

Fragiori v BLDG 424 Saddleback LLC

2019 NY Slip Op 32800(U)

September 19, 2019

Supreme Court, New York County

Docket Number: 162250/2015

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. 162250/2015

PHYLLIS FRAGIORI,

Plaintiff,

MOTION SEQ. NO. 001

- v -

BLDG 424 SADDLEBACK LLC, BLDG 424 OLIVE LLC,
FEIL 424 BEACON LLC, MILL-RUN TOURS, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action commenced by plaintiff Phyllis Fragiori, defendants BLDG 424 Saddleback, LLC, BLDG 424 Olive, LLC and Feil 424 Beacon, LLC (collectively "BLDG 424") move for summary judgment dismissing the complaint and for summary judgment on their cross claims against co-defendant Mill-Run Tours, Inc. ("Mill-Run"). Mill-Run cross-moves for summary judgment dismissing the complaint on the ground that plaintiff failed to establish any defects with respect the door saddle which allegedly caused her fall. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On December 10, 2012, plaintiff was allegedly injured when she fell in the doorway of an office located at 424 Madison Avenue, New York, New York ("the building") while attending a

business appointment at Mill-Run. BLDG 424 owns, operates and/or maintains the building. Mill-Run leases office space on the 12th floor of the building and has been a tenant in that space for almost thirty years.

On November 30, 2015, plaintiff commenced this personal injury action alleging that she tripped over an uneven lip, saddle, and/or step at the entry way to Mill-Run (see Shein affirmation, exhibit C). Issue was joined by Mill-Run and BLDG 424 in separate answers, each asserting cross claims for contractual and common law indemnification against the other (see Shein affirmation, exhibits D & E). BLDG 424 also asserted a cross claim against Mill-Run alleging that the latter breached its lease by failing to procure commercial general liability insurance for the benefit of BLDG 424.

BLDG 424 now moves for summary judgment seeking to dismiss the complaint on the ground that plaintiff has not established that BLDG 424 created the condition that caused plaintiff to fall, or that it had actual or constructive notice of any defective condition in the entrance to Mill-Run. In support of its motion, BLDG 424 relies on the deposition testimony of plaintiff, who testified that, at the time of the accident, she was leaving Mill-Run through its entrance door. Plaintiff testified that a man opened the door for her as she exited Mill-Run's office and entered the main hallway, at which time three people were behind her (see Shein affirmation, exhibit G). As she exited Mill-Run, plaintiff's right foot was on a ledge that was about two inches tall and uneven, which caused her to lose her balance and fall (*id.*).

BLDG 424 also relies on the deposition testimony of Pierre Azzi, the general manager of Mill-Run (see Shein affirmation, exhibit J). At his deposition, Azzi testified that there was a lobby between the elevators and the entrance to Mill-Run on the 12th floor (*id.*). Azzi also testified that there was a step or saddle under the entrance to the door to Mill-Run. According to Azzi, Mill-

Run was responsible for any repairs to the entrance door (*id.*). Azzi recalled that, on the date of the accident, there was a warning sign on the door which said “watch your step” (*id.*).

BLDG 424 also relies on the deposition testimony of Sara Fontanet, a property manager for the building (see Shein affirmation, exhibit K), who testified that Mill-Run was a tenant on the 11th and 12th floors of the building. Fontanet stated that, prior to December 10, 2012, no one had complained about the height differential with respect to the saddle of the door in question, and she did not recall any similar incidents involving anyone tripping over that saddle (*id.*).

BLDG 424 also submitted an affidavit from Fontanet in which she states that, since the doorway saddle was not a structural element of the building, BLDG 424 would not have been responsible for maintaining it (see Shein affirmation, exhibit N). Fontanet did not know the height difference between the floor and the saddle because she had never measured it, but believed it to be about two inches.

Additionally, BLDG 424 relies on the deposition testimony of non-party Rosario Mariani (see Shein affirmation, exhibit L). At his deposition, Mariani testified that he had visited Mill-Run several times, was familiar with the door to the office, and never had a problem entering or exiting Mill-Run through the door in question. Mariani, who estimated that the saddle was about two or three inches high and four inches wide, never noticed that the saddle was uneven.

BLDG 424 also submits the affidavit of Lawrence P. Wolf, the assistant secretary of BLDG 424 (see Shein affirmation, exhibit O). In his affidavit, Wolf states that, pursuant to the terms of Mill-Run’s lease, Mill-Run was responsible for maintaining the premises in good condition, along with the fixtures and appurtenances thereto. Wolf also states that the door saddle was part of the leased premises and not a structural element of the building. Therefore, it was Mill-Run’s obligation to maintain the door saddle in a safe condition. Wolf also states that,

pursuant to the lease, Mill-Run was obligated to obtain comprehensive commercial general liability insurance with coverage of a three million dollar per occurrence limit for personal injuries, and such policy was to name the landlord as an additional insured. Wolf claims that Mill-Run breached the lease because it did not obtain such insurance.

BLDG 424 argues that, by Azzi's admission, Mill-Run was responsible for maintaining the door saddle in question in good repair, and that it neither created the condition that caused plaintiff's fall nor had actual or constructive notice of the same. BLDG 424 also argues that plaintiff has failed to allege a violation of any specific statute with respect to the door saddle, and that she did not establish that the door saddle was structural in nature.

Further, BLDG 424 argues that, pursuant to the language of the lease, it is entitled to contractual indemnification from Mill-Run. BLDG 424 seeks reimbursement of its costs, including its attorneys' fees, in the amount of \$25,000.

In opposition to BLDG 424's motion, Mill-Run argues that, on the errata sheet executed by Azzi after reading his deposition transcript, Azzi corrected his testimony by saying that BLDG 424, as landlord, was responsible for repairs to the floor of the office and the entrance door to Mill-Run's office (see DiMeglio affirmation, exhibit A). Further, Azzi's errata sheet indicated that the landlord, not Mill-Run, had made changes to the door in question. Accordingly, argues Mill-Run, there is a question of fact regarding who was responsible for the maintenance and repair of the door saddle.

Mill-Run further argues that BLDG 424 is not entitled to indemnification for its own negligence. Therefore, BLDG 424 is not entitled to contractual or common law indemnification.

With respect to Fontanet's testimony that the door saddle was not a structural element of the Building, Mill-Run argues that, as a properly manager, not an architect, Fontanet is unqualified

to make such a statement. Mill-Run further asserts that Wolf, an attorney, also is not qualified to reach the same conclusion. Therefore, according to Mill-Run, there is a question of fact regarding whether the door saddle was a structural element of the building.

Finally, Mill-Run argues that, when a tenant fails to procure insurance covering the landlord for personal injuries, the landlord who procures such insurance for itself is limited to recovering from the tenant the cost of purchasing that insurance and any other out of pocket expenses.

Mill-Run also cross moves for summary judgment dismissing the complaint on the ground that plaintiff failed to prove that the door saddle in question was defective. Specifically, Mill-Run argues that this Court should take judicial notice that the door saddle is a normal height and space for a commercial office building in the New York City area. Further, Mill-Run argues that there is no evidence that it created or had actual or constructive notice of a dangerous condition.

In opposition, plaintiff argues that the motions should be denied because there are issues of fact regarding whether the condition which caused plaintiff's injury was dangerous, and whether BLDG 424 and Mill-Run allowed that dangerous condition to exist. Plaintiff argues that, pursuant to NYC Administrative Code 27-371(h), the floor or landing on each side of a door shall be the same elevation on each side, and that the door saddle in question violated this statute. Plaintiff argues that this violation is some evidence of negligence. Additionally, plaintiff contends that BLDG 424's argument that it had no notice of the dangerous condition is belied by the fact that there was a "watch your step" sign on the entrance door and that the sign is some evidence that it was foreseeable that a person would trip on the door saddle.

In reply, Mill-Run argues that plaintiff cannot assert any arguments regarding a violation of the NYC Building Code because such a claim was never asserted in the complaint or in

plaintiff's bill of particulars. Further, according to Mill-Run, plaintiff failed to offer any expert testimony regarding any alleged violations of the NYC Building Code.

LEGAL CONCLUSIONS:

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact [CPLR 3212, subd. (b)]” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks omitted], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Mill-Run's Cross Motion to Dismiss the Complaint

To prove a prima facie case of negligence in a trip-and-fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see Cruceta v Funnel Equities*, 18 AD3d 693, 694 [2nd Dept 2005]; *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2nd Dept 2003]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Negri v. Stop &*

Shop, 65 NY2d 625, 626 [1985]).

In support of its cross motion, Mill-Run argues that there is no evidence that the door saddle is defective because plaintiff fails to allege how it is defective, fails to provide an expert affidavit supporting this allegation, and fails to establish that Mill-Run had actual or constructive knowledge of the alleged defect. Moreover, urges Mill-Run, any hazard posed by the door saddle was open and obvious, and there had been no incidents or injuries related to the door saddle in the almost 30 years that Mill-Run had been a tenant of that space. Accordingly, Mill-Run has established prima facie entitlement to summary judgment dismissing the complaint (*see Hall for Stephenson v New Way Remodeling, Inc.*, 168 AD3d 620 [1st Dept 2019]).

Plaintiff contends that the door saddle was defective because it contained a ledge of about 2 inches and was uneven. However, plaintiff does not provide the actual measurements of the door saddle, and therefore fails to establish its actual height and the alleged unevenness. Further, even if the door saddle in question is about two inches high, plaintiff failed to submit an expert's opinion regarding how the door saddle was uneven, defective, or a dangerous condition.

Further, plaintiff argues that the door saddle violates NYC Administrative Code 27-371(h), which requires that the floor or landing on each side of a door shall be the same height, and therefore there are issues of fact precluding summary judgment in favor of Mill-Run. However, in the absence of any measurements regarding a height difference on either side of the door saddle, it is not clear whether either side of the door saddle in question differed in height in violation of the NYC Administrative Code. Other than plaintiff's conclusory statements, there is no proof that the door saddle was defective or in a dangerous condition (*see Bentivegna v Investment Props. Assocs.*, 180 AD2d 500 [1st Dept 1992] [no proof that door that struck plaintiff was defective]). This Court also notes that plaintiff's argument regarding violations of the NYC Administrative

Code is being raised for the first time in opposition to defendants' motion. Since this allegation was not set forth in the complaint or bill of particulars, it cannot be considered by this Court. *See Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 (1st Dept 2018).

Plaintiff also argues that the deposition testimony of non-party Mariani raises an issue of fact because, at his deposition, Mariani testified that he was told, by an unspecified person, that there was a two-inch step at the entrance to Mill-Run because they had to run wires for computer equipment (see Shein affirmation, exhibit L at 22). However, Mariani had no firsthand knowledge of this, nor did he have any knowledge of how or when the door saddle was installed. Mariani did not even name the person who provided him with this hearsay information. Therefore, as Mill-Run correctly argues, plaintiff cannot raise an issue of fact based solely upon inadmissible hearsay testimony (*see Guaman v New Sprout Presbyterian Church of New York*, 33 AD3d 758, 759 [2nd Dept 2006]; *Joseph v Hemlok Realty Corp.*, 6 AD3d 392 [2nd Dept 2004] [issue of fact cannot be raised solely by inadmissible hearsay]; *cf. Allstate Ins. Co. v Keil*, 268 AD2d 545 [2nd Dept 2000] [hearsay statements by an identified declarant may be sufficient to withstand a motion for summary judgment under certain circumstances.]).

Finally, plaintiff argues that the "watch your step" sign is proof that the door saddle was defective, or at least raises a question of fact regarding any defects with respect to the door saddle. However, the sign, in and of itself, is not proof of a defect or of negligence (*e.g. Altschuler v Gramatan Mgt., Inc.*, 27 AD3d 304, 304 [2nd Dept 2006] [warning sign not evidence of negligence]).

Based on the foregoing, Mill-Run's cross motion for summary judgment dismissing the complaint is granted.

BLDG 424's Motion for Summary Judgment

In view of the foregoing, BLDG 424's motion for summary judgment dismissing the complaint is granted in light of the fact that there is no evidence that the door saddle was defective, BLDG 242 had no actual or constructive knowledge of any alleged defect, and plaintiff has failed to raise an issue of fact in opposition to the motion.

BLDG 424's motion for summary judgment against Mill-Run on its cross claims for contribution, contractual and common law indemnification is denied given the finding above that Mill-Run has no liability herein. However, with respect to BLDG 424's cross claim alleging that Mill-Run breached its lease with BLDG 424 by failing to procure commercial general liability insurance for the benefit of BLDG 424, Mill-Run concedes it did not procure such insurance. Therefore, that cross claim is not dismissed (*see Natarus v Corporate Prop. Invs., Inc.*, 13 AD3d 500, 501 [2d Dept 2004] [third-party claim that defendant failed to procure contractually mandated insurance coverage was not academic notwithstanding dismissal of the underlying complaint]). Given Mill-Run's concession that it breached the lease by failing to procure the general liability insurance, BLDG 424's motion for summary judgment is granted on this claim. The breach of lease claim is hereby converted into a third-party claim for the purpose of litigating the issue of damages, and the caption is amended accordingly (*see Soodoo v LC, LLC*, 116 AD3d 1033 [2d Dept 2014]; *Jones v New York City Hous. Auth.*, 293 AD2d 371, 372 [1st Dept 2002]).

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

ORDERED that defendant Mill-Run Tours, Inc.'s cross motion for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the motion by defendants BLDG 424 Saddleback, LLC, BLDG 424 Olive LLC, and FEIL 424 Beacon LLC's for summary judgment dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the motion for summary judgment by defendants BLDG 424 Saddleback, LLC, BLDG 424 Olive LLC, and FEIL 424 Beacon LLC's on their cross claims against Mill-Run Tours, Inc. is granted with respect to their claim for breach of contract to procure insurance, and is otherwise denied; and it is further

ORDERED that the cross claim for breach of contract for failure to procure insurance by defendants BLDG 424 Saddleback, LLC, BLDG 424 Olive LLC, and FEIL 424 Beacon LLC as against defendant Mill-Run Tours, Inc. is hereby converted to a third-party action; and it is further

ORDERED that this case shall hereinafter bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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PHYLLIS FRAGIORI,

Plaintiff,

Index No. 162250/2015

-against-

BLDG 424 SADDLEBACK, LLC, BLDG 424 OLIVE,
LLC, FEIL 424 BEACON, LLC AND MILL-RUN
TOURS, INC.,

Defendants.

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BLDG 424 SADDLEBACK, LLC, BLDG 424 OLIVE,
LLC, FEIL 424 BEACON, LLC,

Third-Party Plaintiffs,

-against-

MILL-RUN TOURS, INC.,

Third-Party Defendant.

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And it is further

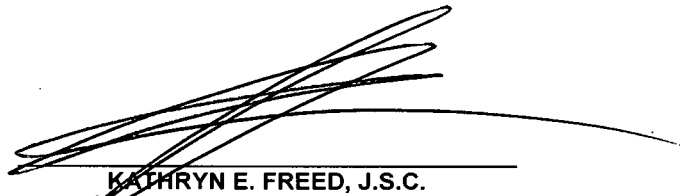
ORDERED that, upon filing by BLDG 424 Saddleback, LLC, BLDG 424 Olive LLC, and FEIL 424 Beacon LLC with the Trial Support Office a copy of this order with notice of entry, and the payment of any appropriate fee(s), if any, the Clerk shall cause this matter to be placed on upon the calendar for a trial on damages with respect to the third-party claim; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

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

9/19/2019

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