

Rubin v D & B Christopher St. Corp.
2019 NY Slip Op 32121(U)
July 18, 2019
Supreme Court, New York County
Docket Number: 160039/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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SUZANNE RUBIN,
Plaintiff,

- v -

INDEX NO. 160039/2015
MOTION DATE
MOTION SEQ. NO. 003, 004

D & B CHRISTOPHER ST. CORP. and STICK
STONE & BONE,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 88-101, 124, 126-128, 130-132, 136, 138, 140, 142

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102-123, 125, 129, 133-135, 137, 141

were read on this motion for summary judgment.

Defendant Stick Stone & Bone (SSB) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and the cross-claims advanced by defendant D&B Christopher St. Corp. (D&B) (mot. seq. 003). Plaintiff and D&B oppose.

D&B moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and the cross-claims advanced by SSB, and for summary judgment on its cross-claims (mot. seq. 004). Plaintiff and SSB oppose.

I. RELEVANT BACKGROUND

On March 30, 1990, SSB entered into a seven-year lease with non-party 111 Christopher Associates (111) to rent the premises located at 111 Christopher Street. SSB agreed therein, and in an attached addendum, to be responsible for "all non-structural repairs" and to keep the sidewalks and curb in front of the premises clean and free from "snow, ice, dirt and rubbish." It

also agreed to indemnify 111 for any damage or injury to the property or others, unless due to 111's own negligence, and to comply with all laws imposing a duty on 111 at its sole cost and expense. (NYSCEF 94, 108).

At her deposition, plaintiff testified that on March 5, 2015 at approximately 5:00 p.m., she slipped and fell on cellar doors in front of the premises. Although she did not recall whether it was snowing at the time, she claimed that the cellar doors were completely covered with a combination of snow and ice and that her foot made contact with metal. Although she stated that the tip of her boot "hit something" before she fell, she denied having tripped; she "just slid."

After her fall, plaintiff noticed "a little rise between the cellar doors," which she described as the obvious cause of her fall. She estimated that the rise was one quarter of an inch, and if less, an eighth of an inch. From photographs, she characterized the cellar doors as "old and well worn" with "no treads" on one of them. (NYSCEF 95, 110).

On September 9, 2015, plaintiff filed her summons and complaint alleging that defendants were negligent in their maintenance of the premises. (NYSCEF 91, 104). On November 11, 2015, D&B filed its answer advancing cross-claims for indemnification and contribution against SSB. (NYSCEF 92, 105). On January 14, 2016, SSB filed its answer advancing cross-claims for indemnification and contribution against D&B. (NYSCEF 93, 106).

II. PLAINTIFF'S CLAIMS

A. Contentions

1. SSB (NYSCEF 89)

SSB asserts that it is entitled to summary judgment absent a duty to clear snow, ice, or freezing rain during the storm that was in progress when plaintiff fell. It observes that its manager had shoveled and spread salt on the sidewalk and cellar doors every 20 to 30 minutes,

including almost immediately before plaintiff's fall, and maintains that neither the shoveling nor salting of the sidewalk and cellar doors exacerbated or created a hazardous condition. It also observes that plaintiff testified that her foot made direct contact with the metal of the cellar doors.

In support, SSB submits the expert affidavit of a certified consulting meteorologist who alleges therein that at the time of plaintiff's accident, "moderate snow was falling, the temperature was 20 degrees," and that seven to eight inches of snow had fallen in the area of plaintiff's accident that day. (NYSCEF 101).

SSB also denies liability for plaintiff's accident as it neither owned nor operated the premises, and had no contractual obligation to make structural repairs to the cellar doors. It observes that there is no lease with D&B, and that even if the prior lease governed, only non-structural repairs and the removal of snow and ice was delegated to it.

SSB denies that it had access to or use of the cellar doors during its occupancy nor did it cause or create any defect in the cellar doors. In support it offers the deposition of its manager at the time of plaintiff's accident who testified that she had been working for SSB for 12 years and that although the doors afforded access to the basement underneath, she never saw anyone use them. She described the doors as looking "worn and torn" as they did when she began working for SSB, and denied that any complaint had been lodged about their condition. She also acknowledged SSB's responsibility for removing snow from them. According to the manager, it was snowing all day on the date of plaintiff's accident, and every 20 to 30 minutes, she shoveled the snow and applied salt on the cellar doors. (NYSCEF 96, 115).

2. D&B (NYSCEF 103)

D&B denies liability for plaintiff's accident given the storm in progress, or that it had

actual or constructive notice of the snow or ice where plaintiff fell, observing that its superintendent performed no snow or ice removal that day, and that SSB admits responsibility for snow removal. It also argues that as plaintiff estimated the height differential of the cellar doors as between an eighth to a quarter of an inch, the defect is trivial and non-actionable. In support, D&B submits certified weather records from the National Oceanic and Atmospheric Administration's National Climatic Data Center which reflect that the New York metropolitan area was experiencing snowfall at the time of plaintiff's accident. (NYSCEF 109).

D&B also offers the deposition of the building's superintendent who testified that he and the president of D&B, SSB's current landlord, have sole access to the basement via interior stairs and that the cellar doors are never opened, nor has he received any complaint about their condition, although he had no recollection of their condition. (NYSCEF 97, 112). By affidavit, the building's superintendent denies that the cellar doors were maintained or repaired before plaintiff's accident, and asserts that SSB was responsible for removing snow and ice from them. He claims to have measured the height difference between the two cellar doors as between an eighth and a quarter of an inch, and had never noticed that they were hazardous. (NYSCEF 113).

D&B's president confirms that the 1990 lease is accurate and in effect when plaintiff fell, and states that the cellar doors were neither maintained nor repaired before plaintiff's accident. He denies that the doors were hazardous, and citing the lease, states that SSB was responsible for removing snow and ice from the sidewalk and cellar doors. (NYSCEF 114).

3. Plaintiff (NYSCEF 130, 133)

In opposition to defendants' motions, plaintiff observes that her claims are not premised solely on defendants' failure to clear snow and ice from the cellar doors, but also on their worn, unclean, unsound, and unsafe condition. She asserts that the 1990 lease obligates SSB to comply

with all laws applicable to D&B at its own cost and expense, which necessarily includes the law mandating that owners maintain the sidewalks abutting their real property.

Plaintiff argues that D&B's duty to maintain its premises in a reasonably safe condition is nondelegable, notwithstanding the lease, and observes that D&B's superintendent had little knowledge of the cellar doors. Moreover, she claims, the opinion of D&B's president that the cellar doors were not defective is self-serving and insufficient to meet its *prima facie* burden.

Plaintiff claims that she raises an issue of fact as to whether the cellar doors were properly maintained, and observes that defendants' witnesses admit that they were worn. She relies on her own testimony that when she stepped onto the door, her foot got caught in a gap, and that the cellar doors sloped toward the street, thus contributing to the dangerous condition.

The defective condition of the cellar doors is not trivial, plaintiff maintains, as they were raised, worn out, and lacked proper traction, and the accident is attributable to both the defective condition and accumulation of slush. She also alleges that D&B's assertion that the height differential is trivial disregards other defects contributing to plaintiff's accident.

Plaintiff also argues that constructive notice is not an issue as SSB's store manager testified that the cellar doors were worn and that she shoveled and salted the area every 20 minutes on the day of the accident.

In support, plaintiff submits the affidavit of a safety consultant, who states therein that large parts of the cellar doors were worn smooth, have no traction, and are conducive to hydroplaning when wet. He describes the doors as sloped toward the street, rendering them more dangerous when wet or slushy. Moreover, he opines, when temperatures fall below 25 degrees, salt is not as effective, and unmelted salt may act like "small ball bearings" which are dangerous when left on hard, smooth metal surfaces. (NYSCEF 131, 134).

4. SSB's reply (NYSCEF 142)

SSB observes that plaintiff does not deny that her accident occurred while a storm was in progress and argues that plaintiff's expert is not qualified to render an opinion as to the cause of the accident as his expertise is in occupational safety and plaintiff's accident did not occur in a workplace. Moreover, the expert's findings are based on plaintiff's hearsay statements that are contradicted by her deposition testimony, and a site visit months after the alleged accident when the weather conditions were different.

5. D&B's reply (NYSCEF 141)

D&B observes that plaintiff testified that she fell because the area was not salted or sanded, and that the area on which she stepped and slipped was completely covered with snow and ice. To the extent that she now claims to have tripped on the doors, it points out that she denied having tripped.

D&B asks that plaintiff's expert's report be disregarded as speculative, as he did not replicate the conditions that existed on the date of plaintiff's accident and prepared his report before plaintiff was deposed, and thus, did not consider the photographs on which plaintiff had circled the location of her accident. In addition, the expert had examined the entire area of the doors, as opposed to the specific part on which plaintiff had fallen. D&B notes that the expert discussed unmelted salt, whereas plaintiff testified that there was no salt applied to the doors, and references other decisions in which the affidavits and reports of plaintiff's expert have been rejected.

B. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the

absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

1. Hazardous condition

In New York City, it is the duty of the owner of real property abutting any sidewalk to maintain the sidewalk in a reasonably safe condition. (Administrative Code § 7-210; *Fernandez v Highbridge Realty Assocs.*, 49 AD3d 318, 319 [1st Dept 2008]). Real property owners are also liable for “cellar doors that [...] are not skid resistant or are otherwise in a dangerous or unsafe condition.” (Administrative Code § 19-152[a][6]).

A landowner has no duty to remedy dangerous conditions caused by a storm while the storm is in progress. (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008], *lv denied* 11 NY3d 705 [2008]; *Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007] [“the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended”]).

Evidence of a storm in progress may warrant dismissal, especially if based on the analysis of a licensed meteorologist. (*Powell v MLG Hillside Assocs., L.P.*, 290 AD2d 345, 345

[1st Dept 2002]). As it is undisputed that a snowstorm was in progress at the time of plaintiff's accident, defendants demonstrate, *prima facie*, that dismissal is warranted.

Once a defendant meets its *prima facie* burden of establishing that a storm was in progress at the time of the plaintiff's accident, "the burden shift[s] to the plaintiff to show that something other than the precipitation from the storm in progress caused the accident." (*Blair v Loduca*, 164 AD3d 637, 640 [2d Dept 2018]). For example, a plaintiff may raise a triable issue as to whether the landowner had undertaken to remove snow and thereby created or aggravated a hazardous condition. (*Baumann v Dawn Liquors, Inc.*, 148 AD3d 535, 537 [1st Dept 2017]). While the opinion of plaintiff's expert sufficiently demonstrates that the presence of unmelted salt on the cellar doors may have exacerbated the hazard, it does not raise an issue of fact as plaintiff had testified that there was no salt or sand on the cellar doors. (*See e.g., Raghu v New York City Hous. Auth.*, 72 AD3d 480, 482 [1st Dept 2010] [expert's opinion that accumulation of powder on stairs led to plaintiff's fall does not raise issue of fact where plaintiff did not testify that she fell due to powder]).

A plaintiff may also defeat summary judgment by showing that structural defects may have contributed to or aggravated the hazard. (*Vosper v Fives 160th, LLC*, 110 AD3d 544, 545 [1st Dept 2013]). Here, plaintiff's deposition testimony and the opinion of her expert raise issues of fact as to whether the worn, smooth, and sloped cellar doors caused her to slip and fall. As in *Vosper*, the doors' defective condition created a risk that a pedestrian would fall, a risk that increased with the presence of snow and ice. (*Id.*).

Plaintiff's expert properly based his report on, among other things, an interview with plaintiff and his on-site inspection of the premises. Thus, his opinion is neither conclusory nor speculative. (*Cf Santiago v United Artists Commc'ns, Inc.*, 263 AD2d 407, 408 [1st Dept 1999])

[rejecting expert opinion where “expert never stated when he conducted his on-site inspection of the step, never compared the results of his on-site inspection with any of the photographs of the step, and never stated that the condition of the step at the time of his inspection was the same as that at the time of the accident”). While the weather conditions at the time of his inspection differed from those prevailing when plaintiff fell, it is undisputed that the condition of the cellar doors was unchanged. That the expert did not review the photograph on which plaintiff circled the location of her accident is irrelevant, given his opinion that the cellar doors in their entirety were defective, and he offers a basis for the standards on which he relies in his roughness testing. Moreover, defendants offer no explanation as to how the expert’s background in “occupational” safety renders him incapable of opining on the conditions of the cellar doors, and in any event, the expert’s resume reflects his expertise in slip and fall accidents. Defendants’ objections, absent the submission of their own expert reports, concern plaintiff’s expert’s credibility, which is to be resolved by the trier of fact. (*Pisani v First Class Car & Limousine Serv. Corp.*, 82 AD3d 596, 597 [1st Dept 2011]; *Vosper*, 110 AD3d at 545 [“disagreement with plaintiff’s expert’s findings or methodology presents issues of fact and credibility for a jury to resolve”]).

2. Defendants’ liability

The duty to maintain cellar doors abutting real property rests with the real property owner (Administrative Code § 19-152[a][6]), and is non-delegable (*see Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011] [Administrative Code § 7-210 imposes non-delegable duty on owner of abutting premises to maintain and repair sidewalk]; *see also Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008] [section 7-210 “mirrors” duties and obligations of property owners with regard to sidewalks set forth in Administrative Code sections 19-152 and 16-123]; *Scuteri v 7318 13th Ave. Corp.*, 52 Misc 3d 391, 398 [Sup Ct, Kings County 2016], *affd in part, appeal*

dismissed in part 150 AD3d 1172 [2d Dept 2017]). As the owner's duty is non-delegable, even where a lease obliges the tenant to maintain cellar doors, the tenant owes no duty to an injured third party, absent evidence that the tenant created the hazardous condition or made special use of the cellar doors. (*See Collado*, 81 AD3d at 542 [lease provisions obligating tenant to repair sidewalk do not impose duty to third party where tenant did not create condition or make special use of sidewalk]).

Even if the lease governs, as it is undisputed that SSB neither had access to the cellar doors nor made special use of them, it does not supplant the non-delegable duty imposed by the Code. As only the allegedly defective condition of the cellar doors is actionable, and not the presence of snow or ice (*see supra* at II.B.1.), plaintiff has a cause of action against only D&B.

III. CROSS-CLAIMS

As SSB is not liable in negligence to plaintiff (*see supra*, II.B.2), it may not be held liable to D&B for common-law indemnity or contribution, nor may it hold D&B liable for common-law indemnity or contribution.

The parties dispute whether the lease governs, and the affidavit of D&B's president, absent additional evidence, is too conclusory and unsubstantiated to establish that it does. Moreover, D&B is not a party to the lease, and it was in effect only until 1997. Accordingly, issues of fact exist as to whether either party is entitled to contractual indemnification.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that Stick Stone & Bone's motion for summary judgment is granted to the extent that plaintiff's claims, as asserted against it, are severed and dismissed, and D&B Christopher St. Corp's cross-claims for common-law indemnity and contribution are dismissed,

and otherwise is denied; it is further

ORDERED, that D&B Christopher St. Corp.'s motion for summary judgment is granted to the extent that Stick Stone & Bone's cross-claims for common-law indemnity and contribution are dismissed, and otherwise is denied.

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7/18/2019
DATE

BARBARA JAFFE, J.S.C.

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