

Gurwitz v Claridge House LLC
2022 NY Slip Op 31338(U)
April 25, 2022
Supreme Court, New York County
Docket Number: Index No. 159014/2020
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05RCP**

Justice

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KAREN GURWITZ,

Plaintiff,

- v -

CLARIDGE HOUSE LLC, WHOLE FOODS MARKET
GROUP INC., CITY OF NEW YORK

Defendants.

-----X

INDEX NO. 159014/2020

MOTION DATE 03/08/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 6, 7, 8, 9, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant Whole Foods Market Group, Inc's motion for summary judgement is denied.

Plaintiff Karen Gurwitz commenced this negligence action on October 23, 2020, alleging that on May 2, 2020, she exited the building located at 1551 Third Avenue, New York, NY 10128 (the "Premises") and tripped and fell due to a hole or depressed area on the sidewalk abutting the Premises (NYSCEF Doc. No. 1 [Compl. at ¶¶53-54]). Plaintiff asserts claims against: (1) the landlord of the Premises, Claridge House LLC ("Claridge House"); (2) the lessee of the Premises, Whole Foods Market Group, Inc ("Whole Foods"); and (3) the City of New York ("the City") alleging that they created the subject defect or failed to rectify same (*Id.* at ¶64). Whole Foods interposed an Answer on December 22, 2020, asserting, as relevant here, cross claims against Claridge House for negligence and contractual and common law indemnity (NYSCEF Doc. No. 6 [Answer at ¶¶18-22]).

Whole Foods now moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint or, alternatively, granting it conditional summary judgment on its cross claim against Claridge House for contractual indemnification and directing Claridge House to reimburse the attorney's fees incurred by Whole Foods to date.

As a threshold matter, the Court is unpersuaded by the arguments in opposition to the instant motion that Whole Foods' failure to comply with Uniform Rules 202.8(a) and 202.8-g mandates the denial of the motion; this non-compliance has not prejudiced plaintiff or Claridge House (See Meserole Hub LLC v Rosenzweig, 71 Misc 3d 1222(A) [Sup Ct, Kings County 2021]; but see Amos Financial LLC v. Crapanzano, 145 NYS 3d 366 [Sup Ct, Rockland County 2021]). Accordingly, the Court will consider Whole Foods' motion on its merits.

DISCUSSION

"The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Whole Foods has not satisfied this standard. Whole Foods premises the branch of its motion seeking summary judgment dismissing the complaint on Section 18.03(A) of the Lease which provides, as pertinent here, that:

Tenant shall, at Tenant's own expense, make as and when needed all (a) nonstructural repairs and replacements to the sidewalks and curbs adjacent to the Premises and shall keep said sidewalks and curbs free from snow, ice, dirt and rubbish and sweep street to 18" from the curb. However, Tenant shall not be required to make major structural repairs and replacements to the sidewalk and curbs except if damaged due to use, acts or omissions by Tenant or Persons Within Tenant's Control (especially the 88th Street loading dock area).

(NYSCEF Doc. No. 28 [Lease at §18.03] [emphasis added]).

In support of the instant motion, Whole Foods argues that correcting the subject sidewalk defect required a major structural repair and was therefore not its responsibility. In opposition, Claridge House maintains that the sidewalk defect is non-structural and therefore the responsibility of Whole Foods. Ultimately, this argument is irrelevant to the resolution of this motion. As a general rule, “[p]rovisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff” (Collado v Cruz, 81 AD3d 542 [1st Dept 2011]) and, while an exception to this rule exists, that exception is inapplicable here. Therefore, regardless of whether the defect in question was structural or non-structural, any failure by Whole Foods to make repairs required under Section 18.03 would not provide grounds for plaintiff to recover against it. There are, however, potential avenues for plaintiff to recover against Whole Foods that are not addressed by any of the parties.

“New York City Administrative Code § 7-210 imposes a non-delegable duty on the owner of an abutting premises to maintain and repair the sidewalk” (Id. [emphasis added]). (Collado v Cruz, 81 AD3d 542, 542 [1st Dept 2011]). Accordingly, a tenant may not be liable in a tort action based on a failure to maintain or repair an abutting sidewalk unless: (1) the parties’ lease comprehensively displaces the landlord’s duty to maintain the sidewalk and places it exclusively on the tenant; (2) the tenant affirmatively causes or creates the defect that caused plaintiff to trip; or (3) the tenant “put the subject sidewalk to a special use for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition” (Kellogg v All Saints Hous. Dev. Fund Co., Inc., 146 AD3d 615 [1st Dept 2017]; see also Abramson v Eden Farm, Inc., 70 AD3d 514 [1st Dept 2010]).

The first of these exceptions is inapplicable here. A review of the Lease demonstrates that it does not shift Claridge House's duty to maintain the subject sidewalk onto Whole Foods so comprehensively and exclusively that plaintiff may recover against Whole Foods for a breach of its limited duty to maintain the sidewalk under the Lease (See e.g., Collado v. Cruz, 81 AD3d 542 [1st Dept 2011]). However, on the record before it, the Court cannot say whether either of the two other exceptions enumerated above apply; Whole Foods has not submitted any evidence establishing that it did not affirmatively create the defect in the sidewalk or that it did not put the sidewalk to a special use for its own benefit. As a result, that branch of Whole Foods' motion for summary judgment dismissing the complaint must be denied.

The branch of Whole Foods' motion seeking a grant of conditional summary judgment on its indemnification cross claim against Claridge House is also denied. "The right to contractual indemnification depends upon the specific language of the contract" (Langner v Primary Home Care Services, Inc., 83 AD3d 1007, 1010 [2d Dept 2011] [internal citations and quotations omitted]) and a grant of conditional summary judgment is appropriate on a claim for contractual indemnification where the contract in question unambiguously sets forth the parties' agreement for one party to indemnify the other (See e.g., Hong-Bao Ren v Gioia St. Marks, LLC, 163 AD3d 494, 496 [1st Dept 2018]).

In support of its motion, Whole Foods points generally to Section 11.03(b) of the Lease, which provides that:

Landlord agrees except to the extent of Tenant's or Persons Within Tenant's Control's negligence or willful misconduct, to indemnify... Tenant ... against any and all liability (statutory or otherwise), claims, suits, demands, damages, judgments, costs, fines, penalties, interest and expenses (including reasonable counsel fees and disbursements incurred in any action or proceeding), to which Tenant or any such partner, officer, director, contractor, agent or employee may be subject or suffer arising from, or in connection with (i) except if Tenant or Persons Within Tenant's Control are at fault or negligent but Landlord and its agents,

employees, owners and partners are not at fault or negligent, any liability or claim for any injury to, or death of, any persons or damage to property (including any loss of use thereof), occurring in a non-public area of the Building within Landlord's exclusive custody and control, or ... (iv) any defaults by Landlord after notice and a reasonable opportunity to remedy the same in the performance of Landlord's obligations under this Lease or from any act, omission or negligence of Landlord or its agents, employees or owners in the Building, unless Section 8.04 applies to release Landlord, provided that in no event shall this paragraph (b) permit Tenant to recover consequential, special or punitive damages, except as indemnity against such damages recovered by another party against Tenant, or damages for lost profits.

(NYSCEF Doc. No. 28 [Lease at §11.03(b)] [emphasis added]).

In a tender letter to Claridge House demanding that Claridge House defend and indemnify it, Whole Foods cited Section 11.03(b)(i) (NYSCEF Doc. No. 29 [Tender Letter]) but it is not clear that this sub-section applies, as the sidewalk is neither “non-public” nor in the exclusive control of Claridge House. To the extent Whole Foods is seeking indemnification under Section 11.03(b)(iv) of the Lease, questions of fact exist as to whether Whole Foods provided Claridge House with the necessary notice and time to remedy the sidewalk defect that are prerequisites to Claridge Houses' indemnification obligations under that subsection.

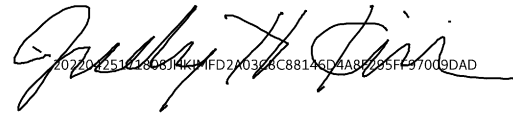
In light of Whole Foods' failure to establish that Claridge House's indemnification obligations have been triggered, a grant of conditional summary judgment on Whole Foods' cross claim for indemnification is inappropriate (See e.g., Goyard NY, LLC v Friedland Properties, Inc., 160 NYS3d 600 [1st Dept 2022]; Langner v Primary Home Care Services, Inc., 83 AD3d 1007, 1010 [2d Dept 2011]). Accordingly, that branch of Whole Foods' motion for an order granting it conditional summary judgment as to its contractual indemnification cross claim is denied. Whole Foods' related request for an order directing Claridge House to reimburse it for its attorneys' fees and defense costs is denied for the same reasons set forth above.

In light of the foregoing, it is

ORDERED that Whole Foods' motion for summary judgment is denied in its entirety; and is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with notice of entry upon all parties by NYSCEF within fifteen days of the date of this decision and order.

This constitutes the decision and order of the Court.



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4/25/2022

DATE

JUDY H. KIM, 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