

Santiago v Post Rd. Assoc., LLC
2019 NY Slip Op 34807(U)
June 28, 2019
Supreme Court, Westchester County
Docket Number: Index No. 50864/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X

KIMBERLY SANTIAGO,

Plaintiff,

DECISION & ORDER
Index No. 50864/2017
Motion Sequence 4

-against-

POST ROAD ASSOCIATES, LLC and UNICORN
CONTRACTING CORP.,

Defendants.

-----X

UNICORN CONTRACTING CORP.,

Third-Party Plaintiffs,

-against-

WHITE PLAINS HOSPITAL,

Defendant.

-----X

The following papers were received and considered in connection with the defendants' motion for summary judgment:

Notice of Motion/Affirmation/Exhibits 1-7	1-9
Memorandum of Law in Support	10
Affidavit/Exhibits 1-2	11-13
Affirmation in Partial Opposition	14
Affirmation in Partial Opposition/Exhibits A-G	15-22
Memorandum of Law in Reply	23

Factual and Procedural Background

The plaintiff, Kimberly Santiago ("Santiago") commenced this action by filing a summons and complaint on January 20, 2017, to recover monetary damages for a trip and fall accident that occurred on August 2, 2016, on the interior staircase of 101 East Post

Road, White Plains, New York. The defendant, Unicorn Contracting Corp. ("Unicorn") commenced a third-party action against the third-party defendant, White Plains Hospital Medical Center ("WPH").

On the day of the accident, Santiago was an employee at White Plains Hospital and worked Monday through Friday from 8:00 a.m. to 4:00 p.m. She testified that she worked on the third floor of the building where the accident occurred and slipped on the landing of the second floor as she was going down the stairs. She testified that she was told that a metal bracket caused her to trip and fall.

WPH now moves for summary judgment to dismiss the plaintiff's claims against the defendants Post Road Associates ("Post Road") and Unicorn and to dismiss the third-party complaint, pursuant to CPLR 3212, arguing that Santiago's claims must be dismissed because the defendants did not owe her a duty of care as an out-of-possession landlord and the defendants did not have notice of the transient condition. WPH further argues that Unicorn's third-party claims against it should be dismissed because Unicorn is not a third-party beneficiary entitled to contractual indemnification or insurance coverage and Unicorn cannot assert a claim for common law indemnification and contribution because Santiago asserts direct liability against it.

Unicorn partially opposed that part of WPH's motion seeking dismissal of the contractual indemnification claims, arguing that if Unicorn's motion for summary judgment is denied, it is entitled to a conditional order for contractual indemnification against WPH. Unicorn argues that while WPH is correct that, under the indemnification agreement, there is no duty to defend, there is a duty to indemnify, arising out of claims due to WPH's

obligations under the lease agreement. Unicorn asserts that it acted as an agent of Post Road Associates, LLC ("Post Road") when it oversaw the construction project at the Premises.

In opposition, to that part of WPH's motion seeking dismissal of the claims and in support of WPH's argument stating that Unicorn is not entitled to contractual indemnification, the plaintiff, Santiago, argues that the defendants did not show when the staircase was last cleaned nor inspected. Santiago further argues that a metal hinge caused her to fall and she saw workers in the staircase prior to her fall and the staircase was in a generally dirty condition, establishing no one cleaned the area. Santiago also asserts that the witness Steven Giamundo cannot establish a prima facie case, as he does not know when the area was last cleaned and inspected and he was not present on the morning of the accident. Santiago also argues that Post Road is not entitled to summary judgment, because the lease agreement states that the landlord is responsible for the common areas of the building, which would include the staircase.

In reply, WPH asserts that the defendants have established lack of actual or constructive notice of the alleged dangerous condition and the absence of any duty owed to the plaintiff. WPH further asserts that Unicorn's claims should be dismissed, since it cannot refute the absence of any viable claims for common law indemnification or contribution and it did not oppose WPH's argument that Unicorn is not a third-party beneficiary of the lease agreement and therefore, it is not entitled to any contract-based rights, such as indemnity.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law (*see Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). “[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact (*see e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) and the burden shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position (*Id.*).

To impose liability upon a defendant in a slip-and-fall case, a plaintiff has to put forth evidence showing the existence of a dangerous or defective condition and a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*see Davis v Sutton*, 136 AD3d @ 732-733; *Sawicki v GameStop Corp.*, 106 AD3d 979; *Armijos v. Vrettos Realty Corp.*, 106 AD3d 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 A.D.3d 1307, 1308).

In this case, there is no evidence that anyone, including Santiago, observed the metal hinge prior to her accident. It “could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation” (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Further, the Court finds no merit in Santiago's arguments that WPH's cleaning contract only started in 2018 and not 2016; that construction by Unicorn was still ongoing at the time of the accident; and that the landlord is obligated to clean the stairwell under the lease.

WPH provided a copy of the cleaning contract with BCR Maintenance, Inc. ("BCR"), which was dated March 10, 2016 and copies of the certificate of insurance for BCR's workers compensation liability coverage in effect from February 1, 2016 through February 1, 2017, for WPH. Ossie T. Dahl, the administrative director of Engineering services for WPH, who was the vice president of facilities at the time of Santiago's accident, also submitted an affidavit attesting to WPH being in full possession of the Premises in August 2016 and stating that pursuant to the lease, WPH was responsible for cleaning, repair and maintenance inside the building, including the interior stairwells. Dahl also states that WPH contracted with BCR in March 2016 for cleaning services for all four floors of the Premises. Neither does the testimony of Patricia Russell-Delucia a WPH employee dispute this. She testified that she did not know how the building was cleaned in 2016, not that it was not cleaned. Her testimony does not establish that there was no cleaning contract, nor does it create an issue of fact.

Delucia's testimony also does not establish that construction was ongoing in August 2016. WPH and the defendants established that construction on the Premises by Unicorn was completed by May 2016 and a punchlist done by June/July 2016.

The Court previously decided Post Road's motion for summary judgment finding that it was an out-of-possession owner with no control over the premises and not contractually

bound to repair unsafe conditions. As a result, it was not liable for injuries that occurred on the Premises in August 2016.

The Court also grants that part of WPH's motion seeking dismissal of Unicorn's third-party claims. "The right to contractual indemnification depends upon the specific language of the contract" (*Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772 [2d Dept 2010] quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Id.*). The intent to confer a direct benefit on a third party must clearly appear in order to enable that party, not named in the contract, to recover (see *Travelia v Skanska USA, Inc.*, 28 Misc3d 885 [NY Supreme Ct. 2010]).

As stated by WPH, the lease agreement does not name Unicorn as the managing agent under the lease nor state that Unicorn is entitled to indemnity or defense. Paragraph 19.03 of the lease agreement provides indemnification for liability for the landlord only and despite Unicorn's claim does not refer to indemnification of the agent of the landlord, but rather extends liability to any agent of the tenant.

The claim for common law indemnification/contribution is also dismissed, as WPH has established prima facie that it was not negligent and the Court has found WPH not to be liable in Santiago's accident.

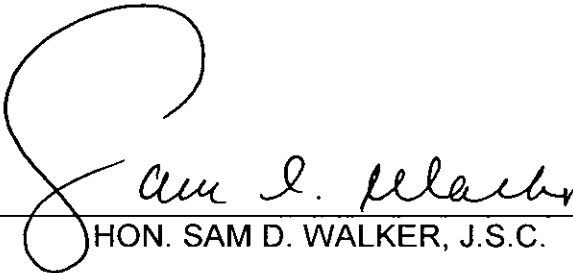
Accordingly, it is

ORDERED that White Plains Hospital Medical Center's motion for summary judgment is granted; and it is

ORDERED that the action against White Plains Hospital Medical Center, is dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
June 28, 2019



HON. SAM D. WALKER, J.S.C.