Black v Aurora Contrs., Inc.
2020 NY Slip Op 32909(U)
July 21, 2020
Supreme Court, Richmond County
Docket Number: 150867/2018
Judge: Wayne M. Ozzi
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dSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MARGARET BLACK and FREDERICK BLACK,

Plaintiffs,

- *against* -

AURORA CONTRACTORS, INC., STATEN ISLAND MALL, GGP STATEN ISLAND MALL, LLC and GGP, INC.,

Defendants.

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AURORA CONTRACTORS, INC., and GGP STATEN ISLAND MALL, LLC,

Third-Party Plaintiffs,

- *against* -

RESTANI CONSTRUCTION GROUP,

Third-Party Defendants.

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PART 23

Present:
Hon. Wayne M. Ozzi

DECISION & ORDER

Index No. 150867/2018
Motion Nos. 001, 002

The following papers numbered 1 to 8 were marked fully submitted on the 25th day of June 2020.

	Papers Numbered
Notice of Motion by Plaintiff Margaret Black for Partial Summary Judgment with Supporting Papers, (dated March 17, 2020).....	1
Defendants/Third-Party Plaintiffs' Affirmation in Opposition (dated May 4, 2020).....	2
Notice of Motion by Defendants/Third-Party Plaintiffs' Aurora Contractors, Inc. and GGP Staten Island Mall, LLC for Summary Judgment Dismissing the Complaint, with Supporting Papers (dated May 5, 2020).....	3

Upon the foregoing papers, the motion (Seq. No. 001), *inter alia*, of plaintiff Margaret Black for partial summary judgment on the issue of liability is granted in its entirety; the motion (Seq. No. 002) of defendants/third-party plaintiffs Aurora Contractors, Inc. and GGP Staten Island Mall, LLC for summary judgment dismissing the complaint is denied; and the balance of the motion seeking contractual indemnification over and against third-party defendant Restani Construction Corp. shall be reserved until the time of trial.

BACKGROUND

This action was commenced to recover damages for personal injuries sustained by plaintiff Margaret Black[1] on March 9, 2018, when she fell near the entrance to the Staten Island Mall, located at 2655 Richmond Avenue, Staten Island, New York. At the time, a renovation project was

[1] The causes of action asserted on behalf of plaintiff Frederick Black were discontinued with prejudice pursuant to a Stipulation of Discontinuance filed on October 24, 2019.

underway. The 85-year old plaintiff tripped and fell on a temporary asphalt walkway, which served as an "access ramp" during the construction project. Plaintiff sustained lacerations to her face, nose, and forehead requiring 90 stitches to close, displaced left and right nasal bone fractures, and lacerations over her left brow and nasal bridge extending into the nasal tip. She underwent facial laceration repair with local tissue transfer.

In the complaint, Mrs. Black alleges her injuries were caused by the negligence of the defendants, their agents, servants and/or employees, in creating and/or failing to repair the uneven and unlevel condition of the asphalt walkway which was the only means of ingress and egress to the mall from the parking lot. In particular, plaintiff claims the asphalt walkway was constructed across a stretch of the curbing in a manner that created a height differential between the asphalt and the top of the curb. She further alleges defendants had actual and/or constructive notice of the defect.

Insofar as it appears in the record before the Court, the property owner, GGP Staten Island Mall, LLC (hereinafter, "GGP") retained defendant/third-party plaintiff Aurora Contractors, Inc. (hereinafter, "Aurora") to construct a 3,000 square foot expansion to the existing mall, various site improvements and a parking garage. In turn, Aurora hired third-party defendant Restani Construction Group (hereinafter, "Restani") as the site coordinator to perform civil construction work relating to asphalt walkways, driveways, and concrete curbs.

Presently before the Court is plaintiff's motion for partial summary judgment on the issue of liability, and an order striking defendant Aurora's fifth affirmative defense and defendant GGP's first affirmative defense seeking, *inter alia*, apportionment, and contribution for plaintiff's alleged negligence and culpable conduct. Additionally, the property owner (GGP) and the construction manager (Aurora) move for summary judgment dismissing the complaint, and for

contractual indemnification over and against third-party defendant Restani. It bears noting, by Stipulation, So Ordered by the Court on May 28, 2020, the caption of this matter was amended to delete Staten Island Mall and GGP, Inc. as named plaintiffs.

MARGARET BLACK'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY
(Motion Seq. 001)

In support of plaintiff's motion, *inter alia*, for partial summary judgment on the issue of liability, she relies on the Staten Island Mall's surveillance video of the area and defendants' photographs depicting the condition of the subject walkway at the time of the incident. Mrs. Black testified that on the day of her accident, while proceeding towards the parking garage at the mall, she "cross[ed]" the asphalt walkway and "hit that area", pointing to what appears to be a "gray line" in the photograph marked defendants' Exhibit "F". Mrs. Black was referring to the top of the concrete curb that extended across the width of the walkway. She "slid" and her "feet went out from under her". Plaintiff maintains based on her testimony as well as a series of still shots from the surveillance video (Defendants' Exhibit "H") depicting the incident, that it is clear the concrete curb in the middle of the asphalt walkway was the proximate cause of her accident.

Engineer's Report

Plaintiff submits an Engineer's Report prepared by Harold Krongelb, a professional engineer licensed by the State of New York. The report is affirmed under penalty of perjury.

Mr. Krongelb performed a site examination on March 14, 2018, four days after the occurrence. He reviewed the photographs defendants allege fairly and accurately represent the blacktop asphalt and adjoining concrete curb as it existed at the time plaintiff tripped and fell. According to the expert, prior to his inspection on March 14, 2018, blacktop had been added to

make the concrete curb flush with the adjoining walkway. Although Mr. Krongelb was unable to measure the height differential that existed when the accident occurred, he maintains it is a common practice of engineers to estimate dimensions from photographic evidence. He concludes the estimated height of the concrete curb above the blacktop walkway was at least ¾-inch. However, Mr. Krongelb relied on an unauthenticated image of the walkway "chosen from a video *reportedly* taken at the scene shortly after plaintiff's accident". In any event, it bears noting a height differential to some degree is apparent in the various photographs produced at the depositions.

It is Mr. Krongelb's opinion that New York City Building Code Sections 28-301.1, 28.2-3307.1 and 28.2-3307.2.6 are applicable in this case, *i.e.*, (1) building owners are required to maintain their buildings and all parts thereof and all other structures in a safe condition at all times, (2) pedestrians must be protected during construction, and (3) sidewalks, temporary walkways and pathways that remain open to the public shall be accessible and shall be provided with a clear path, free of obstruction, at least 5 feet in width. He affirms that permitting the walkway to exist with an elevated curb was a violation of Section 28-301.1 of the Building Code. Furthermore, defendants were required to make sufficient repairs to remedy the defective condition of the asphalt walkway, and their failure to do so was a violation of Sections 27-375(f), 28.3-1009.12 and 28.301.1 of the Building Code. Mr. Krongelb also points out the asphalt walkway and adjacent concrete curb were used as a required means of egress and must be in compliance with Section 28.2-3307.2.6 and with similar requirements set forth in the City of New York Fire Code. Pertinently, he affirms "[b]ased on the New York City Building Code, it is the owner's responsibility to use reasonable measures to ensure hazardous conditions do not exist or develop even when the building owner does not exercise direct control of all aspects of a building". He opines defendants were obligated to inspect the site at least on a daily basis for new and existing

hazards. Notably, according to Mr. Krongelb, specific notice to the building owner of a violation is not required.

Based on the foregoing, plaintiff's expert concludes with a reasonable degree of certainty, the elevation of the concrete curb above the adjacent blacktop walkway constitutes a violation of NYC building codes and regulations. The deviation from the applicable provisions was a substantial cause of Margaret Black's trip and fall and subsequent injuries. Plaintiff cites *Elliot v City of New York* (95 NY2d 730 [2001]) for the proposition that the New York City Building Code has the force and effect of a statute. As such, plaintiff contends Mr. Krongelb's uncontroverted findings establish, prima facie, the defendant owner's violation of numerous provisions of the Building Code constitutes negligence per se.

The Construction Agreement

Plaintiff further relies on the Construction Agreement between defendants GGP and Aurora to establish that Aurora owed her a duty of care. Plaintiff maintains, pursuant to the Agreement, the contractor "assumed" a duty of care to persons not a party to the prime contract. Specifically, Section 4.10, entitled "Compliance with Laws" provides, in pertinent part: "[t]he contractor assumes all responsibility for complying with all federal, state and local statutes, ordinances, codes and regulations applicable to the performance of work". Additionally, Section 9.2.1, entitled "Reasonable Precautions to Prevent Loss to Persons and Property" provides, in pertinent part: "[t]the contractor shall take reasonable precautions to provide for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to, *inter alia*, customers".

Plaintiff argues Aurora owed her a duty of care by virtue of the Construction Agreement, and breached its duty to comply with the building code provisions, *e.g.*, to maintain the subject premises in a safe condition at all times and to take immediate action to remedy the hazardous

condition. Consonant with the expert's findings, it is alleged the breach of Aurora's duty to plaintiff was the proximate cause of the accident. Moreover, plaintiff maintains the violation of Aurora's contractual obligation to comply with the applicable New York City building codes constitutes negligence per se.

Actual and Constructive Notice

Plaintiff maintains defendants GGP and Aurora had actual and constructive notice of the hazardous condition of the asphalt walkway as evidenced by the uncontroverted deposition testimony of Aurora's witness, Anthony Higgins, who testified on behalf of Aurora, and James Easley, who testified on behalf of GGP. In particular, Mr. Higgins testified he had seen the area where plaintiff's accident occurred, and it appeared in the same condition as shown in the photographs taken shortly after the occurrence for some period of time. Although Mr. Higgins was unable to identify the time period, defendant GGP's witness, James Easley, also testified he had seen the area where plaintiff fell prior to the date of her accident and it was in the same condition as depicted in defendants' photographs for at least two weeks prior to the date of the incident. Plaintiff alleges defendants have failed to tender any evidence to rebut their witnesses' testimony.

DEFENDANTS/THIRD-PARTY PLAINTIFFS MOTION FOR SUMMARY JUDGMENT DISMISSING THE COMPLAINT (Motion Seq. 002)

GGP and Aurora maintain plaintiff's inability to identify the cause of her fall is fatal to her negligence claim. They argue Mrs. Black testified quite clearly that she did not know what caused her to fall at the curb. She did not observe the condition of the subject area after she fell. It is alleged plaintiff's belated contention that the purported elevation of the curb was the proximate

cause of her accident is nothing more than pure speculation. Movants argue it is just as likely that some other factor such as a misstep or a loss of balance could have caused the trip and fall accident.

In further support of the motion for summary judgment movants maintain the record is devoid of evidence showing that GGP or Aurora constructed or installed the alleged uneven asphalt walkway or engaged in any affirmative act of negligence that caused plaintiff's accident. In this regard, they note the testimony of their witnesses is uncontroverted. According to the Aurora's project manager, Anthony Higgins, the scope of Restani's work for the project included asphalt paving, installation of curbs and construction of temporary walkways throughout the jobsite. No other contractors installed temporary walkways aside from Restani. Mr. Higgins was shown a photograph depicting the subject walkway and he testified it was installed by Restani. GGP's general manager, James Easley, also testified that Restani would have installed the temporary access ramp at issue since he was hired by Aurora to install asphalt, curbing and exterior walkways at the project. Notably, Restani's project manager, Carmine Napolitano, did not know of any other contractors on the jobsite that installed temporary access ramps. Restani had its own employee who was responsible for site safety in the areas where it performed work.

In view of the foregoing, the movants contend there are no triable issues of fact. GGP and Aurora did not create or supervise the construction of the temporary access ramp at issue.

Furthermore, with regard to Aurora, it is alleged plaintiff's claims should be dismissed on the grounds that this defendant did not owe plaintiff a duty pursuant to *Espinal v Melville Snow Contractors* (98 NY2d 136 [2002]) and its *progeny*. More specifically, movants maintain (1) plaintiff was not a party to the Construction Agreement or any other contract between GGP and Aurora wherein the latter agreed to entirely displace the property owner's nondelegable duty to maintain the premises in a safe condition, (2) plaintiff has failed to raise facts showing that

Aurora's purported failure to comply with the New York City Building Code "launched a force or instrument of harm", and/or (3) as evidenced by her deposition testimony, Mrs. Black did not detrimentally rely on Aurora's continued performance of its contractual duty pursuant to the Construction Agreement to safely maintain the walkway at issue. Defendants maintain none of the foregoing circumstances exist in this case. Aurora, therefore, did not owe Mrs. Black a duty of care.

As for plaintiff's claims against the property owner (GGP), defendants allege the uncontroverted testimony of their witnesses, Mr. Higgins and Mr. Easley, establishes prima facie GGP had no actual or constructive notice of the alleged defective condition of the access ramp prior to the date of loss. Movants point out that GGP's general manager, James Easley, testified he was on the job site on a daily basis to observe the work, and GGP's construction manager, Anthony Gambino, inspected the work areas on a weekly basis. Mr. Easley did not recall observing the alleged uneven condition of the subject access ramp prior to the accident, nor was he aware of any complaints or accidents relating to the area at issue. Defendants maintain absent actual or constructive notice the defendant property owner cannot be held liable for negligence.

DISCUSSION

A defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing plaintiff is unable to identify the cause of his or her accident without engaging in speculation (*see Miranda v Leone Realty, Inc.*, 179 AD3d 1052, 1053 [2d Dept 2020]; *Ash v City of New York*, 109 AD3d 854, 855 [2d Dept 2013]).

Here, defendants failed to convince the Court that the injured plaintiff was not aware of what caused her to trip and fall. Their reliance on selective portions of Mrs. Black's testimony

without regard to other statements she made regarding the curb at issue is unavailing. In particular, when plaintiff was asked if she knew what caused her feet to "slip out" from under her, she testified her feet went out from under her while walking over the "gray line" (the curb) across the "black patch" (the walkway) which she pointed to in defendants' photograph. Plaintiff was asked numerous times, "what caused you to fall" and, ultimately, her response was "the curb". Notwithstanding any perceived lack of specificity in Mrs. Black's testimony, the Court will not deem her apparent difficulty understanding the questions posed to her, and her inability to initially recall the circumstances at the time of her accident a fatal defect. Plaintiff's deposition testimony viewed as a whole sufficiently identifies the cause of her fall.

Aurora's Liability

To establish a prima facie case of negligence, plaintiff must demonstrate (1) the existence of a duty on the part of a defendant to the plaintiff, (2) a breach of that duty, and (3) an injury suffered as a result of the breach (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *see Akins v Glen Falls City School District*, 53 NY2d 325, 333 [1981]). Unless there is a duty of care owed to the person injured, a party cannot be held liable in negligence (*id.*).

Consonant with the foregoing, with regard to plaintiff's negligence claim against Aurora, the seminal issue is whether this defendant, as the construction manager for the project, owed plaintiff a duty.

It is well established a contractual obligation, standing alone, will not give rise to tort liability in favor of a non-contracting third party (*see Huttie v Central Parking Corp.*, 40 AD3d 704, 705 [2d Dept 2007], citing *Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002]). Rather, the injured party is relegated to its contractual remedies, if any (*see Church v Callanan Indus.*, 99 NY2d at 111). However, "[u]nder

some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract" (*Huttie v Central Parking Corp.*, 40 AD3d at 705; *see Church v Callanan Indus.*, 99 NY2d at 111; *Espinal v Melville Snow Contrs.*, 98 NY2d at 139-141; *see also Timmins v Tishman Const.*, 9 AD3d 62, 65-66 [1st Dept 2004], *lv dismissed* 4 NY3d 739).

There are three noteworthy exceptions to the rule in *Espinal* and its progeny, in which a duty of care to non-contracting third parties such as plaintiff may arise out of a contractual obligation or the performance thereof, *i.e.*, (1) were the contractor creates an unreasonable risk of harm to another or increases that risk while engaged in the affirmative discharge of its contractual obligations, (2) where the plaintiff detrimentally relies upon the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the duty of, *e.g.*, an owner, to maintain the premises in a reasonably safe condition (*see Church v Callanan Indus.*, 99 NY2d at 111-112; *Espinal v Melville Snow Contrs.*, 98 NY2d at 139-141). In the foregoing instances, a duty of care to third persons may be found relating to the performance of the contractual obligation, thereby subjecting the promisor to tort liability for failing to exercise due care in the discharge of its contractual duties (*see Church v Callanan Indus.*, 99 NY2d at 113-114).

In the matter at bar, the Court finds, per the explicit terms of the Construction Agreement, Aurora entirely displaced the property owner's duty to maintain the premises safely, *i.e.*, in compliance with the New York City Building Code (*see Huttie v Central Parking Corp.*, 40 AD3d at 705). Specifically, Section 4.10 of the Construction Agreement provides, "[t]he contractor assumes *all* responsibility for complying with *all* federal, state and local statutes, ordinances, codes and regulations applicable to the performance of work". Thus, Aurora assumed the property owner's duty to maintain the subject premises in a safe condition in accordance with

all applicable laws. The duty owed to plaintiff was breached, as evidenced by Mr. Krongelb's Engineer's Report which establishes, prima facia, (1) the elevation of the concrete curb above the adjacent blacktop walkway constitutes a violation of the NYC Building Code Sections 28-301.1, 28.2-3307.1 and 28.2-3307.2.6, and (2) the deviation from the applicable provisions cited in the expert's report was a substantial cause of Margaret Black's trip and fall and subsequent injuries. The Court finds Mr. Krongelb's report sufficient to accomplish its intended purpose. Defendants have offered no expert opinions rebutting Mr. Krongelb's conclusions. Their attorney's assertion that the expert's findings are exclusively based on surmise and speculation is unavailing.

In opposition to plaintiff's prima facie showing of her entitlement to partial summary judgment as against defendant Aurora on the issue of liability, defendants have failed to raise a triable issue of fact (*see Zuckerman v City of New York,* 49 NY2d 557, 562-563 [1980]). Aurora's fifth affirmative defense that plaintiff's damages shall be diminished in the proportion attributable to her culpable conduct shall be stricken absent a factual basis for contributary negligence.

GGP's Liability

Ordinarily, "a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Miranda v Leone Realty, Inc.*, 179 AD3d 1052, 1053 [2d Dept 2020] citing *Ash v City of New York*, 109 AD3d at 855; *see Grande v Won Hee Lee*, 171 AD3d 877, 878 [2d Dept 2019]; *Hahn v Go Go Bus Tours, Inc.*, 144 AD3d 748, 748-749 [2d Dept 2015]).

It is undisputed defendants GGP and Aurora did not create or construct the temporary access ramp or the curb at issue. The parties' witnesses testified the installation of temporary access ramps, and curbing was within Restani's scope of work, and no other contractors on the job site

performed those tasks. Moreover, it is undisputed neither GGP or Aurora supervised the performance of Restani's work.

However, the defendant property owner failed to establish prima facie that it lacked actual and/or constructive notice of the hazardous condition of the subject walkway. More specifically, James Easley testified that prior to the incident, while on the job site, he observed the area in question, and it appeared in the same condition as depicted in defendants' photographs, which were taken by GGP's security officer shortly after the incident. Pertinently, Mr. Easley admitted the asphalt walkway appeared in that condition for "at least two weeks" prior to the date of the accident. Based on the foregoing, plaintiff has sufficiently demonstrated the condition in question existed for at least two weeks prior to the occurrence. Thus, defendant GGP had actual and constructive notice of the elevated curb for a sufficient period of time within which to remedy it. Notably, defendants were able to correct the defect within four days after the accident.

In accordance with the foregoing, plaintiff is entitled to partial summary judgment as against GGP on the issue of liability. Defendant's first affirmative defense that recovery should be apportioned between plaintiff and GGP according to their relative responsibilities shall be stricken absent a factual basis for contributory negligence.

Accordingly, it is

ORDERED, the motion (Seq. No. 001) of plaintiff Margaret Black for partial summary judgment on the issue of liability as against defendants/third-party plaintiffs Aurora Contractors, Inc. and GGP Staten Island Mall, LLC is granted; and it is further

ORDERED, the balance of plaintiff's motion for an order striking defendant Aurora's fifth affirmative defense and defendant GGP's first affirmative defense is granted, and said defenses are hereby stricken from their answer; and it is further

ORDERED, the motion (Seq. No. 002) of defendants/third-party plaintiffs Aurora Contractors, Inc. and GGP Staten Island Mall, LLC for summary judgment dismissing the complaint is denied; and it is further

ORDERED, the balance of the motion for contractual indemnification over and against third-party defendant Restani Construction Corp. shall be reserved until the time of trial; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

ENTER,

Dated: July 21, 2020

HON. WAYNE M. OZZI, J.S.C.