

Frost v Eastgate Corporate Park, LLC
2021 NY Slip Op 33303(U)
April 28, 2021
Supreme Court, Orange County
Docket Number: Index No. EF008973-2018
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

MILDRED FROST,
-----X

Plaintiff,

-against-

EASTGATE CORPORATE PARK, LLC,
MASTERWORK MANAGEMENT, LLC,
MASTERWORK HOME and CENTER FOR
STRESS REDUCTION,

Defendants.
-----X

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF008973-2018

Motion Date: April 2, 2021

Motion Seq. Nos. 2 and 3

The following papers numbered 1 to 10 were read on Defendants' motions for summary
judgment:

Table listing documents and page numbers: Notice of Motion (CFSR) - Affirmation / Exhibits 1-2, Affirmation in Partial Opposition / Exhibits 3, Reply Affirmation 4, Notice of Motion (Eastgate) - Affirmation / Exhibits 5-6, Affirmation in Opposition (Plaintiff) / Exhibits - Affidavit 7-8, Affirmation in Partial Support and Partial Opposition (CFSR) / Exhibit 9, Reply Affirmation 10

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

A. Factual Background

Plaintiff Mildred Frost alleges that she sustained injury when she fell on April 10, 2017 on the sidewalk outside the entrance to the Center for Stress Reduction (“CFSR”) in the Eastgate Corporate Park in Goshen, New York. There was a walkway from the parking lot to CFSR. In the middle of the walkway, a few feet from the building’s entrance, was a sizeable patch of rough, spalled or broken concrete. The depth of this disturbance was only about 1/8th inch, but it created an uneven walking surface. Plaintiff, a regular patron of the CFSR, was well aware of the existence of this sidewalk defect and ordinarily tried to skirt it by walking around it to the left (going in; to the right, coming out). On the date of the accident, when she emerged from CFSR, a man was walking up the middle of the path toward her. She sidled to her left to avoid him, stepping on the defective area of concrete as she did so and fell.

B. Procedural History

Plaintiff commenced this action against Eastgate Corporate Park, LLC (“Eastgate”), the owner of the corporate park, Masterwork Management, LLC, the management company responsible for repairs, and CFSR, a lessee of space in the corporate park. Eastgate cross claimed against CFSR for contractual indemnification and breach of contract to procure insurance. There are three pending motions for summary judgment. (1) Eastgate has moved for dismissal of the Complaint on the ground that the defect which caused Plaintiff’s fall was “trivial” and non-actionable. (2) CFSR has moved for dismissal of the Complaint and all cross claims on the ground that it bore no responsibility under its lease for the defect at issue. (3) Eastgate in turn moved for judgment as a matter of law on its cross claims against CFSR for contractual indemnification and breach of contract to procure insurance.

C. Eastgate's Motion For Dismissal of the Complaint: Trivial Defects

In *Trincere v. County of Suffolk*, 90 NY2d 976 (1997), the plaintiff “stumbled and fell over a cement slab that was elevated at an angle ‘a little over a half-inch above the surrounding paving slabs.’” *Id.*, at 977. The Court of Appeals held that “[a]fter examination of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury”, the lower court correctly concluded that the defect presented by the raised sidewalk slab was trivial and non-actionable as a matter of law. *Id.*, at 978.

The Court of Appeals re-examined the issue of trivial defects in *Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 (2015). It observed:

Trincere and the line of cases in which it stands establish the principle that a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it “unreasonably imperils the safety of” a pedestrian [cit.om.].

Id., at 78. The Court identified examples of factors that may render a physically small defect actionable, including “a jagged edge”; “a rough, irregular surface”; “the presence of other defects in the vicinity”; “poor lighting”; or “a location – such as a parking lot, premises entrance / exit, or heavily traveled walkway – where pedestrians are naturally distracted from looking down at their feet.” *Id.*, at 78. Commenting on the standard of liability for cases involving physically insignificant defects, the Court observed:

[T]he test established by the case law in New York is not whether a defect is *capable* of catching a pedestrian’s shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances.

Id., at 80. On a motion for summary judgment:

A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact.

Id., at 79.

Summarizing the current state of the law in this regard, the Second Department in

Bishop v. Pennsylvania Avenue Management, LLC, 183 AD3d 685 (2d Dept. 2020), wrote:

Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). In determining whether a defect is trivial, the court must examine all of the facts presented, including the “width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury” (*Trincere v. County of Suffolk*, 90 NY2d at 978...). There is no “minimal dimension test” or per se rule that the condition must be of a certain height or depth in order to be actionable (*id.* at 977). Physically small defects may be actionable “when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d at 79).

Bishop, supra, 183 AD3d at 686. *See also, Kozik v. Sherland & Farrington, Inc.*, 173 AD3d 994, 996 (2d Dept. 2019).

Here, Eastgate in moving for summary judgment focused almost exclusively on the physically insignificant depth (1/8th inch) of the defect. Disregarding the Court of Appeals’ admonition in *Hutchinson*, it undertook no meaningful effort to address the circumstances surrounding the Plaintiff’s accident. There is no “minimal dimension test”, and while 1/8th inch defects may in many cases be deemed non-actionable as a matter of law, courts generally so hold only after considering whether the surrounding circumstances magnified the danger posed by the

defect. *See, e.g., Kavanagh v. Archdiocese of the City of New York*, 152 AD3d 654, 655 (2d Dept. 2017); *Atkinson v. Key Real Estate Associates, LLC*, 142 AD3d 871, 872 (1st Dept. 2016).

As the Court of Appeals recognized in *Hutchinson*, one key circumstance that may enhance the danger of an otherwise insignificant defect is its location at a “premises entrance / exit, or heavily traveled walkway – where pedestrians are naturally distracted from looking down at their feet.” *Id.*, 26 NY3d at 78. *See, e.g., Maldonado v. 2121 Shore Condominium*, 138 AD3d 789 (2d Dept. 2016) (depressed drain near front door entrance; held, defendant failed to establish entitlement to summary judgment); *Vani v. County of Nassau*, 77 AD3d 819 (2d Dept. 2010) (height differential between concrete slabs on walkway leading to school entrance; held, defendant failed to establish entitlement to summary judgment); *Bolloli v. Waldbaum, Inc.*, 71 AD3d 618 (2d Dept. 2010) (pothole near supermarket entrance; held, defendant failed to establish entitlement to summary judgment).

Here, the defect which caused Plaintiff’s fall was located just feet from the entrance to the CFSR, and right in the middle of the walkway. Moreover, the accident occurred when Plaintiff was distracted by having to change course to avoid another patron coming up the walkway toward her. The Court concludes that Eastgate failed to demonstrate as a matter of law that the circumstances were not such as to magnify the hazard of the sidewalk defect and make it difficult for Plaintiff to traverse safely on foot. Accordingly, its motion for summary judgment must be denied regardless of the sufficiency of Plaintiff’s opposition papers. *See, Hutchinson v. Sheridan Hill House Corp., supra; Kozik v. Sherland & Farrington, Inc., supra; Maldonado v. 2121 Shore Condominium, supra; Vani v. County of Nassau, supra.*

D. The Lease Agreement Between Eastgate and CFSR

The "Lease Agreement" between Eastgate as Landlord and CFSR as Tenant provided in pertinent part as follows:

1. PREMISES:Landlord hereby leases to Tenant, and Tenant hereby accepts and leases from Landlord, the floor area of certain premises in a building to be constructed, in the Eastgate Corporate Park as set forth in Exhibit "A" (Premises)

[Exhibit "A" shows "Floor Area of Premises leased at 3 Coates Drive, 3,054 square feet of building as set forth on Exhibit "A-1" annexed]
8. REPAIRS AND MAINTENANCE:
 - (a) Tenant shall at its own cost and expense keep and maintain the Premises in a reasonable manner, making all necessary repairs and replacements in the interior of the Premises....
 - (e) The Landlord shall maintain and provide for the regular lawn care and general maintenance of the parking lot and driveway areas to the Premises including but not limited to snow plowing, rubbish removal, lightpost maintenance including bulb replacing, exterior lighting and electricity for the parking lot, insurance, and other costs and expenses relating to the building and the maintenance, repair, and replacement of the exterior portion of the building, including but not limited to, the roof of the building, landscaping, parking lot, and the expansion of parking lot area, if necessary....
14. FIRE AND CASUALTY DAMAGE:
 - (a) During the term of this Lease, and any renewal thereof, Tenant agrees to maintain standard fire and extended coverage insurance covering the contents of the Premises occupied by Tenant....
 - (b) Tenant must give Landlord prompt notice of fire, accident, damage or dangerous or defective condition.
 - (c) Landlord has the right to demolish or rebuild the Building if there is substantial damage by fire or other casualty to the Building....
15. LIABILITY. Tenant shall procure and maintain at its sole cost and expense during the term and any extension thereof, a combined single limit, public

liability insurance policy insuring Landlord and Tenant against claims for damages resulting from injury to property, person, or loss of life arising out of Tenant's use and occupancy of the Premises.....Landlord shall not be liable to Tenant or Tenant's employees, agents, representatives, patrons or visitors, or to any other person whomsoever, for any injury to person or damage to property on or about the Premises, resulting from and/or caused by any breach or default on the part of the Tenant in the performance of any covenant or agreement on the part of the Tenant to be performed, pursuant to the terms of this Lease, or arising out of the negligence or misconduct of Tenant, its agents, servants, representatives or employees, or of any other person entering upon the Premises, and Tenant hereby covenants and agrees that it will at all times indemnify and hold safe and harmless the Premises, Landlord's agents, representatives and employees from any loss, liability claims, suits, costs, expenses, including without limitation attorney's fees and damages, both real and alleged, arising out of any such damage or injury; except injury to persons or damage to property the cause of which is due to the negligence or misconduct of Landlord, its agents, servants, representatives or employees.

E. The Parties' Obligations Under the Lease Agreement

1. Duty to Maintain and Repair

Under the Lease Agreement, the CFSR leased certain "Premises", defined as 3,054 square feet of the floor area of a building at 3 Coates Drive in the Eastgate Corporate Park, owned by defendant Eastgate. (Lease Agreement ¶1 and Ex. "A")

CFSR's duty to maintain was limited to the "Premises", and its duty to repair to "the interior of the Premises." (Lease Agreement ¶8[a]) The duty to maintain elements exterior to the leased Premises was exclusively the Landlord's. (Lease Agreement ¶8[e]). Eastgate's principal, Joseph Matta, confirmed this allocation of responsibility at his deposition. He testified:

Q ...as a general proposition is it fair to say that the tenant is responsible to maintain and take care of the interior of the premises that they lease and the landlord is responsible to take care of the exterior of the building and the grounds ?

A Generally speaking, yes. (Matta Dep., p. 77)

Mr. Matta further testified Eastgate and its agents regularly inspected the grounds and arranged for the repair of any defects. (*See*, Matta Dep., pp. 88-90)

Under the terms of the Lease Agreement, then, it was the obligation of Eastgate and its management company, not CFSR, to maintain and repair the exterior walkway where Plaintiff's accident occurred. Eastgate claims, however, that CFSR was obligated pursuant to Lease Agreement ¶14[b] to notify Eastgate of the defective condition of the walkway. Not so.

It is a signal principle of contract interpretation that the intention of the parties to a written contract be ascertained from construction of the instrument as a whole. *See, e.g., Westmoreland Coal Co. v. Entech, Inc.*, 100 NY2d 352, 357 (2003); *Empire Properties Corporation v. Manufacturers Trust Co.*, 288 NY 242, 248 (1942); *Paige v. Faure*, 229 NY 114, 118 (1920).

The intention of the parties to a contract must be ascertained not from one provision but from the entire instrument. Single clauses of a contract cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are part. A written contract will be read as a whole and every part will be interpreted with respect to the whole. The meaning of a writing may be distorted if undue force is given to a single word or phrase. The document should be read as a whole to ensure that excessive emphasis is not placed upon particular words or phrases. A court must consider the entire writing and may not view particular words in isolation. In reading the contract as a whole, the court must interpret it to give effect to the general purpose of the contract. In reading an agreement as a whole, each individual provision must be considered within the greater concept of the entire agreement. Single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are part.

Clauses of a contract should be read together contextually in order to give them meaning. If possible, all provisions of a contract should be read together as a harmonious whole. Single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract in which they are found. A court will consider the entire contract and will choose the interpretation that best accords with the sense of the remainder of the contract.

28 N.Y. Prac. (Banks, New York Contract Law) §10.3.

Paragraph 14[b] of the Lease Agreement does state that “Tenant must give Landlord prompt notice of fire, accident, damage or dangerous or defective condition.” However, in accordance with the principles outlined above this provision may not properly be read in isolation, untethered from its context, to impose a general obligation on CSFR to notify Eastgate of all defective conditions. Paragraph “14” is concerned exclusively with (a) “fire and casualty” damage (b) to the leased Premises, and it is quite clearly in that context that the notice obligation of subdivision “b” applies. Thus construed, the Lease Agreement did not require CSFR to notify Eastgate of defective sidewalk conditions exterior to the leased Premises, maintenance and repair of which was exclusively Eastgate’s obligation under the terms of the Agreement.

In view of the foregoing, CSFR owed neither Plaintiff nor Eastgate a duty of care with respect to the defective condition of the exterior walkway where her accident occurred. Therefore, Plaintiff’s Complaint, as against CSFR, must be dismissed.

2. CSFR’s Contractual Duty to Indemnify

While the verbose indemnification provision of the Lease Agreement is not a paragon of clarity, “injury to persons...the cause of which is due to the negligence or misconduct of Landlord” is explicitly and unambiguously excluded from the scope of CSFR’s contractual obligation to indemnify Eastgate. (Lease Agreement ¶15) Inasmuch as Eastgate may not be held liable to Plaintiff herein except upon a finding of its own negligence in failing to discover and remedy the defective condition of the sidewalk, any claim over against CSFR for contractual indemnification would be barred by the express terms of Paragraph “15” of the Lease Agreement. Therefore, Eastgate’s cross claim for contractual indemnification must be dismissed.

3. CFSR's Contractual Duty to Procure Insurance

Paragraph "15" of the Lease Agreement provides:

Tenant shall procure and maintain at its sole cost and expense during the term and any extension thereof, a combined single limit, public liability insurance policy insuring Landlord and Tenant against claims for damages resulting from injury to property, person, or loss of life arising out of Tenant's use and occupancy of the Premises....

Eastgate contends, and the Court agrees, that Plaintiff's lawsuit constitutes a "claim[]" for damages resulting from injury to...person...arising out of Tenant's use and occupancy of the Premises": inasmuch as Plaintiff was utilizing the sidewalk where the accident occurred in her capacity as a patron of CFSR, her claim arose out of CFSR's use and occupancy of the Premises. CFSR has not argued otherwise, and indeed has not opposed Eastgate's motion for summary judgment on its cross claim for CFSR's breach of its contractual obligation to procure insurance. However, as CFSR asserts, if and to the extent that Eastgate acquired its own insurance to protect against this risk, its recovery on the cross claim is limited to its out-of-pocket costs. *See, Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 NY2d 111 (2001). The Court of Appeals therein wrote:

Lease provisions by which the tenant covenants to procure insurance and name the landlord as an additional insured are generally valid and enforceable [cit.om.]. A landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant [cit.om.]. Here, however, the landlord procured its own insurance covering the risk....The landlord obtained its own insurance and therefore sustained no loss beyond its out-of-pocket costs [cit.om.].

.....
Under settled contract principles...the landlord...is entitled to be placed in as good a position as it would have been had the tenant performed. Its recovery is limited to the loss it actually suffered by reason of the breach [cit.om.].

Inchaustegui, supra, 96 NY2d at 114, 116.

It is therefore

ORDERED, that the motion for summary judgment dismissing Plaintiff's complaint is denied, and it is further

ORDERED, that the motion of defendant Center For Stress Reduction for summary judgment dismissing the cross claim of defendant Eastgate Corporate Park, LLC for contractual indemnification is granted, and the said claim is hereby dismissed, and it is further

ORDERED, that the motion for partial summary judgment by defendant Eastgate Corporate Park, LLC against defendant Center For Stress Reduction on its cross claim for breach of contractual obligation to procure insurance is granted.

The foregoing constitutes the decision and order of the Court.

Dated: April 28, 2021
Goshen, New York

E N T E R



HON. CATHERINE M. BARTLETT, A.J.S.C.

**JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE**