Lewis v Abraham
2020 NY Slip Op 30789(U)
March 13, 2020
Supreme Court, New York County
Docket Number: 151490/17
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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MICHAEL LEWIS,

Plaintiff,

-against-

NIR ABRAHAM, DALEE REALTY, LLC, 2 BROS PIZZA, THE JUICE SHOP, LLC c/o AMERSON, and 2BP3, LLC,

Defendants.

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Index No. 151490/17
Motion Sequence 05/06

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

This is a personal injury action in which plaintiff Michael Lewis (Plaintiff or Mr. Lewis) claims that he tripped and fell on a ramp leading into a pizza shop located at 113 East 125th Street in Manhattan. The premises are owned by Dalee Realty, LLC (Dalee) and operated by 2BP3, LLC, also known as 2 Bros. Pizza (Tenant or 2BP3). It is undisputed that the ramp was constructed by a contractor hired by 2BP3. Counsel for Dalee asserts that Abraham Nir, who is sued here in his individual capacity and is alleged to have an ownership interest in Dalee, is not actually affiliated with same.

In MS 05, defendants Nir and Dalee move for summary judgment dismissing Plaintiff's claims and all cross-claims asserted against them. Dalee also move for summary judgment against 2BP3 on its cross-claims. In MS 06, 2BP3 moves for summary judgment dismissing Plaintiff's claims against them. Plaintiff opposes both motions. As more fully set forth below, the motions are granted in part and denied in part.

Mr. Lewis was deposed on January 9, 2019.[1] He testified that the accident in question occurred on December 16, 2016 at about 8:00PM (Lewis Deposition, pp. 22, 30-31):

[1] Plaintiff's exhibit A (Lewis Deposition)

Q. And I know you said the accident occurred on a sidewalk, was there anything specific on that sidewalk that may have caused the accident?

A. Yes, there was a ramp protruding into the street, and they had – it was a crack in the ramp, and I remember tripping over that.

* * * *

Q. What part of the ramp did you trip over?

A. I remember and I recall tripping over the very edge part of it, like the edge where it almost ends.

Q. So the part that's further away from the store?

A. Right, more protruding into the street, yeah. . . .

Q. When was the first time you noticed the ramp?

A. When I tripped over it actually.

Q. Was that right when the accident occurred, was it afterwards when you looked down, something else?

A. It was right after, because I remember people surrounding me, and then I turned around after I fell and broke my fall, I looked up, and saw the edge where I fell at; I saw the part where I tripped over.

Photographs of the ramp in question are annexed to Plaintiff's opposition papers.[2] They show that the ramp protruded outward from the door of the pizza shop over the sidewalk, that the ramp appears to have been the same material and color as the sidewalk, and that the ramp had no handrails or other safety features to alert a pedestrian as to its presence.

Eliahu Nir was deposed on behalf of Dalee.[3] He testified[4] that he owns Dalee and that he replaced the sidewalk outside of the pizza ship at some point after 2013. After that the Tenant installed the ramp without Dalee's knowledge or permission. Daniel Moshkovich, who managed the pizza shop and oversaw its operations, was deposed on behalf of 2BP3.[5] As is relevant to this motion, Mr. Moshkovich did not know when the ramp was installed, but recalls that at one point the

[2] Plaintiff's exhibit C.

[3] Abraham Nir is Eliahu's Nir's father. He was not deposed.

[4] Plaintiff's exhibit D.

[5] Plaintiff's exhibit F (Moshkovich Deposition).

ramp did have handrails and that it was painted yellow. He did not know when or why the handrails were removed or why the yellow paint was removed (Moshkovich Deposition pp. 29-34). Mr. Eli Halili owns 2BP3 and was also deposed. Mr. Halili testified[6] that he first considered installing a ramp in 2011 or 2012 after receiving a complaint from a wheelchair-bound customer who was having trouble accessing the pizza shop. The first ramp he utilized was made of metal and was painted yellow. It was not built into the sidewalk and was removed each night after the shop closed (Halili Deposition pp. 30-35). At some point Mr. Halili decided to build the concrete ramp, but does not know who he hired to perform this work and does not know when it was completed. He also had no knowledge as to why the ramp did not have handrails at the time of the accident, and did not recall if he sought Dalee's approval for the ramp's construction (*id* at pp. 37-38, 46-47, 52-53).

The documentary evidence shows that Dalee and 2BP3 entered into a Lease Agreement on January 15, 2016.[7] Among other provisions, the Lease provides (¶¶ 3, 4, 8, 13, 44.02, 52):

> Tenant shall make no changes in or to the demised premises of any nature without Owner's prior written consent. Subject to the prior written consent of Owner . . . Tenant at Tenant's expense, may make alterations, installations, additions or improvements which are non-structural . . . by using contractors or merchants first approved by Owner.
>
> Owner shall maintain and repair the public portions of the building, both exterior and interior, except that if Owner allows tenant to erect on the outside of the building a sign or signs . . . Tenant shall maintain such exterior installations in good appearance and shall cause the same to be operated in a good . . . manner and shall make all repairs thereto necessary to keep same in good order and condition, at Tenant's own cost and expense, and shall cause the same to be covered by the insurance provided for hereafter . . . .Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition
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> Owner or Owner's agent shall have the right but shall not be obligated to enter the demised premises in any emergency at any time, and, at other reasonable times to examine the same and to make sure repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building which Owner may elect to perform. Tenant

[6] Plaintiff's exhibit G.

[7] Plaintiff's exhibit H (Lease).

> shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses . . . incurred as a result of any breach by Tenant . . . or the carelessness, negligence or improper conduct of the Tenant.
>
> Tenant shall maintain a policy or policies of comprehensive public liability . . . insuring the Owner and Tenant against any liability arising out of the ownership, use, occupancy or maintenance of the Demised Premises and all areas appurtenant thereto including the basement, awning, canopy, signs, and sidewalk . . .
>
> Tenant shall indemnify Owner and hold Owner harmless from and against all claims, liens, costs (including attorneys' fee) and other liabilities which Owner may incur, arising out of or due to any such alterations . . .

Plaintiff has retained professional engineer Scott Silberman as an expert witness in this case. His affidavit and report are included as part of Plaintiff's opposition papers.[8] In relevant part he made the following observations and conclusions regarding the ramp (Silberman Report, ¶ 8,

> It is my professional opinion to a reasonable degree of engineering certainty that the subject ramp and adjacent sidewalk was constructed and designed in such a manner so as to create a reasonably foreseeable public safety hazard, particularly a tripping hazard, because the sides of the ramp [were] vertical and created a vertical grade differential that was significant, approximately 1.5 inches in the location where Mr. Lewis tripped, which was directly in the path of pedestrians on a crowded New York City sidewalk. Moreover, the ramp did not have any railings on both sides, which would have prevented a person, such as Mr. Lewis, from accidentally walking it and tripping over the sides. Finally, because the ramp was similar in appearance to the sidewalk it was placed on, it made it extremely difficult to notice and created a condition of optical confusion, especially in low light when it occurred.

In support of their motion, defendants Dalee and Nir raise the following arguments: (1) Abraham Nir had no personal involvement with the subject premises and is not a member of or otherwise affiliated with Dalee; (2) Dalee was an out-of-possession landlord that did not create the defective condition, have notice of the defective condition, or violate any building codes; (3) 2BP3 was solely responsible for maintaining the ramp; and (4) 2BP3 should be defending and indemnifying Dalee as per the terms of the Lease and the facts of this case. 2BP3 argues that: (1) it had no notice of the "crack" in the ramp that allegedly caused Plaintiff's fall; (2) In any event, the

[8] Plaintiff's exhibit I (Silberman Report). The court notes that Mr. Silberman claims to have inspected the site on November 10, 2016, a month before Plaintiff's accident. His report to Plaintiff's counsel is dated February 9, 2017 and his affidavit submitted in connection with this motion is dated October 21, 2019.

crack was a trivial defect that is not actionable; and (3) any defects in the ramp were open and obvious.

Plaintiff argues that summary judgment must be denied to all defendants because there is an issue of fact whether the ramp was defective, whether the defect was trivial, and whether the defect was open and obvious. Plaintiff further argues that none of the defendants have demonstrated that they lacked actual or constructive notice of such defects, and that Dalee has failed to show that it was really an out-of-possession landlord.

DISCUSSION

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); *see also Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

It is settled that landowners and business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition. *Di Ponzio v Riordan*, 89 NY2d 578, 582 (1997); *Basso v Miller*, 40 NY2d 233, 241 (1976). While they are not insurers of the safety of

people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]) they must reasonably ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use." *Miller v Gimbel Bros.*, 262 NY 107, 108 (1933); *see also Hackbarth v McDonalds Corp.*, 31 AD3d 498, 498 (2d Dept 2006). This duty to maintain property in a reasonably safe condition must be viewed in light of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk. *See Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 (1st Dept 2006). Businesses owners who operate places of public assembly have a duty to provide members a "safe means of ingress and egress". *Id.*

I. Abraham Nir

Mr. Nir's motion is granted. Assuming for arguments sake that Mr. Nir was a member of the LLC that controlled Dalee, he still cannot be held liable for Dalee's actions by virtue of his corporate membership. See NY Limited Liability Company Law 609-610. To pierce the corporate veil, Plaintiff bears a heavy burden of showing that Dalee was "dominated" by Mr. Nir and that such domination resulted in wrongful consequences. *See Singh v Nadlan, LLC*, 171 AD3d 1239, 1240 (2d Dept 2019); *Board of Mgrs. of 325 Fifth Ave. Condominium v Continental Residential Holdings LLC*, 149 AD3d 472, 475 (1st Dept 2017); *Matias v Mondo Props. LLC*, 43 AD3d 367, 368 (1st Dept 2007). There are no facts and circumstances here that would lead the court to pierce the corporate veil and hold Mr. Nir personally responsible for Dalee's alleged negligent conduct. Accordingly, all claims and cross-claims against Mr. Nir are dismissed.

II. Dalee

Historically, an out-of-possession landlord in New York City who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions would not be liable for personal injuries caused by an unsafe condition existing on the premises. *See Rivera v Nelson*

Realty, 7 NY3d 530, 534 (2006). This recently changed as a result of the Court of Appeals' decision in *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 (2019). In *Xiang*, the Court held that NYC Administrative Code § 7-210[9] applies to every owner of real property abutting any sidewalk and "makes no distinction for those owners who are out of possession." *Id.* at 172. In other words, a landowner's duty to maintain its premises is "an affirmative, nondelegable obligation," and while an owner "can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210." *Id* at 194. Accordingly, Dalee is not entitled to summary judgment dismissing Plaintiff's claims against it on the ground that it is an out-of-possession landlord.

III. 2BP3

2BP3 asserts that it had no notice of the alleged defective condition and that the defect was both trivial and open and obvious. Both arguments are without merit.

As for notice, 2BP3's burden is to show that it "neither created the hazardous condition, nor had actual or constructive notice of its existence." *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 (1st Dept 2010); *see also Atashi v Fred-Doug*, 117 LLC, 87 AD3d 455, 456 (1st Dept 2011) ("Actual notice may be found where a defendant . . . was aware of [a condition's] existence prior to the accident . . ."); *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) ("To constitute constructive notice, a defect must be visible and apparent

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[9] Administrative Code of City of NY § 7-210(a)-(b) provides, in relevant part:

> a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it"). In this regard, 2BP3 relies upon Mr. Halali's statement[10] that he had no knowledge of the "crack" that Plaintiff allegedly tripped on. This approach improperly narrows the scope of Plaintiff's testimony and the nature of the defective. To the contrary, the testimony, photographic evidence, and expert report show that Plaintiff's accident may not have been the result of the crack alone, but several factors, including the lack of handrails, poor lighting, and "optical confusion" caused by the fact that the ramp was the same color as the concrete sidewalk. What matters for notice purposes is that 2BP3 built the ramp and had its employees and customers traverse it on a daily basis. This is enough to show that 2BP3 "created" the alleged defective condition, had actual notice of same, and at the very least had constructive notice of the ramp's alleged defects.

As for 2BP3's open and obvious claims, "[w]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.'" *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997) (quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2d Dept 1993]). Summary judgment is appropriate if the condition complained of is "both open and obvious and, as a matter of law, not inherently dangerous." *Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418 (1st Dept 2009). "[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 72 (1st Dept 2004). "To establish an open and obvious condition, a defendant must prove that the hazard 'could not reasonably be overlooked by anyone in the area whose eyes were open.'" *Powers v 31 E 31 LLC*, 123 AD3d 421, 422 (1st Dept 2014) (citing *Westbrook*, 5 AD3d at 72). "The burden

[10] NYSEF Doc. 168.

is on the defendant to demonstrate, as a matter of law, that the condition that caused the plaintiff to sustain injury was readily observable by the plaintiff employing the reasonable use of his senses." *Powers*, 123 AD3d at 422.

2BP3 has not met its burden in this regard. Instead of showing if/how the ramp complies with applicable building codes, 2BP3 instead attempts to show how the various codes and standards cited to in Plaintiff's bill of particulars are inapplicable. This approach does not speak to the fact that the ramp lacked handrails and had no other safety features to distinguish it from the ground. Under these circumstances alone, the court declines to find that the ramp was an open and obvious defect as a matter of law.

Finally, an owner or operator may also be awarded summary judgment in the case of a trivial defect "not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection." *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 (2015). In determining whether a defect is trivial, "a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury." *Pennella v 277 Bronx River Rd. Owners, Inc.*, 309 AD2d 793, 794 (2d Dept 2003). This is not to say that physically small defects cannot be actionable; they can be depending upon their intrinsic characteristics. *See Hutchinson*, 26 NY3d at 79. The key is to pay attention to the specific circumstances and facts before the court. *Id.*

2BP3's analysis of this issue rests entirely upon *Nunez v Morwood Dry Cleaners*, 116 AD3d 831 (2d Dept 2014). In that case, the plaintiff was injured by an "alleged defect in a sidewalk cellar door". In awarding the defendant summary judgment, the court noted that defendants "may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." *Nunez*, like many other cases of this nature, are incredibly fact specific. For example, in *Smolen v Kmart, Inc.*, 2 AD3d 1438, 1439 (4th

Dept 2003), the plaintiff testified that his fall was caused by a depression in a ramp which plaintiff's expert did not even address in his expert. The court reviewed photos of the alleged depression and found it to be too trivial to sustain a cause of action. In *Clouse v Columbia Presbyt. Hosp.*, 35 AD3d 209, 210 (1st Dept 2006), plaintiff slipped and fell on the "sandy" condition on a ramp as she exited defendants' building. Plaintiff's expert claimed that the ramp was also too steep, did not have adequate handrails, and did not have a non-slip surface, but the court determined that these factors did not contribute to her fall because she fell immediately upon stepping out of the building. Here, unlike *Smolen,* the photographs depict what could be considered a defective ramp because it protruded from the entrance to the pizza shop well into the sidewalk and had no handrails or yellow paint to attract a pedestrian's attention. And unlike *Clouse*, the alleged defects might be causally related to Plaintiff's injuries given his testimony as to how the accident occurred. In consideration of these facts and circumstances, it is best left to a jury to decide whether these conditions constitute a trivial or an actionable defect.

IV. Dalee's Cross-Claims

Dalee's cross-claims are for common law contribution (first cross-claim), common-law indemnification (second cross-claim), contractual indemnification (third cross-claim), and breach of the obligation to procure insurance (fourth cross-claim).

Common Law Indemnification and Contribution

A claim for contribution arises when "two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person." *Smith v Sapienza*, 52 NY2d 82, 87 (1981); *see also Nassau Roofing & Sheet Metal Co. v Facilities Dev.*, 71 NY2d 599, 603 (1988) ("[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought."). Similarly, to recover for common law indemnification, a party must prove "that it was not guilty of any negligence beyond the statutory

liability." *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 (1st Dept. 1999); *see also Santoro v Poughkeepsie Crossings, LLC*, 2019 NY App. Div. LEXIS 8910, *5-6 (quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]) ("[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee"). Here, insofar as the court has already decided that liability issues should be decided by a jury, Dalee's motion for summary judgment on its contribution and common-law indemnity cross-claims are premature.

Contractual Indemnification

The Lease requires 2BP3 to "indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses . . . incurred as a result of any breach by Tenant . . . or the carelessness, negligence or improper conduct of the Tenant." It does not, contrary to Dalee's contention, require 2BP3 to pick up Dalee's defense in this case. As such, Dalee's request that the court issue an order requiring 2BP3's insurance carrier to reimburse Dalee's insurance carrier for fees and expenses incurred thus far is denied. Moreover, and as set forth above, Dalee's duty to maintain the property in a reasonably safe condition is statutorily non-delegable, even as an out-of-possession landlord. *See Xiang Fu He, supra*; Administrative Code § 7-210. This does not necessarily mean Dalee is precluded from enforcing its indemnity clause, but it does mean that whether Dalee can in fact do so depends upon how fault is apportioned between it and 2BP3 at trial.

Insurance

Dalee's claim that 2BP3 failed to obtain insurance and/or list Dalee as an additional insured as required by the Lease is belied by the insurance policy annexed to 2BP3's motion papers.[11]

CONCLUSION

[11] NYSCEF Doc. 167.

In light of all of the foregoing, it is hereby

ORDERED that all claims and cross-claims against Abraham Nir are severed and dismissed; and it is further

ORDERED that the motions are otherwise denied.

Counsel are directed to appear for a pre-trial conference in Part 30 (60 Centre, Room 408) on April 13th at 10:00AM.

The Clerk of the Court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 3-13-20

SHERRY KLEIN HEITLER, J.S.C.