

Rogan v 7-Eleven Inc.
2020 NY Slip Op 33864(U)
November 20, 2020
Supreme Court, New York County
Docket Number: 158942/2017
Judge: J. Mabelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

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EDWARD ROGAN,

Plaintiff,

- v -

7-ELEVEN INC., 7-ELEVEN DISTRIBUTION COMPANY,
MASSACHUSETTS MUTUAL LIFE INSURANCE CO.,
ROSELAND MANAGEMENT COMPANY, L.L.C.,
ROSELAND MANAGEMENT SERVICES, L.P., ROSELAND
RESIDENTIAL, L.P., MACK-CALI REALTY, L.P., MACK-
CALI REALTY CORPORATION, MACK-CALI WP REALTY
ASSOCIATES, L.L.C., MACK-CALI SERVICES,
INC., MACK-CALI REALTY ACQUISITION CORP, MACK-
CALI CW REALTY ASSOCIATES, L.L.C., MACK-CALI MID-
WEST REALTY ASSOCIATES, L.L.C., MACK-CALI NORTH
HILLS, L.P., MACK-CALI SO. WEST REALTY
ASSOCIATES, L.L.C., MACK-CALI TAXTER ASSOCIATES,
L.L.C., MACK-CALI TEXAS PROPERTY, L.P.,
CORNERSTONE REAL ESTATE ADVISORY SERVICES,
L.L.C., CORNERSTONE REAL ESTATE ADVISERS, L.L.C.,
RIVERBANK WEST,

Defendant.

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MASSACHUSETTS MUTUAL LIFE INSURANCE CO.,
CORNERSTONE REAL ESTATE ADVISORY SERVICES,
L.L.C., CORNERSTONE REAL ESTATE ADVISERS, L.L.C.,
RIVERBANK WEST

Plaintiff,

-against-

THE CITY OF NEW YORK

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 82, 83, 84, 85, 86,
87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103

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

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595753/2018

In the underlying action, plaintiff alleges that he tripped and fell on December 10, 2015, on cable wires coming out of an “underground vault” located on the sidewalk adjacent to 555 West 42nd Street, in New York, New York. The relevant defendants¹ here are 7-Eleven Inc. and 7-Eleven Distribution Company (collectively, “7-Eleven”), which was a tenant at the property where the accident took place; and Massachusetts Mutual Life Insurance Co., Cornerstone Real Estate Advisory Services, L.L.C., Cornerstone Real Estate Advisers, L.L.C., and Riverbank West (collectively, “Landlord”) which owned the property where the accident took place.

Pending before the court is a motion filed by 7-Eleven that seeks: (i) an order pursuant to CPLR §3212 granting summary judgment and dismissing plaintiff’s complaint, with prejudice, on the basis that plaintiff has failed to establish a *prima facie* case of negligence with respect to 7-Eleven; and (ii) summary judgment on 7-Eleven’s cross claims for contribution and indemnification as against Landlord who, per a lease agreement in place, is obligated to indemnify and hold harmless defendant 7-Eleven from any liability, loss or cost arising from Landlord’s failure to perform its obligations under the lease. Upon the foregoing documents, this motion is GRANTED.

With respect to that branch of the motion seeking summary judgment against plaintiff, 7-Eleven argues that there is a lease agreement (the “Lease”) between itself and Landlord, which provides that Landlord is solely responsible for maintaining, cleaning and lighting all common areas, including maintenance and repair of sidewalks. 7-Eleven argues that, pursuant to this provision, it was a mere tenant and had neither a contractual nor legal duty or responsibility to maintain and/or repair the sidewalks under the lease agreement. 7-Eleven, therefore, maintains

¹ There are 15 other defendants, who are not the subjects of the instant motion. Accordingly, they did not file any responsive papers to said motion.

that it owed no duty of care to plaintiff when plaintiff was on the sidewalk of the property and cannot, therefore, be found to have breached such a duty.

The Landlord opposes and argues that the Lease also contains a disclaimer which states that the Tenant (7-Eleven) “shall be responsible . . . for the costs of any repair or maintenance necessitated as a result of the negligence . . . of Tenant . . .” Landlord argues that there remains a question of fact as to whether any employee of 7-Eleven was involved in the creation of, or failure to remedy, the trip hazard that precipitated plaintiff’s fall.

Plaintiff’s claim that 7-Eleven created the condition that caused plaintiff’s accident, is belied by the record. According to plaintiff’s own examination before trial (EBT), a transcript of which was attached to the motion, plaintiff himself testified that the cable wiring he tripped over was installed, pulled through the vault, and run along the sidewalk with the metal flashing (i.e. a cover for the wires) by either Time Warner (plaintiff’s own employer), or by one of Time Warner’s subcontractors. Plaintiff further acknowledged that the condition of the sidewalk itself had nothing to do with his fall and that there was nothing wrong with the sidewalk in that area. Under these facts, it is clear that 7-Eleven did not create the hazard.

Further, the New York Court of Appeals stated, in Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (N.Y. Ct. of Appeals 2002):

[...] in Palka [Palka v. Servicemaster Mgmt. Servs. Corp., 83 N.Y.2d 579 (1994)], we considered whether a maintenance company under contract to provide preventive maintenance services to a hospital assumed a duty of care to the plaintiff, a nurse who was injured when a wall-mounted fan fell on her as she was tending to a patient. The contract between the parties was “comprehensive and exclusive” [...] and required the maintenance company to inspect, repair and maintain the facilities, and to train and supervise all support service personnel. The company’s obligation to the hospital was so broad that it entirely displaced the hospital in carrying out maintenance duties and became “the sole privatized provider for a safe and clean hospital premises” [...]. Because the company’s contractual obligation was comprehensive, we found this to be another instance in which a contracting provider owed a duty to “noncontracting individuals reasonably within the zone and contemplation of the intended safety services,” including the plaintiff (id.).

[In contrast, in the current case here,] by the express terms of the contract, Melville was obligated to plow only when the snow accumulation had ended and exceeded three inches. This contractual undertaking is not the type of “comprehensive and exclusive” property maintenance obligation contemplated by Palka. Melville did not entirely absorb Miltope’s duty as a landowner to maintain the premises safely [...]. Indeed, the contract stated that “[i]t is the responsibility of the property manager or owner to decide whether an icy condition warrants application(s) of salt-sand by Melville. Owner must inspect property within 12 hours of work. Any defect in performance must be communicated immediately.” Although Melville undertook to provide snow removal services under specific circumstances, Miltope at all times retained its landowner’s duty to inspect and safely maintain the premises. Melville was under no obligation to monitor the weather to see if melting and refreezing would create an icy condition.

Here, neither plaintiff nor Landlord argue that the Landlord’s duty to maintain the sidewalk was anything but comprehensive and exclusive. Under these facts, 7-Eleven did not owe a duty of care to plaintiff. Accordingly, that branch of the motion seeking summary judgment and dismissing plaintiff’s complaint, with prejudice, is GRANTED.

With respect to the second branch of the motion, wherein 7-Eleven seeks summary judgment on its cross claims for contribution and indemnification against Landlord. This claim is dismissed as moot, based on the above finding of there being no liability as to 7-Eleven. Landlord does not dispute that the indemnification of the Lease obligates Landlord to indemnify and hold 7-Eleven harmless from any liability, loss, or cost arising from Landlord’s failure to perform its obligations under the lease.

IT IS HEREBY ORDERED that summary judgment in favor of 7-Eleven, with respect to plaintiff, is GRANTED and plaintiff’s complaint against 7-Eleven is dismissed with prejudice. Consistent with this finding, summary judgment on 7-Eleven’s cross claims for contribution and indemnification is denied as moot, as there is no finding of liability or remaining claims against 7-Eleven for which indemnification remains an issue.

11/20/2020

DATE



J. MACHILLE SWEETING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE