

Carmona v Chetrit Group

2021 NY Slip Op 33893(U)

October 21, 2021

Supreme Court, Queens County

Docket Number: Index No. 714465/2017

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

JESUS CARMONA, Index No.: 714465/2017

Plaintiff, Motion Date: 10/21/21

- against - Motion No.: 6

THE CHETRIT GROUP and MASPETH 5718 Motion Seq.: 2
LLC,

Defendants.

- - - - - x

MASPETH 5718 LLC,

Third-Party Plaintiff,

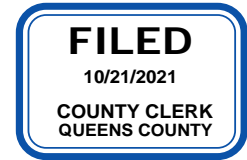
- against -

FRA GROUP, INC.,

Third-Party Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant/third-party plaintiff MASPETH 5718 LLC for an order pursuant to CPLR 3212, dismissing plaintiff's summons and verified complaint in its entirety; and/or in the alternative, granting defendant/third-party plaintiff MASPETH 5718 LLC summary judgment on its third-party complaint against third-party defendant FRA GROUP, INC.:



	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of LawEF 39 - 60
Plaintiff's Affirmation in Opposition.....	EF 61 - 64
FRA Group, Inc.'s Affirmation in Opposition.....	EF 65 - 66
Reply Affirmation-Exhibits.....	EF 68 - 69

This is an action to recover damages for personal injuries sustained by plaintiff on March 2, 2015 when he was caused to

slip and fall on an accumulation of snow and/or ice on the external steps of the premises located at 60-20 59th Place, in Queens County, New York. At the time of the accident, Maspeth 5718 LLC (Maspeth) owned the subject premises. FRA Group, Inc. (FRA) was Maspeth's tenant. This action has been discontinued as against The Chetrit Group.

Plaintiff commenced this action on October 18, 2017 by filing a summons and complaint. Defendants joined issue by service of a verified answer on November 10, 2017. Maspeth commenced a third-party action on March 14, 2019. FRA filed a verified answer to the third-party complaint on April 5, 2019. Maspeth now moves for summary judgment, dismissing the complaint and granting summary judgment in its favor on its third-party complaint.

Plaintiff appeared for an examination before trial on November 9, 2018 and February 27, 2020. Plaintiff testified that at the time of the accident, he was working as an upholsterer with FRA. He held that position since 1992. His general schedule was Monday through Friday, usually beginning at 7:00 a.m. On the day of the accident, he arrived at work sometime before 7:00 a.m. He typically arrived between 5:30 a.m. and 6:30 a.m. It had snowed the day before, but it was no longer snowing at the time of the accident. There was approximately one foot of snow on the ground. The parking lot had been cleared of snow. There are approximately fourteen to sixteen metal steps to get into his office. The building owners normally clean the staircase in the mornings. When he first arrived in the morning, it did not look like the stairs had been shoveled or salted. He never made any complaints about the condition of the staircase. On the date of the accident, he was the first to arrive and made it into the building. After sitting with a cup of coffee, and speaking with his manager, he realized he forgot a canister of coffee in his car. He went outside to get it. It was still before 8:00 a.m. He exited through the same door he had come in that morning. He started to go down the stairwell. On the second step, he began to fall. During his deposition, plaintiff was shown photographs of the staircase, which he testified accurately represented the condition of the staircase immediately after his fall. The photographs, which were marked, are submitted with the motion.

Ilya Khvasechko, Maspeth's superintendent, appeared for an examination before trial on behalf of Maspeth on March 4, 2020, and testified that FRA was a tenant at the premises, which are owned by Maspeth. The premises is a four-building complex with approximately ten tenant spaces. If snow is anticipated, Maspeth would put down salt. When the snowstorm is over, Maspeth's

security guard would clear the snow. Security always clears the snow from the steps before the tenants come to work, and makes a small path for people to get to the building. He does not have to call security to put salt out and shovel the snow. Security knows what to do, and it always happens. When plaintiff advised him of the accident, he checked the calendar to see that the accident occurred on a Monday before 8:00 a.m., and that it had snowed the Sunday evening prior. Shoto Darguashvili was the security guard on duty Sunday evening into the Monday of the accident. He spoke with Mr. Darguashvili about the accident and showed Mr. Darguashvili the photographs plaintiff took immediately after the accident. Mr. Darguashvili informed him that the snow was not on the steps when he applied salt around 5:00 or 6:00 that morning. Mr. Darguashvili told him that he made a path, pushed snow from the steps, and sprinkled salt on the steps. There was no snow or ice on the steps after Mr. Darguashvili cleared the steps. FRA has a sign above the steps. FRA installed the sign. Maspeth was not involved in supervising the installation of the sign. He thinks the snow fell from the sign after Mr. Darguashvili shoveled.

Robert Auerbach, one of FRA's owners, appeared for an examination before trial on February 9, 2021 on behalf of FRA and testified that he had no knowledge regarding the installation of the sign.

In support of the motion, Shoto Darguashvili submits an affidavit, affirming that he is a security guard for the subject premises. He is responsible for the application of salt and snow removal at the tenant entrances. At the time of plaintiff's accident, he worked Sundays and Mondays from 6:00 p.m. to 8:00 a.m. He would have been the only Maspeth employee on the premises Monday morning before 8:00 a.m. It was his custom and practice to begin clearing an evening snowfall around 6:00 a.m. the next morning. He always started with FRA's leased premises by clearing a path and removing snow from the staircase leading to the FRA entrance.

The Lease between Maspeth, as owner, and FRA, as tenant dated September 12, 2008 provides, in relevant part, at Paragraph 4:

[FRA] shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein. [FRA] shall be responsible for all damage or injury to the demises premises. . . caused by, or resulting from, carelessness, omission, neglect or improper conduct of [FRA]. . . or arising out of the

installation, use or operation of the property or equipment of [FRA].

Paragraph 8 provides, in relevant part, that Maspeth shall not be liable:

for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by, or due to, the negligence of [Maspeth]. . . [FRA] shall indemnify and save harmless [Maspeth] against and from all liabilities, damages, penalties, claims, costs and expenses. . . including reasonable attorney's fees, paid, suffered or incurred as a result of any breach by [FRA] of any covenant or condition of this lease, or the carelessness, negligence, or improper conduct of [FRA].

Based upon the submitted evidence, Maspeth contends that it is entitled to summary judgment as it has established, prima facie, that it is free from negligence as the snow fell from FRA's sign sometime within the interim two hour period between Maspeth fully clearing the snow and the accident. Maspeth further contends that it is entitled to contractual indemnification since FRA agreed to defend and indemnify Maspeth for any damages arising out of the installation, use or operation of the premises.

In opposition, plaintiff contends that Maspeth failed to make a prima facie showing that it did not have notice of the subject snow and ice condition. Additionally, there is, at the very least, a triable issue of fact as to whether Maspeth can be charged with constructive notice of a recurring dangerous condition based on Mr. Darguashvili's affirmed statement that it is his belief that the snow may have fallen from the FRA sign onto the staircase and Mr. Khvasechko's testimony that the snow falls and lands on the steps from the sign after Mr. Darguashvili cleans at 6:00 a.m.

FRA opposes the motion on the grounds that Maspeth has failed to establish that it was not negligent, and thus, it is not entitled to indemnification based upon the terms of the Lease.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see Zuckerman v City of N.Y., 49 NY2d 557 [1980]).

A defendant owner who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that he or she 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 (see Bloomfield v Jericho Union Free School Dist., 80 AD3d 637 [2d Dept. 2011]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]). "To meet their initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Przywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Viewing the evidence in the light most favorable to the nonmoving parties, at the very least, triable issues of fact remain as to whether Maspeth had notice of the dangerous condition. Although Mr. Darguashvili affirmed that it was his custom and practice to clear the steps, the photographs, taken immediately after the accident, depict snow on the staircase. As such, issues of credibility preclude summary judgment. Moreover, Maspeth failed to establish that Mr. Darguashvili's snow removal efforts did not "launch a force or instrument of harm" by creating or exacerbating the icy condition (see Rong Wen Wu Arniotes, 149 AD3d 786 [2d Dept. 2017]; Perry-Renwick v Giovanni Macchia Landscaping & Gardening, Inc., 136 AD3d 772 [2d Dept. 2016]; Smith v NY City Hous. Auth., 124 AD3d 625 [2d Dept. 2015]; Viera v Rymdzionek, 112 AD3d 915, 916 [2d Dept. 2013] ["The defendant's submissions failed to eliminate all triable issues of fact as to whether the ice upon which the plaintiff slipped was formed when snow piles created by the defendant's snow removal efforts melted and refroze"]).

Regarding that branch of the motion seeking contractual indemnification, as issues of fact remain as to Maspeth's own negligence, Maspeth is not entitled to summary judgment.

Accordingly, and based upon the above reasons, it is hereby

ORDERED, that the motion is denied.

Dated: October 21, 2021
Long Island City, N.Y.

Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.

