Soso v Blink Fitness
2021 NY Slip Op 32169(U)
September 24, 2021
Supreme Court, Kings County
Docket Number: Index Number 6861/2014
Judge: Devin P. Cohen

Supreme Court of New York
County of Kings

Index Number 6861/2014
Seq 010 & 011

Part 91

MAXINE SOSO,

Plaintiff,

against

BLINK FITNESS, EIB FLATBUSH LLC AND EMMES MASTER SERVICES LLC, NEW CINGULAR WIRELESS, PCS, LLC, s/h/a THE AMERICAN TELEPHONE & TELEGRAPH COMPANY (AT&T),

Defendants.

DECISION/ORDER

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

Papers Numbered

Notice of Motion and Affidavits Annexed	1-2
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	3-8
Replying Affidavits	9-10
Exhibits	Var.
Other	

Upon review of the foregoing papers, defendant New Cingular Wireless, PCS, LLC[1] ("New Cingular")'s motion for summary judgment (Seq. 010) and defendant EIB Flatbush LLC ("EIB") and Emmes Master Services LLC ("Emmes")'s motion for summary judgment (Seq. 011) are decided as follows:

Introduction

Plaintiff commenced her case against Blink Fitness and EIB on May 6, 2014. On November 30, 2015, the court granted plaintiff's motion to amend her pleadings to add New Cingular (identified as AT&T) as a defendant. Plaintiff then filed amended pleadings and defendants EIB, New Cingular, and Blink Fitness each served answers to the amended complaint. Discovery thereafter commenced in this litigation which included an exchange of

[1] The caption shall be amended to reflect the legal name of this party, sued herein as The American Telephone & Telegraph Company. The modified caption has been used for this order.

documents, a medical examination of plaintiff, and several depositions. Plaintiff filed a note of issue on March 1, 2019. Thereafter, because of outstanding discovery issues, defendants EIB and Emmes jointly and New Cingular separately filed motions to vacate the note of issue. Justice Knipel issued an order on July 25, 2019 directing further discovery, including depositions of witnesses for defendants Blink Fitness and New Cingular as well as various non-party witnesses.

Several depositions were held after the note of issue was filed. Significantly, Larry Segall, Blink's former Vice President testified to leasing issues on September 17, 2019; Keith Bryan on behalf of defendant New Cingular testified on September 26, 2019; Christopher Plath, the property manager for Emmes at the time of the accident was deposed on November 26, 2019; and William Miller, Vice President of Real Estate for Blink Fitness testified on July 21, 2020.

Factual Background

Plaintiff Soso alleges that on July 3, 2013, at or about 7:10pm, she was walking upon the sidewalk in front of 841 Flatbush Avenue, where she tripped and/or lost her balance and fell (Ms. Soso EBT at 15). Specifically, Plaintiff testifies that she tripped on a hole in the sidewalk, caused by a missing paver in the brick section of that sidewalk, in front of the Flatbush property (*id.* at 20–21). At the time of Plaintiff's alleged accident, EIB owned a building which included addresses 833–845 Flatbush Avenue, Brooklyn, New York 11226. On May 10, 2012 Blink entered into a lease with 833 Flatbush LLC which was subsequently assigned to EIB (Emmes Representative Sarah Grise EBT at 18–19).[2] New Cingular was also a commercial tenant that

[2] Both the affirmation in support and multiple affirmations in opposition to the instant motion identify the representive of Emmes as "Susan Grise." However, the deposition transcript indicates that the deponent's first name is "Sarah." (Ms. Grise EBT at ¶ 6).

entered a lease agreement with 833 Flatbush LLC which was subsequently assigned to EIB (AT&T Lease; Noreen Appleby, Manager of Lease Administration for AT&T, Aff. at 1).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facia showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facia showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter the court must address the timeliness of these motions for summary judgment. Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6 requires a party to move for summary judgment within 60 days from the date of the filing of the note of issue. In the instant case, Ms. Soso filed the note of issue on March 1, 2019. Thereafter, multiple defendants contended that there was still outstanding discovery. These contentions were affirmed by Justice Knipel's July 25, 2019 order providing for additional depositions, but not extending the deadline for filing motions for summary judgment. New Cingular's motion was served on November 12, 2020; EIB and Emmes' motion was filed on March 21, 2021.

An untimely motion for summary judgment may be permitted if good cause is shown for the untimeliness (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Here, the defendants claim that their motions for summary judgment were delayed due to the outstanding depositions of Mr. Segall, Mr. Bryan, Mr. Plath, and Mr. Miller. The last of these depositions was completed on July 21, 2020. The defendants also rely on tolling of filing limitations by Executive Order 202.8. This tolling was extended to November 3, 2020 by Executive Order 202.67.

New Cingular's motion is timely as it was filed within 60 days of the expiration of the tolling effected by Executive Order 202.67. However, EIB and Emmes' motion for summary judgment was filed 138 days after the end of the extended tolling period, and 243 days after the final requested EBT was completed. Because this motion is not a cross-motion, and because EIB and Emmes' are dissimilarly situated from defendant New Cingular and their motion therefore relies on different arguments, EIB and Emmes' motion is denied as untimely.

Duty of Care for Sidewalk Maintenance

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Administrative Code of the City of New York § 7–210 imposes a non-delegable duty on a property owner to maintain and repair the sidewalk abutting its property. Unless there is a lease agreement "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk" (*Paperman v 2281 86th Street Corp.*, 142 AD3d 540, 541 [2d Dept 2016] citing *Abramson v Eden Farm, Inc.*, 70 AD3d 514 [1st Dept 2010]), "provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as the plaintiff" (*Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908, 909–910 [2d Dept 2014]).

Absent this kind of contract, a commercial tenant of property abutting a public sidewalk "owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made

repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty" (*Torres v. City of New York*, 153 AD3d 647, 648 [2d Dept 2017]).

New Cingular's lease with EIB states that New Cingular is obligated to "take good care of . . . the sidewalks adjacent [to the demised premises], and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damages from the elements, fire or other casualty, excepted" (EIB/New Cingular Lease at ¶ 4). New Cingular argues that, pursuant to its lease, its responsibility for the sidewalk was limited to non-structural maintenance and that the missing paver is structural, placing it beyond the purview of New Cingular's responsibility (citing *Sokolov v Shelbourne Towers*, 2018 NY Misc. LEXIS 6728 at *6–11 [Sup Ct, Kings County 2018]). Moreover, EIB's property manager at the time of the accident, Mr. Plath, testified that he does not know if New Cingular was required to make structural repairs (Mr. Plath EBT at 32, 35). In response, plaintiff and co-defendants point to New Cingular representative Mr. Bryan's testimony that New Cingular took responsibility for making structural repairs to the sidewalk directly in front of the store (Mr. Bryan EBT at 38–39). Namely, Mr. Bryan testified that a store manager would notify, through a ticket process, a call center operated by New Cingular, and that New Cingular would send a crew to repair the sidewalk (*id.* at 38–42). Plaintiff and co-defendants argue that this admission raises a question of fact as to whether New Cingular undertook repairs to the sidewalk and, if so, whether those repairs were performed negligently, rendering New Cingular liable to the plaintiff.

Still, the lease in this case does not "entirely displace" the owner's responsibility to maintain the sidewalk because it limits the tenant's responsibility to only making "non-structural" repairs. Under the *Paperman* and *Dalder* standard, Administrative Code of the City of New York § 7–210 does not apply to New Cingular because it is not an owner and its lease with EIB is not sufficiently broad to impose a duty on New Cingular. There is also no allegation that New Cingular made special use of the sidewalk, nor is there evidence that New Cingular created the defect.

That said, New Cingular may still bear liability if the corporation voluntarily but negligently made repairs to the sidewalk that resulted in the defective condition. The foregoing testimony indicates that New Cingular was responsible for maintaining some portion of the sidewalk. Moreover, Mr. Bryan's testimony indicated that there was a system in place to "escalat[e]" issues with the sidewalk in order to have them repaired by New Cingular (Mr. Bryan EBT at 73). While Mr. Bryan's testimony stressed the distinction between the area "directly in front of" the New Cingular storefront and the rest of sidewalk, New Cingular does not provide evidence that no repairs were made to the brick portion of the sidewalk at New Cingular's request.[3] Because New Cingular has not provided sufficient evidence to rebut the allegations that its negligent repairs caused the defective sidewalk, its motion for summary judgment is denied.

Contractual Indemnification

[3] The affidavit of Mr. Chen, the professional engineer offered by New Cingular, is inadequate to refute the existence of New Cingular's duty because "legal" expert testimony is not permissible, and Mr. Chen is attempting to testify to the non-existence of a legal duty. Mr. Chen does not testify that repairs never took place; therefore, his testimony does not bear on the question of New Cingular's duty of care.

"The right to contractual indemnification depends upon the specific language of the lease and the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and surrounding circumstances" (*Reisman v. Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2nd Dept. 2010]). "A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]). Because New Cingular has established that there was no contract between it and Emmes or it and Blink Fitness, New Cingular is entitled to summary judgment dismissing any contractual cross-claims by those defendants (*Pantaleo v Bellrose Senior Housing Development Fund Co., Inc.*, 147 AD3d 189, 191 [2d Dept 2017]). However, because there is an outstanding question of fact as to whether New Cingular was responsible for the condition of the sidewalk, New Cingular's motion is otherwise denied.

Common-Law Indemnification and Contribution

"[A] conclusion that [the defendant] is not liable to [the plaintiff] for the injuries sustained by him necessarily defeats the cross-claims for indemnification and contribution asserted against [the defendant] by [other] defendants (*Stone v Williams*, 64 NY2d 639, 642 [1984]; *see also Rodriguez v Yosi Trucking*, 151 AD2d 556 [2d Dept 1989]). Because there are outstanding questions of fact as to New Cingular's liability to Ms. Soso, this issue is not ripe for summary judgment.

Breach of Contract

"Lease provisions by which the tenant covenants to procure insurance and name the landlord as an additional insured are generally valid and enforceable" (*Inchaustegui v. 666 5th*

Ave. Ltd. P'ship, 96 NY2d 111, 114 [2001]). No evidence has been provided that New Cingular had a contract with Emmes or Blink Fitness; therefore both of those defendants' breach of contract claims are dismissed.

Monica Retana, Finance-Treasury Lead Risk Specialist of AT&T Management Services, LLC, testified that New Cingular's insurance policy includes a blanket additional insured endorsement in form IL 10 (12/06) that names "any person or organization to whom you have agreed under contract or agreement to provide insurance" (Ms. Retana Aff. at ¶ 2). Defendant EIB does not provide evidence or argument as to why New Cingular's procurement of insurance by way of this blanket additional ensured endorsement is insufficient to meet New Cingular's obligations under the lease. Accordingly, EIB's cross-claim for breach of contract is dismissed.

Conclusion

New Cingular Wireless' motion for summary judgment (Seq. 010) is granted to the extent of dismissing Emmes' and Blink's cross-claims against New Cingular and dismissing all breach of contract claims against New Cingular. New Cingular's motion is denied in all other respects. EIB and Emmes' motion for summary judgment (Seq. 011) is denied as untimely.

This constitutes the decision and order of the court.

September 24, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court

8