

Hernandez v Brithym Realty Corp.
2020 NY Slip Op 34613(U)
May 5, 2020
Supreme Court, Queens County
Docket Number: Index No. 711957/17
Judge: Richard G. Latin
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Short Form Order

5/8/2020
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable RICHARD G. LATIN
Justice

IA PART 40

COUNTY CLERK
QUEENS COUNTY

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SIMONA REYES HERNANDEZ,

Plaintiff,

Index No.: 711957/17
Motion Date: 2/27/2020
Motion Cal. No.: 49
Motion Seq. No.: 3

-against-

BRITHYM REALTY CORP., et al.,

Defendant.
-----X

The following numbered papers read on this motion by defendant Rite Aid of New York, Inc (“Rite Aid”), for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 5
Answering-Affidavits-Exhibits.....	6 - 8
Answering-Affidavits-Exhibits.....	9 - 10
Replying.....	11 - 12

Upon the foregoing cited papers, it is ordered that defendant Rite Aid’s motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff’s complaint and co-defendants’ cross claims and ordering co-defendants to defend and indemnify them, is determined as follows:

Plaintiff commenced this action to recover for injuries she allegedly sustained when she tripped and fell on a defect in the sidewalk adjacent to the property located at 3700-06 Junction Boulevard, Queens, New York on November 14, 2016. The adjacent property was owned by co-defendants Brithym Realty Corp. and Murray R. Breidbart d/b/a Brithym Realty Co., and leased to Rite Aid. Rite Aid now moves for summary judgment on the basis that the defect upon which plaintiff tripped was trivial, and because it was co-defendants’ duty to repair the sidewalk.

As a general matter, it is typically a question of fact for the jury to determine whether a dangerous or defective condition exists on a property, based on the particular facts of the case (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]). However, injuries that result from trivial defects are not actionable (*see Hahn v Wilhelm*, 54 AD3d 896 [2d Dept 2008]). There are a myriad of factors that the court must consider and a determination that a defect is trivial, solely based on a ‘minimal dimension test,’ is unacceptable (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]).

Here, in support of the motion the movant submits, inter alia, plaintiff's deposition testimony and photographs that were found to be fair and accurate representations of the defect. Plaintiff averred that, on the date of the incident, she fell when her left foot went into a hole. She did not characterize the defect as a mere crack, but a triangular hole that was roughly one-and-a-half inches deep. Moreover, the picture of the defect demonstrates that its location was directly in front of the store's entrance. Absent from the picture was any measurement device used by movant to measure the size of the defect. In viewing the evidence in the light most favorable to the plaintiff, the evidence submitted, including plaintiff's deposition testimony and the photographs of the subject defect, was insufficient to establish that the alleged defect was trivial as a matter of law (*see Maldonado v 2121 Shore Condominium*, 138 AD3d 789 [2d Dept 2016]). Accordingly, that branch of the motion seeking to dismiss plaintiff's complaint is denied.

As to those branches of the motion seeking defense and indemnification and to dismiss co-defendant Murray R. Breidbart d/b/a Brithym Realty Co.'s cross claim, the movant submits, inter alia, the lease between the co-defendants and the rider to the lease. At the outset, there are no provisions in the lease or rider that discuss indemnification, thus, movant can only recover on a theory of common-law indemnification.

Here, the lease and rider addendums do state in pertinent part:

ARTICLE 7 – Parking Lot Tenant shall maintain, clean and remove snow from all sidewalks adjoining its Premises, at its sole cost and expense.

ARTICLE 12 – Repair Landlord shall maintain in good condition and repair the roof, structural and exterior portions of the Premises . . .

Addendum to Article 12 (Repairs And Maintenance). A. Except for Landlord's requirements . . . Tenant at its expense, shall take good care of the leased premises, keep them in good order and condition and make all necessary non-structural repairs thereto . . .

59. Tenants Operating Charge. The Tenant agrees to pay Landlord, as an additional rental, "Tenant's Operating Charge," . . . [which] shall mean amount equal to Tenant's Share . . . of the "Operating Costs," . . . [which] shall mean the total of all the costs and expenses (and taxes thereon, if any) incurred by Landlord (whether directly or through independent contractors) with respect to the operation and maintenance of the Building . . . including: (I) [the] lobby, plaza, sidewalk, curb and other public area maintenance and cleaning . . .

Furthermore, pursuant to the New York City Administrative Code § 7-210(a), it is the burden of an owner of real property abutting a sidewalk to maintain it in a reasonably safe condition. Moreover, it is well settled law that a party to a lease that is only required to make non-structural repairs, is not required to fix defective sidewalk slabs as such defects are structural in nature (*see Berkowitz v Dayton Const., Inc.*, 2 AD3d 764 [2d Dept 2003]). Thus, Rite Aid demonstrated that it owed no duty to plaintiff and it is incumbent on the plaintiff or co-defendants to raise a triable issue of fact.

In opposition the co-defendants attempted to show, through movant’s assistant manager’s deposition testimony, that Rite Aid employees would salt the ground before it snowed, would not communicate notice to the landlord, and were basically clueless when it came to any protocol to make repairs. Nevertheless, neither that testimony nor the testimony of Marc Durst, co-defendant Brithym Realty Corp.’s managing agent, demonstrated that Rite Aid created the defective condition, negligently maintained repairs, or used the sidewalk for a special purpose (*id.*). Thus, those branches of movant’s motion are granted.

Accordingly, defendant Rite Aid’s motion is granted solely to the extent that it is entitled to defense and common-law indemnification from co-defendants Brithym Realty Corp. and Murray R. Breidbart d/b/a Brithym Realty Co. and the cross claim of Murray R. Breidbart d/b/a Brithym Realty Co. is dismissed.

Defendant Rite Aid shall serve a copy of this order on all parties, together with notice of entry, within 30 days of the date of entry of this order.

This constitutes the decision and order of the Court.

Dated: May 5, 2020



RICHARD G. LATIN, J.S.C.

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