Broderick v Starbucks Corp.
2020 NY Slip Op 33608(U)
November 2, 2020
Supreme Court, New York County
Docket Number: 151129/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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LINDA BRODERICK,

Plaintiff,

- v -

STARBUCKS CORPORATION, THE 233 BROADWAY CONDOMINIUM, THE 233 BROADWAY CONDOMINIUM BOARD OF MANAGERS, 233 BROADWAY BORROWER LLC,WOOLWORTH 100 OWNER LLC

Defendant.

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INDEX NO. 151129/2016

MOTION DATE 10/23/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 78, 79, 81, 86

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that Defendant Starbucks Corporation's motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and the action is severed and continues against the remaining defendants; and it is further

ORDERED that the counsel for Starbucks shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

MEMORANDUM DECISION

In this negligence action, defendant Starbucks Corporation ("Starbucks") moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and all crossclaims as against it (Motion Seq. 002).

BACKGROUND FACTS

This action arises from an accident which occurred on November 21, 2015 when Plaintiff allegedly sustained injuries as a result of a trip and fall on a "sidewalk area at the northwest corner of Broadway and Barclay Street, and is the area located near the entranceway to the Starbucks located upon the lands and premises at 233 Broadway [New York, New York]." (NYSCEF doc No. 1, ¶¶ 7-8).

At the time of the incident, defendants 233 Broadway Owners, LLC. ("233 Broadway") and Woolworth 100 Owner LLC ("Woolworth") owned the building located at 233 Broadway in Manhattan (the "Building"; NYSCEF doc No. 75, pp. 10:25 to 11:7). Woolworth claims ownership only of the top thirty (30) floors of the Building. 233 Broadway, which owns the ground floor of the Building, leases 1,586 square feet portion this space to Starbucks under a lease agreement entered into on April 8, 2002 (the "Lease Agreement").

Plaintiff testified that she fell on a sidewalk near the corner of the Building where Starbucks' store was located, thus:

> "Q: At the time of the accident, the sidewalk on which you fell, was that sidewalk next to a building of some kind?
> A. Yes.
> Q. If you know, was it a residential building meaning just an apartment building, was it a commercial building meaning stores or businesses or both or something else, if you know?
> A. Well, it was -- the Starbucks was on the corner right there.
> Q. Did you fall at a corner?
> MR. BLOOM: You mean near a corner?
> Q. Did you fall at or near a corner?

A. Near a corner, yes.
Q. And this Starbucks that you 22 mentioned, was that at the corner and this building was adjacent to the sidewalk where you fell?
A. Yes."

(NYSCEF doc No. 58, p. 51:4-25).

Plaintiff further testified that she tripped and fell because of a raised flag on said sidewalk (NYSCEF doc No. 58, p. 58:9-11; *see also* NYSCEF doc No. 59, Exhibit B).

Starbucks now moves for dismissal of the complaint as well as all crossclaims against it (Motion Seq. 002), arguing that as a lessee of the land abutting the public sidewalk where the alleged accident happened, it owes no duty to keep such sidewalk in a safe condition (NYSCEF doc No. 50, ¶¶ 10-14). According to Starbucks, a lessee will only be liable for any injuries sustained on the sidewalk if the lessee: (1) either created or caused the defective condition that caused injury; (2) negligently made repairs or renovations to the sidewalk; (3) caused the condition due to special use of the sidewalk, or (4) violated a statute that expressly imposes liability on the property owner or lessee for failure to maintain the sidewalk (*Id.*, ¶¶ 10-14). Starbucks insists that none of these circumstances apply to it. Finally, Starbucks contends that there is nothing in the Lease Agreement which requires it to maintain or repair the sidewalk where Plaintiff allegedly fell (*Id.*, ¶15).

Plaintiff opposes the motion, while the other defendants did not file any opposition[1]. Plaintiff argues that while the Lease Agreement provides that Starbucks shall not be responsible for the cost of structural repairs, Section 11 requires Starbucks to make sure those repairs get made in order to keep the premises in good condition (NYSCEF doc No. 81, ¶ 8). Plaintiff maintains

[1] In their Answers, Woolworth asserted a crossclaim for common law indemnification (NYSCEF doc No. 52 at 5-6) and 233 Broadway asserted crossclaims for common law and contractual indemnification, as well as breach of contract for failure to procure insurance (NYSCEF doc No. 54, ¶¶ 18-20). The Court deems these crossclaims abandoned as Woolworth and 233 Broadway do not oppose Starbucks' motion for dismissal.

that the failure of Starbucks to address the implication of Section 11 raises an issue of fact warranting the denial of Starbucks' motion for summary judgment.

In Reply, Starbucks denies that Petitioner sufficiently raised an issue of fact as Section 11 makes no reference to a "sidewalk" and in fact limits Starbucks' repair obligations to the interior of its premises, the storefront and doorways, and to its own equipment and signs (NYSCEF doc No. 86, ¶ 7).

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228, [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers' (*Smalls v AJI Indus., Inc.*, 10 N.Y.3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Here, Starbucks has made a prima facie showing that it cannot be held liable for injuries allegedly sustained by Plaintiff by reason of any dangerous condition on the sidewalk abutting Starbucks' store; thus, the complaint as against Starbucks should be dismissed.

The general rule is that the owner or lessee of land abutting a public sidewalk "owes no duty to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a special purpose" *Belmonte v. Metropolitan Life Ins. Co.*, 304 A.D.2d 471 [1st Dept 2003]). Liability for injuries sustained as a result of dangerous condition on a public sidewalk is placed on the abutting owner or lessee if either: (i) affirmatively created the dangerous condition; (ii) voluntarily but negligently made repairs; (iii) caused the condition to occur through a special use; (iv) or violated a statute or ordinance expressly imposing liability on the landowner or lessee for a failure to maintain the abutting street (*see Gibss v Husain*, 184 AD3d 809 [2d Dept 2020]; *see also Richter v Reade*, 303 AD2d 232 [1st Dept 2003]; *Montalvo v Western Estates*, 240 AD2d 45 [1st Dept 1998]). Starbucks has demonstrated that none of these exceptions apply to it.

Mr. Keith Costello, Starbucks' facilities manager in charge of the store located at 233 Broadway, stated in his affidavit that Starbucks did not construct the public sidewalk adjacent to the 233 Broadway store, and that Starbucks was neither performing any construction or repairs to said sidewalk on or before the date of Plaintiff's accident (NYSCEF doc No. 61, ¶2; *see also* NYSEF doc No. 73, 11-24 to 12-12). In her opposition, Plaintiff failed to raise any triable issues of fact as to whether Starbucks created any dangerous condition or negligently made repairs on the sidewalk in question. Therefore, the first and second exceptions mentioned above do not apply to Starbucks.

As to the third exception, a "special use" has been characterized as involving "the installation of some object in the sidewalk or street or some variance in the construction thereof" (*Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]). Plaintiff's papers do not argue that Starbucks made "special use" of the sidewalk where Plaintiff allegedly tripped and fell, rendering the third exception inapplicable as well.

Finally, the Court finds that the fourth exception likewise does not apply as Plaintiff failed to show the existence of any statute or ordinance expressly imposing liability on Starbucks as a lessee for any failure to maintain the street abutting its store. Administrative Code §7-120 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. Thus, the First Department has established that repairs to a public sidewalk are considered structural and commercial tenants have no obligation for the maintenance of public sidewalks unless specified in the relevant lease (*see Cucinotta v City of New York*, 68 AD3d 682 [1st Dept 2009], *O'Brien v Prestige Bay Plaza Development Corp*, 103 AD3d 428 [1st Dept 2013]).

Plaintiff, however, argues that Section 11.1 of the Lease Agreement between Starbucks and 233 Broadway places the "onus [] on the tenant to make sure [structural] repairs get made in order to keep the premises in good condition." (NYSCEF doc No. 81. ¶ 7). Thus, according to Plaintiff, Starbucks' failure to address the implication of Section 11.1 raises an issue of fact sufficient to defeat Starbucks' motion for summary judgment. The Court is not persuaded. Section 11.1 of the Lease Agreement provides, in pertinent part, the following:

> "11.1. Tenant, at its sole cost and expense, shall take good care of, and make all interior non-structural repairs to, the Premises, all repairs to Tenant's equipment, all repairs to the HVAC system(s) installed by Tenant or exclusively serving the Premises, and all repairs to the storefront of the Premises, doorways and appurtenant areas providing access to the Premises from the street. Prior to making any repairs, whether inside or outside the Premises, and whether structural or nonstructural, Tenant shall first give Landlord Notice of the need for such repairs, provided, that Tenant shall only be required to give Landlord Notice with respect

> to (i) non-structural repairs, to the extent the cost of the same exceeds fifty thousand dollars ($50,000.00) in each instance and (ii) structural repairs, all such structural repairs. Tenant shall make and be responsible for or, at Landlord's election, Landlord shall make, at Tenant's expense, all repairs, whether inside or outside the Premises, ordinary or extraordinary, as and when needed to preserve the Premises in good working order and condition and to keep the Premises in compliance with all Legal Requirements (to the extent required under Article 10) and Insurance Requirements and to prevent any disruption of, or adverse effect on, the Building, the Building systems, the quiet enjoyment of other tenants or to prevent any damage to the personal property of other tenants, except that Tenant shall not be responsible for the costs of any structural repairs unless the need therefor arises out of [list omitted]…"

The language of Section 11.1 of the Lease Agreement does not expressly provide that Starbucks is under a contractual obligation to maintain and repair the sidewalk involved in this alleged incident. It is at best silent as to who is responsible for the repair and maintenance of the sidewalk.

"Provisions of a lease obligating a tenant to repair the sidewalk abutting the premises do not impose on the tenant a duty to a third party, such as the plaintiff" (*Collado v Cruz*, 81 Ad3d 542 [1st Dept 2011]; *see also Dalder v Incorporated Vil. Of Rockville Ctr.*, 116 AD3d 908 [2d Dept 2014]). It is only when the lease agreement is "so comprehensive and exclusive" as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk that a tenant may be liable to a third party (*Paperman v 2281 86th St. Corp.* (142 AD3d 540 [2d Dept 2016]).

In *Abramson v Eden Farms, Inc.*, 70 AD3d 514 [1st Dept 2010], the First Department upheld a lower court's denial of a lessee's motion seeking summary dismissal of a trip and fall complaint on the ground that the lessee failed to address the "legal issue of whether the lease was so "comprehensive and exclusive" as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk." To elucidate on what "comprehensive and exclusive"

means, the First Department cited the cases of *Espinal v Melville Snow Contrs.* (98 NY2d 136 [Ct App 2002]) and *Giarratani v We're Assoc., Inc.* (29 AD3d 946 [2d Dept 2006]).

In *Espinal*, the Court of Appeals found that a snow removal contractor owed no duty of care to a person who slipped and fell on an icy parking lot which the contractor allegedly failed to properly clear of snow. The Court of Appeals explained that the snow removal contract was not "comprehensive and exclusive" as the contractor did not entirely absorb the landowner's duty to maintain the premises safely. While the contract required the contractor to act under certain circumstances, the Court of Appeals noted that the landowner retained its duty to inspect the premises and could direct the contractor to perform specific actions as were deemed appropriate.

In *Giarratani*, the Second Department held that defendant-property managers failed to establish their entitlement to summary judgment as they failed to show that their agreement with the tenant was "comprehensive and exclusive." The Second Department particularly pointed out that while the tenant "had the right to approve all invoices exceeding $10,000, that did not diminish the property management company's authority to repair the subject curb, particularly in the absence of any proof that the cost of the repair would have exceeded $10,000."

Guided by the cases above, this Court finds that Section 11.1 of the Lease Agreement is not so "comprehensive and exclusive" as to displace the landowner's statutory duty to maintain the sidewalk. Under Section 11.1, 233 Broadway retained certain powers and responsibilities with respect to structural repairs, including: (1) requiring Starbucks to notify 233 Broadway of the need to undertake such repairs ("Prior to making any repairs, whether inside or outside the Premises, and whether structural or nonstructural, Tenant shall first give Landlord Notice of the need for such repairs, provided, that Tenant shall only be required to give Landlord Notice with respect to … (ii) structural repairs, all such structural repairs."); and (2) undertaking to cover for the costs of

structural repairs unless the need thereof arises out of tenant's request, use, operation, acts, omission or negligence ("Tenant shall make and be responsible for or, at Landlord's election, Landlord shall make, at Tenant's expense, all repairs…except that Tenant shall not be responsible for the costs of any structural repairs unless the need therefor arises out of [list omitted]…").

Starbucks also cites to *Paperman v 2281 86th St. Corp.* (142 AD3d 540 [2d Dept 2016]) to lend support to the above conclusion. In *Paperman*, the court found that the rider to the lease "requiring the tenant to, at its own cost and expense, keep and maintain the sidewalk "in thorough repair and good order," was comprehensive and exclusive. As discussed, Section 11.1 of the Lease Agreement does not generally require Starbucks to make structural repairs at its own cost and expense.

Finally, the Court finds that, contrary to Plaintiff's argument, *Abramson* does not help Plaintiff's case. In *Abramson*, as discussed above, the First Department found that defendant had the burden to show that its responsibility to maintain the sidewalk was not "comprehensive and exclusive" in view of the specific provision in the lease agreement which expressly required the tenant "at its own expense" to "make all repairs and replacements to the sidewalks and curbs adjacent". Here, there is no similar provision imposing an obligation on Starbucks to make repairs to the sidewalks at its own cost and expense.

The Court therefore finds that Starbucks is entitled to a summary judgment dismissing the complaint as against it.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant Starbucks Corporation's motion (Motion Seq. 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all crossclaims as against it is granted; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly and the action is severed and continues against the remaining defendants; and it is further

ORDERED that the counsel for Starbucks shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

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11/2/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE