Errazuri v E Food Supermarket Inc.

2021 NY Slip Op 32874(U)

December 20, 2021

Supreme Court, Kings County

Docket Number: Index No. 509687/2019

Judge: Carl J. Landicino

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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 20th day of December 2021.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MARIA ERRAZURI,

Plaintiff,

-against-

E FOOD SUPERMARKET INC. AND CUDE WU,

Defendants.

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Index No.: 509687/2019

DECISION AND ORDER

Motion Sequence #3, #4

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	41-52, 53-67,
Opposing Affidavits (Affirmations)	73-78, 79-84, 90, 91
Reply Affidavits (Affirmations)	89, 93, 95

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

The instant action results from an alleged trip and fall incident that occurred on March 26, 2019. The Plaintiff, Maria Errazuri (hereinafter "the Plaintiff") allegedly injured herself after tripping on a broken, uneven, cracked, sidewalk flag located adjacent to 4901 Fifth Avenue, Brooklyn, New York (hereinafter "the Premises"). The Premises are owned by Defendant Cude Wu (hereinafter "Defendant Wu") and leased by Defendant E Food Supermarket (hereinafter "Defendant Supermarket"), pursuant to a lease agreement (the "Lease").

Defendant Wu now moves (motion sequence #3) for an order pursuant to CPLR 3212, granting her motion for summary judgment dismissing the Plaintiff's complaint, and granting her cross-claims against Defendant Supermarket for contractual and common-law indemnification. In her motion for

summary judgment, Defendant Wu argues that she cannot be liable for Plaintiff's injuries because, pursuant to the Lease with Defendant Supermarket, Defendant Wu is a landlord out of possession and therefore has no duty to keep the adjacent sidewalk in good repair. Wu also contends that the alleged condition was open and obvious and not inherently dangerous. What is more, Defendant Wu argues that the Lease between Defendant Wu and Defendant Supermarket states that Defendant Supermarket has a contractual duty to indemnify Defendant Wu.

Both the Plaintiff and Defendant Supermarket oppose Defendant Wu's motion. Both opponents of the motion contend that the motion by Defendant Wu should be denied as Wu had non-delegable duty to maintain the sidewalk adjacent to the Premises pursuant to Administrative Code of the City of NY § 7-210. It is also argued that Defendant Wu had a responsibility to make structural repairs, including sidewalks, under the Lease.

Defendant Supermarket also moves (motion sequence #4) for an order pursuant to CPLR 3212, granting it summary judgment dismissing the Plaintiff's complaint and dismissing Defendant Wu's cross-claims for contractual and common-law indemnification. Defendant Supermarket argues that it was not responsible under the Lease to repair sidewalk defects, that Defendant Wu had a nondelegable duty to repair any sidewalk defects and that it did not cause and/or create the defect at issue.

Both the Plaintiff and Defendant Wu oppose the motion made by Defendant Supermarket. Defendant Wu argues that Defendant Supermarket had an obligation pursuant to the Lease to make repairs to the sidewalk. Wu also contends that the Supermarket was obligated, pursuant to the Lease to indemnify Defendant Wu for any injuries that occurred at the Premises. The Plaintiff argues that there is a material issue of fact regarding whether the special use of the sidewalk made by Defendant Supermarket caused and created the broken and unlevel sidewalk condition alleged.

"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 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the 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 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 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 [2nd 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. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The Sidewalk Law

Sidewalk liability is covered 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.

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.

Motion Sequence #3

Turning to the merits of the motion made by Defendant Wu (motion sequence #3), the Court finds that Defendant Wu has not met her *prima facie* burden. Defendant Wu argues that she did not have a duty to repair the sidewalk and that the Lease required Defendant Supermarket to make any and all repairs. Defendant Wu also argues that the sidewalk at issue was not dangerous or defective. In support of these positions, Defendant Wu relies primarily on the deposition of Defendant Wu, the deposition of the Plaintiff, the deposition of Xiao Guang Peng, the Lease and photographs of the sidewalk at issue. As to the first position taken by Defendant Wu, the Court has generally held that "a landowner's duty under section 7-210 is an affirmative, nondelegable obligation." *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 174, 137 N.E.3d 469 [2019]; see also *Gambino v. 475 Park Ave. S., LLC*, 197 AD3d 621, 150 N.Y.S.3d 235 [2d Dept 2021]; *Zamora v. David Caccavo, LLC*, 190 AD3d 895, 896, 136 N.Y.S.3d 751 [2d Dept 2021]; *Labiner v. Jerome Florist, Inc.*, 189 A.D.3d 624, 625, 139 N.Y.S.3d 145, 146 [1st Dept 2020], *leave to appeal denied*, 37 N.Y.3d 908, 152 N.Y.S.3d 680 [2021].

As a result, in order to prevail on her motion as against the Plaintiff, Defendant Wu needs to establish "that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Muhammad v. St. Rose of Limas R.C. Church*, 163 AD3d 693, 693, 81 N.Y.S.3d 131, 132 [2d Dept 2018]; see also *Hackbarth v.*

McDonalds Corp., 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.*, 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008]. In the instant proceeding, Defendant Wu merely stated "[n]o" when asked if she had received any complaints regarding the sidewalk at the Premises. (See Defendant Wu's Motion, Exhibit H, Pages 86-87). Defendant Wu does not provide evidence of when the subject sidewalk at the Premises was last inspected prior to the alleged incident. In fact, when asked whether she was responsible for inspecting the sidewalk, she stated it was the responsibility of Defendant Supermarket and that "I rarely go there to inspect their stuff." (See Defendant Wu's Motion, Exhibit H, Page 105).

The Court also finds that Defendant Wu failed to adequately show that the defect at issue did not exist or was *de minimis* or trivial as a matter of law. Generally, for a property owner to meet their *prima facie* burden they must provide evidence such as photographs and an engineer's report. *See Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 73, 41 N.E.3d 766, 770 [2015]. Moreover, "[w]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury."*Poliziani v. Culinary Inst. of Am.*, 167 A.D.3d 790, 790–91, 89 N.Y.S.3d 272, 274 [2d Dept 2018], quoting *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997]. In the instant proceeding, Defendant Wu relies primarily on photographs and deposition testimony of the Plaintiff. Defendant Wu points to testimony where the Plaintiff allegedly indicated with her hand that the defect was less than an inch in

depth. However, the Plaintiff also stated that "[i]t was almost the length of door of the store to where the block ends." (See Defendant Wu's Motion, Exhibit H, Page 51-53). As a result, the photographs of the sidewalk and the Plaintiff's deposition were insufficient for Defendant Wu to show that the sidewalk defect at issue was trivial and non-actionable as a matter of law. *See Simos v. Vic-Armen Realty, LLC*, 161 AD3d 1023, 1025, 76 N.Y.S.3d 610, 612 [2d Dept 2018].

Given that Defendant Wu failed to meet her *prima facie* burden, it is not necessary to review the sufficiency of the opposition papers of the Plaintiff or Defendant Supermarket relating to this motion. *See Gibbs v. Husain*, 184 AD3d 809, 810, 127 N.Y.S.3d 42, 44 [2d Dept 2020].

Motion Sequence #4

Turning to the merits of the motion made by Defendant Supermarket (motion sequence #4) the Court finds that Defendant Supermarket has met its *prima facie* burden. The Court finds that the Sidewalk Law provides that, as per *Xiang Fu He v. Troon Mgmt., Inc.*, a landlord has the sole non-delegable duty to a pedestrian as it relates to any claim that pedestrian might have for personal injuries in relation to hazardous sidewalk conditions. As the Court stated in *Xiang Fu He v. Troon Mgmt., Inc.,* "the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7–210." *Xiang Fu He v. Troon Mgmt., Inc.,* 34 N.Y.3d 167, 174, 137 N.E.3d 469, 475 [2019].

The Court finds that Defendant Supermarket has shown that it did not cause or create the condition at issue. In support of its motion, Defendant Supermarket relies primarily on the testimony of Defendant Wu, the deposition of Xia Guan Peng, the Lease, photographs of the condition at issue and the affidavit of Adam Cassel, P.E. Defendant Supermarket points to the deposition testimony of Xiao Guang Peng, owner of Defendant Supermarket and the affidavit of Adam Cassel, P.E. As part of his deposition, when

Xiao Guang Peng was asked if he had ever received any complaints about a sidewalk defect from his employees he stated "[n]o." (See Defendant Supermarket's Motion, Exhit H, Page 97). When asked if anyone else had ever fallen on the sidewalk in front of the supermarket he stated "[n]o I don't think so." (See Defendant Supermarket's Motion, Exhit H, Page 103). When asked if he had made repairs to the sidewalk in August of 2017 he stated "I did not find anyone for repair." (See Defendant Supermarket's Motion, Exhit H, Page 119). As part of his affidavit Adam Cassel, P.E. stated that "[o]n March 30, 2021, I inspected, measured and photographed the public sidewalk in front of 4901 5th Avenue, Brooklyn, New York, where the plaintiff purportedly fell." He also stated that "it is clear that there is no evidence whatsoever that the conditions at that location developed as a result of the placement of fruit stands on the sidewalk, or any other special use of the sidewalk." His position was based upon the principle that the "slab would be capable of safely supporting a concentrated load of at least 35,000 pounds without failure." (See Defendant Supermarket's Motion, Exhibit M). See *Morelli v. Starbucks Corp.*, 107 AD3d 963, 964, 968 N.Y.S.2d 542, 544 [2d Dept 2013].

In opposition, both Defendant Wu and the Plaintiff have failed to raise a material issue of fact that would prevent the Court from granting Defendant Supermarket's summary judgment motion. The report by Eric Heiberg, P.E. is of limited probative value as the report fails to conclude that the defect at issue was caused or created by the agents or employees of Defendant Supermarket and instead speculates that the placement of the fruit and vegetable stalls outside of the store forced patrons and other pedestrians towards the sidewalk defect. *See Bousquet v. Water View Realty Corp.*, 161 AD3d 718, 720, 76 N.Y.S.3d 205, 207 [2d Dept 2018]. As a result, the opponents of Defendant Supermarket's motion have failed to raise a material issue of fact that would lead this Court to deny Defendant Supermarket's motion for summary judgment.

Indemnification

Lease Provisions:

Paragraph 4 provides in pertinent part that-

> Tenant shall, throughout the term of the lease, take good care of the demised premises (including, without limitation, the storefront) and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, 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 damage from the elements, fire or other casualty, excepted.

Paragraph 15 provides in pertinent part that-

> Tenant will not at any time use or occupy the demised premises in violation of Articles 2 or 37 hereof, or of the certificate of occupancy issued for the building of which the demised premises are a part. Tenant has inspected the demised premises and accepts them "as-is", subject to the riders annexed hereto with respect to Owner's work, if any. In any event, Owner makes no representation as to the condition of the demised premises, and Tenant agrees to accept the same subject to violations, whether or not of record.

Paragraph 16 provides in pertinent part that-

> The Tenant agrees, at Tenant's expense, to maintain and keep free from garbage, snow, ice or other obstructions, sidewalk in front and the side of the building of which the Demised Premises forms a part, and such portion of any street on which the building of which the Demised Premises forms a part is located, as any municipal ordinance or other provision of law may require to be so maintained and kept free by the owner of the building or otherwise. In the event any violations, summonses and/or penalties are imposed by any governmental agency or department against Owner for any alleged violation of said municipal ordinance or other provision of law as specified under this paragraph, Tenant shall be responsible for the payment of the same.

Paragraph 30 provides that-

> Tenant shall at Tenant's expense, keep demised premises clean and in order, to the satisfaction of the owner, and if demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt, and

rubbish maintain said sidewalks in a reasonably safe condition in compliance with requirements of law.

"A party's right to contractual indemnification depends upon the specific language of the relevant contract." *Gurewitz v. City of New York*, 175 AD3d 658, 659, 109 N.Y.S.3d 167, 170 [2d Dept 2019]. "A contractual indemnity provision 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.'" *Hanna v. Milazzo*, 179 AD3d 907, 909, 118 N.Y.S.3d 122, 124 [2d Dept 2020], *quoting Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903, 904 [1989]. In relation to sidewalk repair, although a property owner may have a non-delegable duty as it relates to a pedestrian, the Court in *Xiang Fu He v. Troon Mgmt., Inc.*, stated that "if litigation ensues, the landowner generally has an indemnification action against a tenant or lessee who covenants to maintain the property." *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 175, 137 N.E.3d 469, 476 [2019].

As it relates to the application made by Defendant Wu for indemnification (motion sequence #3), the Court finds that there is an issue of fact regarding whether Defendant Supermarket had a responsibility under the Lease to repair the sidewalk. Defendant Supermarket contends that it was not required to make any repairs to the sidewalk under the Lease. It points to language in paragraph 4 that states that Defendant Supermarket as a tenant would "make all non-structural repairs" and argues that the replacement of a sidewalk flag is considered a structural repair. However, Paragraph 30 does provide that "Tenant shall, at Tenant's own expense, make **all repairs and replacements** to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt, and rubbish maintain said sidewalks in a reasonably safe condition in compliance with requirements of law." (emphasis added). It is unclear if the phrase "make all repairs and replacements to the sidewalks" required Defendant Supermarket to address the alleged defect. What is more, "[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." *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010]. As indicated above, Defendant Wu has failed to meet her *prima facie* burden to show that she is free from negligence in this matter and Defendant Supermarket has failed to establish her *prima facie* burden that it was not responsible to address the issue pursuant to the Lease even though the Court has found that Defendant Supermarket did not cause of create the alleged defective condition. The language of the Lease is not dispositive of the issue.

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

The motion by Defendant Cude Wu (motion sequence #3) for summary judgment and indemnification is denied.

The motion by Defendant E Food Supermarket, Inc. (motion sequence #4) for summary judgment is granted solely to the extent that Plaintiff's complaint is dismissed as against it and the portion of Defendant Supermarket's motion to dismiss Defendant Wu's cross-claim for contractual indemnification 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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