Sanchez v Hirakis
2021 NY Slip Op 31032(U)
March 16, 2021
Supreme Court, Kings County
Docket Number: 520202/2016
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of March, 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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JOSE SANCHEZ,

Plaintiff,

-against-

PETER HIRAKIS, GOOD SHEPHERD SERVICES,

Defendants.

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Index No.: 520202/2016

DECISION AND ORDER

Motion Sequence #4, #5

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	70-92, 94-100
Opposing Affidavits (Affirmations)	102-107, 108-111, 116
Reply Affidavits (Affirmations)	113-115, 118

After a review of the papers and oral argument the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on July 8, 2016. The Plaintiff, Jose Sanchez (hereinafter "the Plaintiff) allegedly injured himself on a purported raised corner of the metal cellar door adjacent to the premises located at 595 Sutter Avenue, Brooklyn, New York (hereinafter "the Premises" or "Property"). The Premises are purportedly owned by Defendant Peter Hirakis (hereinafter referred to as "Defendant Hirakis" or "Hirakis") and leased the first floor to Defendant Good Shepherd Services (hereinafter referred to as "Defendant Good Shepherd" or "Good Shepherd").

Defendant Good Shepherd now moves (motion sequence #4) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. Good Shepherd contends that it does not owe the Plaintiff a duty of care with respect to the subject cellar door, since a commercial tenant does not generally owe a pedestrian a duty of care. Good Shepherd also argues that the express language of the agreement between Defendant Hirakis and Good Shepherd (the "Lease") also absolves it from liability.

Both the Plaintiff and the Defendant Hirakis oppose the motion by Good Shepherd. The Plaintiff contends that Good Shepherd has failed to meet its burden regarding whether it caused or created the alleged defective cellar door. The Plaintiff also argues that there are issues of fact as to 1) whether the Lease between the Defendants absolved Good Shepherd of the responsibility to repair the cellar door and 2) whether Good Shepherd had a duty to make repairs because it enjoyed a special use of the sidewalk. Defendant Hirakis opposes the motion and argues that his Lease with Good Shepherd obligated it to repair any defective condition of the cellar doors.

Defendant Hirakis also moves (motion sequence #5) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. Defendant Hirakis contends that it did not owe the Plaintiff a duty of care with respect to the cellar door, since the Lease states that Good Shepherd was solely responsible for the maintenance and repair of the cellar doors. Hirakis also contends that summary judgment should be granted since he did not cause or create the condition at issue and did not have actual or constructive notice of any alleged condition. Hirakis also seeks an order order pursuant to CPLR 3212 granting summary judgment on its cross-claims against Defendant Good Shepherd for contractual indemnification.

Both the Plaintiff and Good Shepherd oppose the motion by Hirakis. The Plaintiff argues that the motion by Hirakis should be denied as untimely. Both the Plaintiff and Defendant Good Shepherd also argue that the Lease does not absolve Hirakis from making repairs to the cellar doors. The Plaintiff also

contends that arguments made by Hirakis that the defect at issue was open and notorious or otherwise *deminimis* are generally issues left for a jury to decide. Moreover, the Plaintiff argues that Hirakis failed to meet his burden to show that he did not have actual or constructive notice of the alleged defect. Good Shepherd also opposes the motion by Hirakis in relation to the issue of contractual indemnification, since Hirakis never asserted a cross claim for contractual indemnification in his answer.

As an initial matter, the Court finds that the cross-motion for summary judgment made by Defendant Hirakis should not be considered. Hirakis' cross motion was filed on January 8, 2020, more than 120 days after the Note of Issue was filed on September 9, 2019. *See Brill v. City of New York*, 2 NY3d 648, 650, 814 N.E.2d 431, 433 [2004]. However, pursuant to the Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, the Hirakis "was required to make his motion for summary judgment no later than 60 days after the filing of the note of issue, unless he obtained leave of the court on good cause shown." *Goldin v. New York & Presbyterian Hosp.*, 112 AD3d 578, 579, 975 N.Y.S.2d 892, 893 [2d Dept 2013]. What is more, Defendant Hirakis does not make an initial good cause showing thereby permitting the Court to consider the untimely cross motion on the merits. Defendant Hirakis does attempt to address the timeliness issue for the first time in his Reply Affirmation. However, he fails to show that the motion was timely, or that there was some other good cause for it to be considered after the sixty-day period. His contention that he received leave of court is without merit.[1] "A late motion is not permitted simply because it has merit and the adversary is not prejudiced." *Tower Ins. Co. of New York v. Razy Assocs.*, 37 AD3d 702, 703, 830 N.Y.S.2d 726, 728 [2d Dept 2007]. In addition, the motion by Defendant Hirakis and the motion by Good Shephard were not made on nearly identical grounds. The parties make different legal arguments in relation to liability and Hirakis also seeks summary judgment

[1] The Court also notes that in general it is inappropriate to raise a legal issue or argument for the first time in the Reply Affirmation. *See Kane v. Triborough Bridge & Tunnell Auth.*, 8 AD3d 239, 242, 778 N.Y.S. 2d 52, 55 [2d Dept 2004].

on a claim for indemnification. *See Bicounty Brokerage Corp. v. Burlington Ins. Co.*, 101 AD3d 778, 780, 957 N.Y.S.2d 161, 163 [2d Dept 2012].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.' " *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Rous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

Sidewalk liability in the City of New York is addressed by § 7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> **b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain**

> **such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.**
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> **c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.**

An owner subject to the Sidewalk Law must "provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries." *See James v. Blackmon*, 58 AD3d 808, 809, 872 N.Y.S.2d 179, 180 [2d Dept 2009]. "Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Section 7-210, the property owner has the initial burden of demonstrating, *prima facie*, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Harakidas v. City of New York*, 86 AD3d 624, 627, 927 N.Y.S.2d 673, 676 [2d Dept 2011]. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v. Cty. of Suffolk*, 90 NY2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 NY 268, 107 N.E.2d 441 [1952].

Turning to the merits of Good Shepherd's motion (motion sequence #4), the Court finds that Defendant Good Shepherd has failed to provide sufficient evidence to meet its *prima facie* burden. It is true that insofar as the property is utilized for a commercial purpose, the maintaining of the sidewalk abutting the premises is the obligation of the owner pursuant to the afore-mentioned Sidewalk Law. *See Alayev v. Juster Assocs., LLC*, 122 AD3d 886, 887, 998 N.Y.S.2d 83, 84 [2d Dept 2014]; *Berkowitz v. Dayton Const., Inc.*, 2 AD3d 764, 765, 769 N.Y.S.2d 730 [2d Dept 2003]. Further, "[t]he obligation to repair is thus not limited to defects in the actual masonry of the sidewalk flag, but includes the hardware or other items installed in sidewalk appurtenant to the owner's property for the use and benefit of the property owner. Cellar doors are therefore part of the owner's obligation under §7-210." *Langston v. Gonzalez*, 39 Misc.3d 371.377, 958 N.Y.S.2d 888, 894 [Sup Ct, Kings County 2013].

Notwithstanding the above, Good Shephard also has the burden of showing that they did not cause or create the condition at issue. In support of this contention, Good Shephard merely states in paragraph 47 of its affirmation in support of the motion that "there is no evidence whatsoever that Good Shepherd actually created the allegedly dangerous condition." (See Good Shephard Motion, Affirmation, Paragraph 47). However, it is incumbent on Good Shephard to meet this burden by providing evidence that it did not cause or create this condition. As part of his testimony, Alex Garay, the Director of Facilities for Good Shephard, merely states that he had not been informed of any complaints regarding the cellar door. (See Good Shephard Motion, Exhibit S, Pages 39 through 40). This is insufficient for Good Shephard to meet its *prima facie* burden establishing that it did not cause or create the defect at issue. *See Melnikov v. 249 Brighton Corp.*, 72 AD3d 760, 760, 898 N.Y.S.2d 627, 628 [2d Dept 2010].

Even assuming the timeliness of the motion (motion sequence #5) made by Defendant Hirakis, the Court finds that Defendant Hirakis has not provided sufficient evidence to meet his *prima facie* burden. The lease between the parties does not establish that Good Shepherd had an obligation to repair the alleged

uneven cellar door at the Premises. *See Berkowitz v. Dayton Const., Inc.*, 2 A.D.3d 764, 765, 769 N.Y.S.2d 730 [2nd Dept, 2003]; *Salzberg v. Futernick*, 281 A.D.2d 467, 467, 721 N.Y.S.2d 403, 404 [2nd Dept, 2001]. What is more, Defendant Hirakis also failed to show that he did not create the alleged defective condition of the cellar door and failed to show that he did not have actual or constructive notice of its existence. More specifically, Hirakis did not establish that he did not have sufficient time to discover and remedy the purported condition. See *Pevzner v. 1397 E. 2nd, LLC*, 96 A.D.3d 921, 922, 947 N.Y.S.2d 543, 545 [2d Dept 2012]. In support of his application, Defendant Hirakis relies primarily on his own deposition and affidavit. While Defendant Hirakis repeats his contention that Defendant Good Shepherd was responsible to fix the cellar door under terms of the lease, he does not specify when he last inspected the cellar door prior to the alleged incident at issue. What is more, the Court also finds that the question of whether the alleged defective condition at issue in the instant matter is trivial is an issue of material fact for the jury to resolve. *See Simos v. Vic-Armen Realty, LLC*, 161 AD3d 1023, 1024, 76 N.Y.S.3d 610, 612 [2d Dept 2018]. Accordingly, the motion by Defendant Hirakis is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Good Shepherd's motion (motion sequence #4) for summary judgment is denied.
Defendant Hirakis' motion (motion sequence #5) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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