

Bessios v Regent Assoc., Inc.
2022 NY Slip Op 31137(U)
April 7, 2022
Supreme Court, New York County
Docket Number: Index No. 157108/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

EFFIE BESSIOS, as Administratrix of the Estate of
PHILIP BESSIOS, deceased,

Plaintiff,

- v -

REGENT ASSOCIATES, INC., THE CITY OF NEW
YORK, ST. NICHOLAS PARTNERS L.P., 1439 ST.
NICHOLAS CORPORATION, SEONMI BEAUTY
SUPPLY CORP.,

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 77-108, 167, 168, 170, 173-176, 184, 186-190, 194

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 109-135, 169, 171, 177-180, 185, 191-193

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 136-166, 172, 181-183, 195-197

were read on this motion for summary judgment.

Defendant/third-party plaintiff Regent Associates, Inc. (Regent) moves pursuant to CPLR 3212 for an order dismissing the action against it and finding defendant St. Nicholas Partners L.P. (St. Nicholas) and third-party defendant Seonmi Beauty Supply Corp. (Seonmi) liable to it for contractual indemnification and contribution. Plaintiff opposes. Seonmi and St. Nicholas oppose in part. (Mot. seq. 2).

Seonmi moves pursuant to CPLR 3212 for an order dismissing plaintiff's complaint and Regent's cross claims against it. Plaintiff opposes. Seonmi opposes in part. (Mot. seq. 3).

St. Nicholas moves pursuant to CPLR 3212 for an order dismissing plaintiff's claims and all cross claims against it and finding Seonmi liable to it for contractual indemnification and contribution. Plaintiff opposes. Seonmi and Regent oppose in part. (Mot. seq. 4).

I. PERTINENT BACKGROUND

A. Relevant contract provisions

Regent, as landlord, entered into a net lease agreement with St. Nicholas for the premises at 1431-39 St. Nicholas Avenue in Manhattan (NYSCEF 101), thereby agreeing as follows:

9. Repairs.

Tenant shall, at all times during the term, and at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, safe and substantial order and condition, all buildings and improvements on the Premises at the commencement of the term and thereafter erected on the Premises, or forming a part thereof, and their full equipment and appurtenances, both inside and outside, structural and non-structural, extraordinary and ordinary, howsoever the necessity or desirability for repairs may occur, and whether or not necessitated by wear, tear, obsolescence or defects, latent or otherwise; and shall use all reasonable precaution to prevent waste, damage or injury. Tenant shall also, at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, safe and substantial order and condition, and free from vermin, dirt, snow, ice, rubbish and other obstructions or encumbrances, all areas, including but not limited to, sidewalks...

12. Insurance

12.1. During the term Tenant, at its own cost and expense, shall...

12.1.3 Provide and keep in force insurance for liability against bodily injury... under a combined single limit policy in an amount per occurrence not less than \$3,000,000...

13. Indemnity.

Tenant shall indemnify, defend and save harmless Landlord against and from all costs and expenses ...by or on behalf of any person ...arising out of ... (ii) any accident, injury or damage which shall happen in or about the premises or appurtenances or, on or under the streets, sidewalks, curbs or vaults... provided however that the same shall not arise from the willful acts of Landlord...

Additionally, Seonmi entered into a sublease agreement with 1439 St. Nicholas corp., who in turn had entered into a sublease with St. Nicholas. (NYSCEF 125). The sublease states that the net lease (referred to therein as the overlease) is binding on Seonmi, except as provided

in the attached rider, the following provisions of which are in dispute:

18. The following Overlease provisions are hereby changed as stated:
- E. With respect to subparagraphs 12.1.1 and 12.1.3, Undertenant agrees that the insurance coverages referred to shall be purchased with respect to the entire premises (as “premises” is defined in the Overlease) and that either Overtenant or Landlord shall, until further notice to Undertenant, and at their sole option, procure such coverages. Undertenant further agrees that it shall pay to overtenant within ten - (10) days of overtenant’s demand therefor, as additional rent, 60% of the premiums for such insurance. To the extent consistent with the overlease and within overtenant’s authority to so arrange pursuant thereto, and to the extent that so doing does not result in any lesser coverage for overtenant or Landlord, Subtenant shall named as an additional insured under such policies.

B. Amended complaint (NYSCEF 14)

It is alleged in plaintiff’s amended complaint that on June 3, 2017, Philip Bessios (decedent) tripped and fell over a raised sidewalk located next to 1439 West 182nd Street in Manhattan, causing him to sustain severe injuries and resulting in his death on June 7, 2017. Plaintiff, as administrator of his estate, advances causes of action sounding in negligence and wrongful death.

C. Material facts

1. Undisputed facts

Based on the parties’ statements of material fact and responses thereto, the following facts are undisputed:

- (1) The City of New York was discontinued as a defendant in this action.
- (2) Plaintiff did not see decedent’s fall.
- (3) Regent owned the building at 1431-1439 St. Nicholas Avenue on the day of the accident.
- (4) St. Nicholas entered into a net lease with Regent to lease the premises.
- (5) Seonmi entered into a sublease for 1439 St. Nicholas Ave. which explicitly

incorporates the net lease, referring to it as the overlease.

2. Additional relevant deposition testimony

At her 50-h hearing, plaintiff testified that while she did not witness decedent's accident, he told her later that day he had fallen "on the sidewalk, in the raised side... near the tree." She was able to identify from a photograph the area where decedent fell based on decedent's description. (NYSCEF 81). Additionally, at her deposition, she testified that she had previously walked on that sidewalk and had noticed no defect, but that after the accident she saw that a portion appeared to be raised due to tree roots. (NYSCEF 98).

Regent's property manager testified that he was unaware of any witnesses to the accident. He stated that at the time of the accident, St. Nicholas was the tenant at 1431 St. Nicholas Avenue and that Seonmi was the tenant at 1439 St. Nicholas Avenue. He related that he conducted frequent inspections of the premises and the surrounding area, including several times before plaintiff's accident, and did not recall seeing a raised portion of sidewalk adjacent to the premises. (NYSCEF 103).

St. Nicholas's president testified that St. Nicholas was responsible for inspecting and keeping clean the portion of sidewalk adjacent to its space, and that Seonmi had the same responsibility for its space. He did not witness decedent's accident and did not know of any raised portion on the sidewalk adjacent to Seonmi's property. (NYSCEF 104).

Seonmi's president testified that neither she nor her employees witnessed the accident, that she checked the walkway in front of her store daily to make sure that it was clean, and that she did not recall seeing a raised portion of sidewalk. (NYSCEF 105).

Plaintiff also produced an independent witness who testified that between 8:15am and 8:30am, he witnessed the accident while in line at a nearby food truck. While he initially testified

that he did not see decedent fall, he saw him on the ground afterward and later testified that he saw the decedent trip by catching his foot on the “raised sidewalk.” When asked to clarify the discrepancy, he stated that he saw decedent trip and fall out of the corner of his eye while talking to a friend, but did not see whether decedent’s foot had struck the sidewalk. He later reiterated that decedent tripped over the raised portion of sidewalk, although the witness did not see his feet at the time. He also testified that “I’ve known about the sidewalk, its all messed up” and when asked “was that when you first saw the raised sidewalk, that day [of the accident]?” he responded “yes, I’ve seen that, yes. It’s not the first time though.”

II. DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Movants’ liability to plaintiff

1. Contentions

Regent contends that as plaintiff did not see decedent fall, absent videos or photographs of the accident, and as the only eyewitness testimony contains multiple contradictory statements,

plaintiff cannot prove that any parties breached a duty to decedent, or that such breach caused his injuries. Additionally, it contends that the testimony of Regent's and Seonmi's witnesses that they inspected the sidewalk before the accident and did not recall it being raised, is uncontroverted. (NYSCEF 79).

According to Seonmi, as the portion of sidewalk on which the decedent allegedly tripped was raised by tree roots, neither the landlord or tenants may be held responsible for the accident, and that Regent, as owner of the premises, had a non-delegable duty to maintain the sidewalk. (NYSCEF 110)

St. Nicholas also references Regent's non-delegable duty to maintain the sidewalk, and also maintains that plaintiff fails to establish that the accident occurred due to a defective sidewalk condition. (NYSCEF 139).

In opposition, plaintiff argues that movants fail to meet their *prima facie* burden of proving that they did not create the dangerous condition or have actual or constructive notice of it. She relies on the testimony of the eyewitness that the raised sidewalk had existed in that condition for some time before the accident in arguing that it, at a minimum, raises a triable issue of fact, and that his inconsistent statements raise issues of credibility properly left to the trier of fact. She also argues that her deposition testimony concerning the hearsay conversations had with decedent prior to his death are admissible for the limited purpose of defeating a motion for summary judgment. (NYSCEF 174, 178, 182).

In reply to plaintiff, Regent argues that as the eye witness' testimony is contradictory and conclusory, it cannot raise a triable issue of fact, and observes that he was never shown the photograph on which plaintiff had identified the site of decedent's fall. Regent denies that plaintiff's conversations with decedent about the accident are admissible. (NYSCEF 194).

2. Analysis

a. Regent's liability

Pursuant to the Administrative Code of the City of New York § 7-210, it is the “duty of the owner of real property abutting any sidewalk... to maintain such sidewalk in a reasonably safe condition... [who] 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...” (Admin. Code § 7-210[a-b]). “[T]he duty applies with full force notwithstanding an owner’s transfer of possession to a lessee or maintenance agreement with a nonowner.” (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167 [2019]). For an owner of real property to obtain summary dismissal of a cause of action under this section of the Administrative Code, the defendant must establish, *prima facie*, not only that it did not violate Admin. Code § 7-210, but also 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.” (*Gyokchyan v City of New York*, 106 AD3d 780, 781 [2d Dept 2013]; *Garcia v City of New York*, 99 AD3d 491, 492 [1st Dept 2012]).

Here, it is undisputed that Regent neither created nor had actual notice of the allegedly defective condition. “To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.” (*Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]). To demonstrate a lack of constructive notice, a defendant must offer “evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell.” (*Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]).

The frequent inspections of the premises and surrounding areas conducted by Regent’s

property manager falls short of establishing a lack of constructive notice absent evidence of when he last conducted an inspection. (*Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.*, 110 AD3d 637 [1st Dept 2013]). Seonmi's president's daily inspections of the sidewalk for cleanliness are also insufficient to establish lack of constructive notice. (*See Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018] [evidence of inspections insufficient to demonstrate lack of constructive notice where condition at issue not subject of inspections]).

Even if Regent meets its *prima facie* burden, plaintiff raises triable issues of fact based on the eye witness' testimony that he knew of the raised sidewalk condition before decedent's accident, notwithstanding the contradictory statements, as "[i]t is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v Restani Const. Corp.*, 18NY3d 499, 505 [2012]). *Clark v New York City Housing Auth.* is inapposite, as there, the Court found that a conclusory expert affidavit did not create a triable issue of fact. (7 AD3d 440 [1st Dept 2004]).

Additionally, "hearsay evidence may be considered to defeat a motion for summary judgment as long as it is not the only evidence submitted in opposition" (*Fountain v Ferrara*, 118 AD3d 416 [1st Dept 2016], quoting *O'Halloran v. City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). As plaintiff submits photographs of the accident site, along with the testimony of an independent eyewitness, there remain issues of material fact as to whether plaintiff's accident was caused by the raised sidewalk.

b. Seonmi and St. Nicholas's liability

In light of the non-delegable duty imposed on the owner of the abutting premises to maintain and repair the sidewalk (Admin. Code § 7-210), lease provisions obligating a tenant to repair the sidewalk impose on the tenant no duty to a third party. (*Collado v Cruz*, 81 AD3d 542

[1st Dept. 2011]). Absent any allegation that Seonmi or St. Nicholas either created the dangerous condition or made special use of the sidewalk, there is no basis to hold them directly liable to plaintiff. (*Crimlis v City of New York*, 200 AD3d 555 [1st Dept 2021]).

B. Movants' contract claims

1. Contentions

Regent argues that it is entitled to contractual indemnification and contribution from Seonmi and St. Nicholas pursuant to paragraphs nine and thirteen of the net lease. (NYSCEF 79).

Seonmi contends that the lease indemnification provision is invalid and unenforceable pursuant to General Obligations Law § 5-321, as it purports to make the tenant liable for the landlord's negligence. Additionally, as Admin. Code § 7-210 imposes a non-delegable duty on property owners for sidewalk repairs, it argues that Regent is not entitled to indemnification or contribution. Seonmi also argues that, as the sublease modifies the insurance procurement provision in the net lease as to it, it had no obligation to procure insurance. (NYSCEF 110).

St. Nicholas contends that the entity named in this action, St. Nicholas Partners, L.P., was dissolved almost 12 years prior to plaintiff's accident, and its successor in interest is St. Nicholas Partners Corp., thus Regent's claims against the dissolved entity must fail. Additionally, as the portion of the sidewalk where decedent fell is adjacent to Seonmi, it would be the party that owes indemnification and contribution pursuant to the lease, not St. Nicholas. (NYSCEF 139).

In opposition to Seonmi, Regent contends that Admin. Code § 7-210 does not relieve a tenant of its obligations to the landlord undertaken in the lease, and that General Obligations Law § 5-321 does not prohibit indemnity where a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves. (NYSCEF 169).

In reply to Regent, Seonmi argues that, absent an obligation to procure insurance under the lease, the indemnification provision is invalid under the General Obligations Law. (NYSCEF 193).

2. Analysis

a. Indemnification and contribution

Notwithstanding the nondelegable duty on the owner of premises to maintain and repair the abutting sidewalk, a “tenant may be held liable to the owner for damages resulting from a violation of ... [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of [the property].” (*Wahl v JCNYS, LLC*, 133 AD3d 552 [1st Dept 2015], quoting *Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]).

Here, it is undisputed that both Seonmi and St. Nicholas are bound by the terms of the net lease, which requires them to “keep, replace and maintain in thorough repair... all areas, including but not limited to, sidewalks...” and to “indemnify, defend and save harmless Landlord against and from all costs and expenses arising out of ... any accident, injury or damage which shall happen in or about the premises or appurtenances or, on or under the streets, sidewalks, curbs or vaults...” Thus, they must indemnify Regent in the event they are found liable.

Additionally, “Where, as here, a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5–321 does not prohibit indemnity.” (*Great Northern Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 419 [2006]). That the sublease modified the insurance procurement obligations as to Seonmi is of no moment, as the parties still agreed to allocate risk of liability to a third party.

b. Dissolved entity

“[A] lease to a corporation is not terminated by the dissolution of the corporation ... [and that] unless the lease so provides, the rights and obligations thereunder are not extinguished by the corporation's dissolution” (*Goldberg v Harwood*, 216 AD2d 152, 153 [1st Dept 1995]). As St. Nicholas Partners L.P. is party to the net lease, it is may still be held liable to Regent under the lease agreement.

c. Insurance procurement

As it is undisputed that the terms of the sublease explicitly modify the terms of the insurance procurement provision in the net lease to remove Seonmi’s obligation to procure insurance, any claims against it for failure to procure insurance fail.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff Regent Associates, Inc.’s motion for summary judgment (mot. seq. 2) is granted to the extent that it is entitled to contractual indemnification and contribution from Seonmi and St. Nicholas if it is found liable, and otherwise denied; it is further

ORDERED, that third-party defendant Seonmi Beauty Supply Corp.’s motion for summary judgment (mot. seq. 3) is granted to the extent that plaintiff’s direct claims and any cross claims for breach of contract for failure to procure insurance against it are severed and dismissed and otherwise denied; and it is further

ORDERED, that defendant St. Nicholas Partners L.P.’s motion for summary judgment (mot. seq. 4) is granted, to the extent that plaintiff’s direct claims against it are severed and dismissed and otherwise denied.

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4/7/2022

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE