff's arguments that there is a triable issue of fact on the issue of whether Jerome used reasonable care to remove snow and ice from the sidewalk must be rejected. Even if the path was only two feet wide, irregular, was wet or covered with snow and ice, these claims do not demonstrate that Jerome created the icy condition which caused his accident or even generally made the sidewalk more dangerous. Absent such a showing, no reasonable fact-finder could conclude that Jerome is liable

to plaintiff for his accident (see generally *Sanders v. City of New York*, 17 AD3d 169 [1st Dept 2005]). Accordingly, Jerome's motion is also granted.

In light of this result, the court declines to consider the defendants' arguments regarding their cross-claims as moot.

### CONCLUSION

Accordingly, it is hereby


**ORDERED** that both the motion and cross-motion for summary judgment are granted to the extent that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the balance of the motion and cross-motion are denied as moot.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 4/19/19  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.