Mclean v City of New York
2019 NY Slip Op 31379(U)
May 16, 2019
Supreme Court, New York County
Docket Number: 150337/2013
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART IAS MOTION 12EFM

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RAMSEY MCLEAN,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC, KERWAY REALTY, LLC, 59 BLEECKER REALTY LLC, CITY HATS A/K/A CITYHATS.US, M.&D. SHAPIRO HARDWARE CO. INC.,

Defendants.

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INDEX NO. 150337/2013

MOTION DATE _____

MOTION SEQ. NO. 008

DECISION AND ORDER

HON. BARBARA JAFFE:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 142, 143, 144, 147
were read on this motion for summary judgment.

In this action, plaintiff alleges that he was injured when he tripped and fell on the sidewalk in front of 63 Bleecker Street in Manhattan. A wooden board partially covered a hole in the sidewalk.

By lease dated September 12, 2001, defendant M.&D. Shapiro Hardware Co. Inc. (movant), leased from defendant/third-party plaintiff 59 Bleecker the ground floor store in the building at 57-63 Bleecker Street in Manhattan. In that lease, movant agreed to "to make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt, and rubbish," take good care of the sidewalks and "make all non-structural repairs thereto as and when needed to preserve them in good working order and

condition, reasonable wear and tear, obsolescence, and damages from the elements . . ." (NYSCEF 134).

By sublease dated March 23, 2010, defendant Leszak Biela d/b/a E-Hats Coho s/h/a City Hats (City Hats) agreed to undertake all of movant's duties and obligations as set forth in the master lease. (NYSCEF 133). By agreement dated March 29, 2010, 59 Bleecker consented to movant's sublet to City Hats to one-third of the store premises pursuant to a sublease dated March 23, 2010, which was attached as an exhibit. (*Id.*).

Movant now seeks pursuant to CPLR 3212 an order granting it summary dismissal of the complaint as against it and of the cross claims brought against it by defendant Con Edison and 59 Bleecker and defendant/third-party plaintiff Kerway Realty LLC. Only 59 Bleecker opposes.

I. CONTENTIONS

A. Movant (NYSCEF 120)

Movant cites the master lease between it and 59 Bleecker Realty LLC and the sublease between it and City Hats in support of its argument that it may not be held directly liable to plaintiff as there is no "record evidence" suggesting that it either created the hazardous condition or made special use of the sidewalk. It thus argues that 59 Bleecker, as owner of the property, owes plaintiff a non-delegable duty with respect to the sidewalk. And, absent evidence that it owes plaintiff a duty, that it had created or had special use of the sidewalk, movant maintains that there is no basis for holding it liable for common law negligence, indemnity or contribution. Moreover, as City Hats contractually assumed movant's duties and obligations as to the premises, movant also claims that Con Edison's cross claims must be dismissed. Nor is there merit to Con Edison's claim against it for contractual indemnity absent a contract between them.

Movant also seeks dismissal of 59 Bleecker's cross-complaint advancing causes of action

for common law and contractual contribution and indemnity and a failure to obtain insurance. Movant relies on the sublease with City Hats in denying liability to 59 Bleecker for common law contribution and indemnity, contending that the claim should instead be advanced against City Hats. And, in light of the indemnity clause of the master lease, movant argues that it may not be held contractually liable to indemnify 59 Bleecker for damages or costs due to the accident falling within movant's obligations under the lease absent a showing that 59 Bleecker was not reimbursed by insurance. Additionally, as the alleged sidewalk defect was structural, movant asserts that it was the sole responsibility of 59 Bleecker. Thus, movant maintains that a claim for indemnity is barred by General Obligations Law § 5-321. And, based on the sublease "to which 59 Bleecker consented," movant's duties as set forth in the lease "passed through to City Hats."

Movant observes that 59 Bleecker neither pleads nor seeks to prove or at least allege, that it had properly placed movant's insurer on notice of this claim, that it tendered its defense to the insurer once served with the summons and complaint, and that it had met all conditions precedent to obtaining coverage under the insurance policy and was nevertheless denied coverage. Rather, it asserts, 59 Bleecker's allegations are based on "information and belief." It also against relies on the sublease as evidence that the requirement relating to insurance was passed onto City Hats. Absent any evidence that 59 Bleecker tried to obtain coverage under movant's and/or City Hat's policies and was ever denied such coverage, at this juncture in the litigation, and even under New York's recently broadened rules on providing notice of an insurance claim, any such coverage would likely be barred to due to prejudice to the respective insurers.

Alternatively, movant denies having had actual or constructive notice of the defect or an opportunity to repair it.

B. 59 Bleecker (NYSCEF 142)

Absent evidence as to who created the sidewalk defect, movant's "fail[ure] to include in its argument . . . paragraph 30 of the relevant leases (see Exhibits N and M to the motion papers)" which require that the tenant repair the sidewalk, 59 Bleecker argues, movant's motion must fail.

II. ANALYSIS

In New York City, owners or lessees of property abutting the sidewalk are liable for accidents that occur on a defective sidewalk. (*Howard v City of New York*, 95 AD3d 1276 [2d Dept 2012]). An owner or lessee moving for summary dismissal in a trip and fall accident involving a sidewalk must establish that it neither created the defect, nor had actual or constructive notice of it. (*Alayev v Juster Assocs., LLC*, 122 AD3d 886 [2d Dept 2014]).

Moreover, when a lease obligates a tenant to repair the sidewalk, it generally does not thereby impose on the tenant a duty to a third party, unless the lease is so comprehensive regarding sidewalk maintenance as to displace entirely the owner's duty to maintain it. (*Yanovskiy v Tim's Diagnostic's Auto Ctr.*, 170 AD3d 1089 [2d Dept 2019]).

Here, having demonstrated that the sublease is so comprehensive regarding sidewalk maintenance as to displace entirely movant's duty to maintain it, movant satisfies its *prima facie* burden of proving that it owes no duty to plaintiff. 59 Bleecker's sole argument that movant did not base its motion on the "relevant leases" not only has no merit, but it raises no factual issue. Its oblique reference to movant's exhibits to which its consent to the sublease is annexed, absent any argument based specifically thereon, is legally insignificant.

As neither 59 Bleecker nor Con Edison offers opposition to movant's motion relating to contribution and indemnity, in that regard, the motion need not be addressed.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that M.&D. Shapiro Hardware Co. Inc.'s motion for summary judgment is granted in its entirety, and the complaint and all cross claims are severed and dismissed as against with it, with costs and disbursements to defendant upon submission of an appropriate bill of costs to be taxed by the clerk.

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5/16/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE