

Pichardo v City of New York
2020 NY Slip Op 31240(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 150063/2011
Judge: Kathryn E. Freed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

ODETTE PICHARDO,
Plaintiff,

- v -

THE CITY OF NEW YORK, 125 UPTOWN REALTY
LLC, 216-220 WEST 125TH STREET, LLC, URBAN
BRANDS, INC., D/B/A ASHLEY STEWART LTD, LANE
BRYANT # 6389 OF NEW YORK, LLC

Defendant.

-----X

INDEX NO. 150063/2011
MOTION DATE 04/25/2020, 04/25/2020
MOTION SEQ. NO. 003 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 128, 130, 134, 135, 136, 152, 153, 154 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 126, 132, 137, 138, 139, 140, 141, 142, 143, 144, 148, 149, 155, 156, 157 were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant Urban Brands, Inc. d/b/a Ashley Stewart, Ltd. ("Ashley Stewart Ltd.") moves, pursuant to CPLR 3212, for summary judgment dismissing the verified complaint and all cross claims asserted against it (Doc. 61-82) (motion sequence 003). Co-defendant 216-220 West 125th Street, LLC ("216-220 West") opposes the motion, but only to the extent that Ashley Stewart Ltd. seeks dismissal of its cross claims (Doc. 134-136). 125 Uptown Realty LLC ("Uptown Realty") also moves, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims (Doc. 104-113, 155-157) (motion sequence 006), and plaintiff Odette Pichardo ("Pichardo" or "plaintiff") opposes the same (Doc. 138-143). After oral argument,

as well as a review of the parties' papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On March 22, 2011, Pichardo filed a summons and complaint against several defendants seeking damages for injuries she allegedly sustained on September 15, 2010 when she fell on a defective sidewalk in front of, or adjacent to, 224 West 125th Street, New York, NY (Doc. 1). As relevant herein, plaintiff commenced this action against Ashley Stewart Ltd., a clothing store located at 216 West 125th Street; as against 216-220 West, the landlord of the commercial building located at 216 West 125th Street; and Uptown Realty, the landlord of the commercial building located at 224 West 125th Street (Doc. 1).¹ In her bill of particulars, Pichardo alleged, *inter alia*, that the incident occurred at 224 West 125th Street and that her injuries were as a result of defendants' negligent ownership, operation and control of the public sidewalk (Doc. 63 ¶ 2-3).

Each of the aforementioned defendants interposed an answer with cross claims (Docs. 16, 72, 73). In pertinent part, Uptown Realty alleged that, in the event plaintiff's injuries arose from its negligence, all defendants were jointly and severally liable and, thus, bound to fully indemnify and hold it harmless for the amount of any verdict or judgment (Doc. 72 ¶ 18). Ashley Stewart Ltd. and 216-220 West raised similar cross claims against its co-defendants (Docs. 16; 73 ¶ 16). Additionally, 216-220 West alleged that, pursuant to an existing agreement, Ashley Stewart Ltd.

¹ By decision and order entered December 6, 2019 (motion sequence 04 & 07), this Court (Frank, J.S.C.) dismissed the complaint and all cross claims against defendants Lane Bryant # 6389 ("Lane Bryant"), the lessee of Uptown Realty at 224 West 125th Street, and the City of New York (Doc. 146).

was required to secure insurance for the benefit of, and to defend, indemnify and hold harmless 216-220 West (Doc. 73 ¶ 17-20).

In September 2019, Ashley Stewart Ltd. and Uptown Realty filed their respective motions for summary judgment (Docs. 61, 104).

LEGAL CONCLUSIONS:

I. *Ashley Stewart Ltd.'s Motion for Summary Judgment Dismissing the Complaint and Cross Claims (Motion Sequence 003).*

Ashley Stewart Ltd., a clothing store located at 216 West 125th Street, leased the ground floor of said premises from co-defendant 216-220 West (*see* May 1, 1972 Lease [Doc. 66]; subsequently amended pursuant to an agreement dated July 12, 1974 [Doc. 67]; Sublease dated February 5, 1997 [Doc. 69]; and sub-sublease between 216-220 West and Ashley Stewart Woman, Ltd., dated June 28, 2005 [Doc. 70]).

Ashley Stewart Ltd. argues that it is entitled to dismissal of the complaint and all cross claims because, *inter alia*, plaintiff asserted in her bill of particulars that she fell on the sidewalk abutting 224 West 125th Street (Doc. 62 at 2, 8). Assuming, *arguendo*, that plaintiff fell in the area abutting 216 West 125th Street, the sidewalk is not part of the leased premises and, thus, asserts Ashley Stewart Ltd., as a tenant, it had no obligation to maintain the allegedly defective sidewalk that caused plaintiff's injuries (Doc. 62 at 8-9). Instead, claims Ashley Stewart Ltd., the obligation to repair and maintain the exterior of the premises, pursuant to the original lease dated 1972, rested entirely on the landlord, co-defendant 216-220 West (Doc. 62 at 11). Ashley Stewart Ltd. also contends that it has no obligation pursuant to the sub-sublease to defend, indemnify and hold 216-220 West harmless with respect to the sidewalk (Doc. 154 at 5-8).

In opposition to that branch of Ashley Stewart's summary judgment motion seeking dismissal of 216-220 West's cross claims based on indemnification, 216-220 West argues, *inter alia*, that pursuant to the "sub-sublease agreement" dated June 28, 1999, which is effective until February 27, 2029, Ashley Stewart Ltd. ("subtenant") agreed to secure insurance for the benefit of, and defend, indemnify and hold harmless 216-220 West ("the sublandlord") from "any claims, liability, loss damages and expenses, including reasonable attorneys' fees, arising from or relating to . . . the use or occupancy by the Subtenant of the Subpremises" (Doc. 134).

It is well-settled that "[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 eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Ocean v Strivers Gardens Condominium Assn.*, 2019 NY Slip Op 31482[U], 2019 NY Misc LEXIS 2827, *4 [Sup Ct, NY County 2019]). "Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action" (*Swede v 46 W. 21st St., LLC*, 2019 NY Slip Op 33521[U], 2019 NY Misc LEXIS 6369, *4 [Sup Ct, NY County 2019] [citation omitted]).

Generally, "liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control or special use of the property" (*Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 708 [2d Dept 1998] [internal quotation marks and citation omitted]). Pursuant to New York City Administrative Code § 7-210, often referred to as the "sidewalk law," owners of real property have a nondelegable duty to maintain the sidewalk in a reasonably safe condition (see *Baghban v City of NY*, 140 AD3d 586,

586 [1st Dept 2016]; *Wolfe v Gallery Partners, LLC*, 2012 NY Slip Op 32301[U], 2012 NY Misc LEXIS 4299, *12 [Sup Ct, NY County 2012]). Moreover, since repairs to a public sidewalk are considered structural in nature (*see Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]; *Mahon v David Ellis Real Estate, L.P.*, 2016 NY Slip Op 31750[U], 2016 NY Misc LEXIS 3363, *14 [Sup Ct, NY County 2016]; *Hand v City of New York*, 2015 NY Slip Op 30076[U], 2015 NY Misc LEXIS 141, *17-18 [Sup Ct, NY County 2015]), a tenant is not responsible for any such repairs unless specifically implied or imposed by the lease (*see Mahon v David Ellis Real Estate, L.P.*, 2016 NY Misc LEXIS 3363 at *14).

Ashley Stewart Ltd. has established its prima facie entitlement to dismissal of the complaint on the undisputed facts, which warrant a determination that it cannot be held liable for plaintiff's injuries because, even assuming, *arguendo*, that she fell on a defective sidewalk abutting 216 West 125th Street, Ashley Stewart Ltd. had no duty under New York City Administrative Code § 7-210 to make such repairs (*see Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 616 [1st Dept 2017]; *O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]; *Vanallen v Michael Kors Stores LLC*, 2018 NY Slip Op 31998[U], 2018 NY Misc LEXIS 3524, *4 [Sup Ct, NY County 2018]). Further, no such obligation was imposed on Ashley Stewart Ltd. by a lease (Doc. 66). Quite the contrary, the original lease, dated 1972 provided, in pertinent part, that "structural and exterior repairs including those to the . . . sidewalks . . . shall be made by the [l]andlord" (Doc. 66 ¶ 2). Importantly, even if, *arguendo*, the lease contained a provision requiring Ashley Stewart Ltd. to maintain and repair the sidewalk, this is nevertheless insufficient to hold it liable for plaintiff's injuries because, under such circumstances, Ashley Stewart Ltd. could only be held liable *for damages* by 216-220 West (*Wahl v JCNYC, LLC*, 133 AD3d 552, 552 [1st Dept 2015]).

By failing to oppose Ashley Stewart Ltd.'s motion for summary judgment, plaintiff has failed to raise an issue of fact to preclude dismissal of the complaint and, thus, that branch of the motion is granted (*see Unitrin Advantage Ins. Co. v Jagdeo*, 2017 NY Slip Op 31908[U], 2017 NY Slip Op 31908[U], *3 [Sup Ct, NY County 2017]). Moreover, since it cannot be held liable for plaintiff's injuries, Uptown Realty's cross claim against it based on indemnification must also be dismissed.

This Court finds that 216-220 West's cross claims against Ashley Stewart Ltd. seeking indemnification and contribution also warrant dismissal. "Contractual indemnification clauses must be construed [so] as to achieve the apparent purpose of the parties . . . and are enforced only where the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*Matias v W. 16th Realty LLC*, 2019 NY Slip Op 31650[U], 2019 NY Misc LEXIS 3101, *20 [Sup Ct, NY County 2019] [internal quotation marks and citations omitted]; *see Drzewinski v Atl. Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]; *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 [1st Dept 2018]; *DiBuono v Abbey, LLC*, 95 AD3d 1062, 1066 [2d Dept 2012]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). Thus, "[w]here there is an ambiguity as to the meaning of a lease prepared by the landlord, the ambiguity should be resolved in favor of the lessee" (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595 [1st Dept 2014]).

Here, the indemnification clause in the original lease dated 1972 provides, in pertinent part, that:

"[t]he Tenant during the term hereof shall indemnify and save the Landlord free and harmless from and against any and all claims and demands, whether for injuries to persons and loss of life, or damage to property, arising out of the use and occupancy of the demised premises by the Tenant or by any other person or persons holding under the Tenant" (Doc. 66 ¶ 31).

Moreover, the indemnification clause in the sub-sublease reads as follows:

"Subtenant shall protect, indemnify, and save Sublandlord harmless from any claims, liability, loss, damages and expenses, including reasonable attorneys' fees, arising from or relating to (i) any default by Subtenant under this Sublease; (ii) any act, action or inaction by Subtenant which causes Sublandlord to default or be in default of the Original Lease or the Overlease; or (iii) *the use or occupancy by the Subtenant of the Subpremises*. Subtenant shall obtain, with respect to its use and occupancy of the Subpremises, at Subtenant's sole cost and expense, insurance in the amounts set forth in the Original lease. In lieu of the liability insurance requirement set forth in Article 31 of the Original Lease, *Subtenant shall obtain comprehensive public liability insurance against claims for personal injury, death and property damage occurring in or about the Subpremises*; such insurance shall afford single limit coverage with minimum protection of two million (\$2,000,000) dollars with respect to bodily injury and property damage liability in any one occurrence, or death occurring or resulting from one occurrence. Except as set forth in this Sublease, *all insurance to be obtained by the Subtenant shall name Sublandlords, Overlandlords, and Owners as additional insureds*" (Doc. 136 ¶ 7) (emphasis added).

Both the original lease and sub-sublease, which were in full force and effect on the date of plaintiff's injuries, provide that Ashley Stewart Ltd.'s obligation to indemnify and hold 216-220 West harmless for personal injuries was limited to injuries occurring within the demised premises and subleased premises. Since there is no specific language in the agreement holding Ashley Stewart Ltd. responsible for injuries on the sidewalk (*compare Matias v W. 16th Realty LLC*, 2019 NY Misc LEXIS 3101 at *20-21), 216-220 West's cross claim are dismissed as against this defendant.

II. Uptown Realty's Motion for Summary Judgment Dismissing the Complaint and Cross Claims (motion sequence 006).

Uptown Realty maintains that it is entitled to dismissal of the complaint and cross claims because the sloped sidewalk, which plaintiff asserts was the cause of her injuries, abutted 216-220 West's property (Doc. 105 ¶ 7). Assuming, *arguendo*, that the defective sidewalk was in front of 224 West 125th Street, the premises occupied by its tenant Lane Bryant, Uptown Realty maintains

that the slope of the sidewalk, which is its natural topography, was open and obvious and, thus, that no liability arises from Uptown Realty's alleged failure to make said conditions safer (Doc. 105 ¶ 20).

In support of its motion for summary judgment, Uptown Realty submits, *inter alia*, Pichardo's deposition testimony; the deposition testimony of Joseph Hollander ("Hollander"), the property manager for 224 West 125th Street (Doc. 110); the deposition testimony of Andrew Lester ("Lester"), an employee of Wharton Properties, which manages 216 West 125th Street (Doc. 111); and the affidavit of Frank Ferrantello ("Ferrantello"), a certified land surveyor, who affirms, *inter alia*, that plaintiff's injuries did not occur within the premises owned by Uptown Realty (Doc. 106 ¶ 14).

This Court finds that Uptown Realty has established its prima facie entitlement to summary judgment. Pichardo's deposition testimony reveals that she fell on the sidewalk between Lane Bryant and Ashley Stewart (Doc. 109 at 29-30, 55, 57). However, she affirmed that her fall was caused by a slope in the sidewalk and that no cracks or other defects in the sidewalk caused her injuries (Doc. 109 at 58-59). At her deposition, Pichardo was instructed to mark photographs of the sidewalk with a circled "xx" to show where her accident began and to mark with an "x" where she fell (Doc. 109 at 91, 94).

Hollander asserted that the sidewalk in front of 224 West 125th Street, the property owned by Uptown Realty and occupied by Lane Bryant, was flat at the time of Pichardo's injuries (Doc. 110 pg. 28), but Lester conceded that the sidewalk abutting 216 West 125th Street, in front of Ashley Stewart, was sloped (Doc. 111 at 42, 49, 52). Moreover, 216-220 West exerted control over this sidewalk, as evidenced by the fact that, in 2010, Lester hired a contractor to repair the sidewalk up to the property line with 222-224 West 125th Street (Doc. 111 at 42, 49, 52). Further,

Ferrantello opined that, based on a land survey he conducted and the marked photographs from plaintiff's deposition, the area where Pichardo claims to have fallen is outside of the property line for the premises owned by Uptown Realty (Docs. 113, 156).

In opposition to Uptown Realty's motion for summary judgment, plaintiff has failed to raise an issue of fact. Plaintiff argues, *inter alia*, that the three photographs marked during her deposition raise an issue of fact sufficient to defeat Uptown Realty's motion for summary judgment because it cannot be determined from the photographs exactly where she fell and where she began to fall given that the markings are unclear (Doc. 138). However, this Court rejects that argument. In her bill of particulars, Pichardo alleged that she fell because the sidewalk was not level (Doc. 108 ¶ 8/9). This was later corroborated by her deposition testimony that no defect other than the sloped sidewalk caused her fall (Doc. 109 at 55, 58-59). Pichardo does not rebut Uptown Realty's proof that the "sloped" sidewalk was within 216-220 West's property and submits no proof to suggest that there was a slope in front of 216-220 West which could have caused her injuries. Additionally, Pichardo fails to submit proof establishing the exact location of the property line between 222-224 West and 216-220 West 125th Street. The only exhibit that attempts to show a dividing line between the properties is found in a sketch produced by plaintiff's counsel, which plaintiff herself concedes is not evidence and lacks probative value (*see generally Zuckerman v New York*, 49 NY2d 557, 563 [1980]; *Vasquez v Chimborazo*, 155 AD3d 432, 433 [1st Dept 2018]). Based on the foregoing, the complaint is dismissed as against Uptown Realty.

Since Uptown Realty is not liable for the sidewalk of the adjacent property, all cross claims for indemnification and contribution must also be dismissed as against this defendant.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant Urban Brands, Inc. d/b/a Ashley Stewart Ltd.'s motion for summary judgment seeking dismissal of the complaint and all cross claims (motion sequence 03) is granted; and it is further

ORDERED that defendant 125 Uptown Realty LLC's motion for summary judgment seeking dismissal of the complaint and all cross claims (motion sequence 06) is granted; and it is further

ORDERED that the dismissed claims against defendants Urban Brands, Inc. d/b/a Ashley Stewart Ltd. and 125 Uptown Realty LLC are severed and the balance of the action against 216-220 West 125th Street, LLC shall continue; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for defendant Urban Brands, Inc. d/b/a Ashley Stewart Ltd. shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141 B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

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

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

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

5/8/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
--------------------------	--------------

<input type="checkbox"/>	SUBMIT ORDER
--------------------------	--------------

CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
--------------------------	----------------------------

<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
--------------------------	-----------------------	--------------------------	-----------