

Alimari v T-C 2300 Broadway LLC

2019 NY Slip Op 31137(U)

April 18, 2019

Supreme Court, New York County

Docket Number: 157411/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 157411/2017

MANAL ALIMARI,

Plaintiff,

MOTION SEQ. NO. 001

- v -

T-C 2300 BROADWAY LLC, JRT REALTY GROUP, INC.,
CHICO'S FAS, INC., 83RD STREET INVESTORS LLC, DTZ
AMERICAS, INC., THE BOARD OF MANAGERS OF THE
BROMLEY CONDO, BROWN HARRIS STEVENS RESIDENTIAL
MANAGEMENT, LLC, and CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action commenced by plaintiff Manal Alimari, defendant Chico's FAS, Inc. ("Chico's") moves, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against it. The motion is opposed by plaintiff and defendants The Board of Managers of the Bromley Condominium ("the Board") and Brown Harris Stevens Residential Management, LLC ("BHS"). After oral argument, and after a review of the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on November 22, 2016 in which plaintiff was allegedly injured when she fell due to a dangerous condition on the sidewalk abutting the Bromley

Condominium (“the condominium”), located at 2300 Broadway a/k/a 225 West 83rd Street in Manhattan (“the building”). Doc. 1.

On or about April 30, 2007, defendant 83rd Street Investors, LLC (“83rd Street”), as owner, entered into a 12-year lease (“the lease”) with Chico’s for retail space in the building (“the demised premises”). Doc. 39. Paragraph 4 of the lease required Chico’s to “take good care of the demised premises including, without limitation, the storefront and fixtures and appurtenances therein . . . and make all non-structural repairs thereto . . .” Doc. 39, at par. 4. Although that paragraph initially included the words “sidewalks adjacent thereto”, those words were stricken from the signed agreement. Doc. 39 at par. 4.

The rider to the lease provided, inter alia, that Chico’s “shall have no obligation to maintain, repair or replace structural portions of the [d]emised [p]remises which serve both the [d]emised [p]remises and other portions of the [c]ommercial [u]nit or the [b]uilding and [83rd Street] shall be responsible for such maintenance, repair or replacement to the extent [the Board] is not responsible therefor.” Doc. 39, rider, at Art. 47. The rider required the Board “to maintain and repair (such maintenance includes, without limitation, the removal of snow) the sidewalks adjacent to the [b]uilding.” Doc. 39, rider, at Art. 48. Additionally, the rider provided that Chico’s, “at its sole cost and expense, shall maintain, repair and keep the entrance area (but not the sidewalk), to the [d]emised [p]remises clean and free of rubbish and dirt. Doc. 39, rider, at Art. 66 par. J. The lease did not obligate Chico’s to make structural repairs or alterations to the premises unless, “by its manner of use of the demised premises or method of operation therein”, Chico’s violated any laws, rules or regulations relating to the structure of the building. Doc. 39 at par. 6.

The By-Laws provided that “[a]ll maintenance, painting, decorating, repairs, and replacements, whether structural or non-structural, to the [c]ommercial [c]ommon [p]roperties . .

. shall be made solely by the [c]ommercial [u]nit [o]wner.” Doc. 49, By-Laws, at Article III, section 8(c). Additionally, they provided that the owner of the commercial unit was to pay a proportionate share of the cost of insurance, repairs and maintenance expenses, including for the maintenance of sidewalks. Doc. 49, at Article VII, section 1.

On November 22, 2016, plaintiff was allegedly injured when she tripped and fell on a dangerous condition on the sidewalk adjacent to the building. Doc. 1; Doc. 38.

Plaintiff commenced the captioned action by filing a summons and verified complaint on August 18, 2017. Doc. 1. Plaintiff named as defendants in the action T-C 2300 Broadway LLC (“T-C 2300”), JRT Realty Group, Inc. (“JRT”), Chico’s, 83rd Street, DTZ Americas, Inc. (“DTZ”), the Board, and BHS, which entities, it claimed, owned, maintained and/or controlled the premises. Doc. 1.

The Board joined issue by its answer, filed October 12, 2017. Doc. 11. In its answer, the Board denied all substantive allegations of wrongdoing, set forth several affirmative defenses, and asserted cross claims against Chico’s and certain other defendants seeking contribution, common-law and contractual indemnification, and damages for breach of contract. Doc. 11.

JRT joined issue by service of its answer filed October 24, 2017. Doc. 14. In its answer, JRT denied all substantive allegations of wrongdoing, set forth several affirmative defenses, and asserted cross claims against Chico’s and all other defendants seeking contribution and common-law indemnification. Doc. 14.

T-C 2300 joined issue by service of its answer filed November 9, 2017. Doc. 15. In its answer, T-C 2300 denied all substantive allegations of wrongdoing, set forth several affirmative defenses, and asserted cross claims against Chico’s and all other defendants seeking contribution and common-law indemnification. Doc. 15.

Chico's joined issue by its answer filed January 12, 2018. Doc. 18.¹

On or about January 31, 2018, plaintiff served a bill of particulars alleging, inter alia, that, on November 22, 2016, she tripped and fell on the sidewalk abutting the premises due to a dangerous (unspecified) condition. Doc. 38. Plaintiff alleged that defendant violated sections 2903(b) (relating to highway operations) and 2904 (duty of property owner to maintain sidewalk) of the New York City Charter; sections 7-201 (relating to actions against the City of New York) and 7-210 and 19-152 of the New York City Administrative Code (duty of property owners to maintain sidewalks); section 2-09 of Title 34, Chapter 2 of the Rules of the City of New York (relating to sidewalk, curb and roadway work); and New York State Property Maintenance Code section 302.3 (duty to maintain sidewalks, walkways, stairs, driveways, and parking spaces). Doc. 38 at par. 21.

DTZ joined issue by its answer filed February 16, 2018. Doc. 21. In its answer, DTZ denied all substantive allegations of wrongdoing, set forth several affirmative defenses, and asserted cross claims against all defendants seeking contribution and common-law and contractual indemnification. Doc. 21.

On March 8, 2018, the Board filed an amended answer, this time answering on behalf of BHS as well. Doc. 23. In the amended answer, the Board and BHS denied all substantive allegations of wrongdoing, set forth several affirmative defenses, and asserted cross claims against Chico's and certain other defendants seeking contribution, common-law and contractual indemnification, and damages for breach of contract. Doc. 23.

On June 8, 2018, Chico's filed the instant motion seeking summary judgment dismissing the complaint and all cross claims against it. Doc. 30. In support of the motion, plaintiff submits

¹ 83rd Street has not appeared in this action.

an attorney affirmation, the pleadings, the bill of particulars, the lease, and the affidavit of Mark Hoffmann of Chico's. Docs. 31-41.

In his affirmation in support of the motion, counsel for Chico's argues that the application must be granted because Chico's owed no duty to plaintiff and had no obligation to maintain or repair the sidewalk where plaintiff allegedly fell. Thus, urges counsel, Chico's did not violate any of the codes and regulations sets forth in the bill of particulars. Further, urges counsel, the lease did not require Chico's to repair or maintain the sidewalk. Additionally, counsel urges that Chico's cannot be liable for a condition on the sidewalk unless it made special use of the sidewalk or created the condition.

Hoffmann, Director of Real Estate for Chico's, states in his affidavit that the lease, which he authenticates, was in effect as of the date of the alleged incident; that the lease did not require Chico's to repair or maintain the sidewalk; and that Chico's did not make any special use of the sidewalk. Doc. 41.

In opposition, plaintiff argues that the motion must be denied as premature since discovery, including depositions, remains outstanding. Plaintiff further asserts that the motion must be denied because the lease and By-Laws are inconsistent regarding the obligation to maintain the sidewalk. Specifically, asserts plaintiff, the rider provides that "[t]he By-Laws . . . require the [Board] to maintain and repair . . . the sidewalks adjacent to the building" (Doc. 39 at Art. 48), whereas the By-Laws provide that "[a]ll maintenance, painting, decorating, repairs and replacements, whether structural or non-structural, to the [c]ommercial [c]ommon [p]roperties . . . shall be made solely by the [c]ommercial [u]nit [o]wner." Doc. 49 at Article III, section 8(c). Plaintiff further asserts that motion must be denied because it is "undetermined whether there was any type of contract or agreement in effect" between Chico's and T-C 2300 which, plaintiff states "upon information and

belief', owned the commercial unit occupied by Chico's, regarding any obligation to maintain and/or repair the sidewalk abutting the premises. Doc. 43 at par. 12.

In opposition, the Board and BHS argue that the motion is premature since discovery has not been conducted regarding the exact location of the accident, and that such information could be relevant to whether Chico's made a special use of that area. They further assert that, since the By-Laws provide that the costs of structural repairs are common expenses to be shared by all unit owners, including the owner of the commercial unit occupied by Chico's, an issue of fact exists regarding whether this gave rise to a duty on the part of Chico's to maintain and/or repair the sidewalk.

In reply to plaintiff's opposition, Chico's argues that it neither created a dangerous condition nor caused it through a special use of the sidewalk. It further maintains that the lease clearly provides that it had no duty to maintain or repair the sidewalk.

In reply to the opposition by the Board and BHS, Chico's argues that the motion is not premature since the evidence establishes that plaintiff fell on a public sidewalk which it was not required to maintain or repair. It further maintains that the lease does not contain any language requiring it to maintain or repair the sidewalk, and that New York City Administrative Code section 7-210 required the owner of the building to maintain the sidewalk in a reasonably safe condition.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues

of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227; 228 (1st Dept 2006). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, Chico's established its prima facie entitlement to summary judgment by demonstrating that it had no duty under the lease to maintain or repair the sidewalk and that it did not make a special use of the sidewalk.² In opposition to the motion, plaintiff, the Board, and BHS fail to raise a material issue of fact.

The lease clearly imposes no obligation on Chico's to maintain or repair the sidewalk. Assuming, arguendo, that the By-Laws raise an issue of fact by requiring the commercial unit owner to make structural repairs, such issue is not material herein, since Chico's was a commercial tenant, and not a commercial unit owner.

Similarly, although the Board and BHS assert that an issue of fact exists regarding whether Chico's was liable to maintain the sidewalk since the By-Laws obligate the owner of the commercial unit to pay its proportionate share of expenses for structural repairs, they overlook that Chico's was not the owner of the commercial unit. Further, they cite no authority supporting their claim that the financial obligation of a tenant to contribute its proportionate share of expenses for maintenance and/or repairs gives rise to that tenant's obligation to actually perform such work.

² Although Hoffman's affidavit did not contain a certificate of conformity, this issue was not raised in opposition to the motion. In any event, however, such omission was a "mere irregularity" which could have been excused, corrected and given nunc pro tunc effect. *See Redlich v Stone*, 152 AD3d 432 (1st Dept 2017).

Finally, the motion is not premature. "Where essential facts to justify opposition to a motion for summary judgment might exist, but cannot be stated because they are in the moving party's exclusive knowledge or control, summary judgment must be denied (CPLR 3212 [f])." *Curry v Hundreds of Hats, Inc.*, 146 AD3d 593, 594 (1st Dept 2017) (citation omitted). Such is not the case here, where "[d]efendants did not make a showing that the motion should be denied as premature or that any other facts essential to justify a denial of the motion might exist but required additional discovery." *Jimenez v Metro. Transp. Auth.*, 124 AD3d 507, 508 (1st Dept 2015) (citation omitted).

Plaintiff, the Board and BHS contend that it is necessary to conduct plaintiff's deposition in order to determine the exact location of the accident. Doc. 48 at par. 4; Doc. 55 at par. 4. As noted above, plaintiff alleged in her bill of particulars, dated January 31, 2018, that she fell on a "public sidewalk abutting [the premises]." Doc. 38. Although not raised by plaintiff, this Court notes that, when the parties appeared for a preliminary conference in this matter on November 27, 2018, after the instant motion was filed, they advised this Court that the bill of particulars was "served and [was] sufficient." Doc. 85. Since plaintiff, the Board, and BHS did not demand a supplemental bill of particulars describing the incident location in further detail, this Court deems disingenuous their argument that the motion must be denied in order to depose plaintiff on this subject.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendant Chico's FAS, Inc. seeking summary judgment dismissing the complaint and all cross claims asserted against it is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the claims and cross claims against defendant Chico's FAS, Inc. are severed and the balance of the action shall continue; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant Chico's FAS, Inc.; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for defendant Chico's FAS, Inc. shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 14 IB), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that, the remaining parties shall appear for a compliance conference in Part 2, Room 280, 80 Centre Street, on July 16, 2019, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

4/18/2019

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE