Ramirez v B-K Realty II, LLC

2022 NY Slip Op 33875(U)

November 16, 2022

Supreme Court, Kings County

Docket Number: Index No. 513533/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 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 16th day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- -X

PASTORA RAMIREZ,
Plaintiff,

- against-

B-K REALTY II, LLC, DYNAMIC MEDICAL IMAGING, P.C., and HAMILTON CARPET & FLOOR COVERING, INC.,
Defendants.

- X

B-K REALTY II, LLC,
Third-Party Plaintiff,

-against-

DYNAMIC MEDICAL IMAGING, P.C.,
Third-Party Defendant.

- X

B-K REALTY II, LLC,
Second Third-Party Plaintiff,

-against-

HAMILTON CARPET & FLOOR COVERING, INC.,
Second Third-Party Defendant.

- X

DECISION / ORDER

Index No.: 513533/2019
Mot. Seq. No. 2
Submitted: 10/13/22

The following e-filed papers were read herein:	NYSCEF Doc. No.[1]
Notice of Motion, Affirmation and Exhibits	62-80
Opposing Affirmation and Exhibits	82-85
Reply	86

Upon the foregoing papers in this personal injury action, defendant/second third-party defendant Hamilton Carpet & Floor Covering, Inc., ("Hamilton") moves (in motion sequence [mot. seq.] two), for an order, pursuant to CPLR 3212 granting it summary judgment and dismissing the plaintiff's complaint as well as the second third-party complaint[2] of defendant/third-party plaintiff B-K Realty II, LLC ("B-K"), as well as all cross claims. Defendant/third-party defendant Dynamic Medical Imaging P.C. ("Dynamic" or "DMI") opposes the motion. The motion is not opposed by defendant/third-party plaintiff B-K or by plaintiff.

Factual Background and Procedural History

This action arises from a slip and fall on an allegedly icy sidewalk in front of the properties known as 73-36 Grand Avenue (Dynamic) and 73-40 Grand Avenue (Hamilton) in Queens NY. The property owner is defendant/third-party plaintiff B-K. B-K owns three contiguous lots on this block, Block 2803, Lots 5, 7, and 10. Dynamic leased 73-36 Grand Avenue, which is Lot 7, and Hamilton leased 73-40 Grand Avenue, which is Lot 10. They are adjacent to each other despite not being consecutively numbered. The accident occurred on March 8, 2019.

[1] New York State Courts Electronic Filing Document Numbers.

Plaintiff commenced the main action by filing the summons and verified complaint on June 19, 2019 against B-K, as owner of the property. B-K filed an answer on August 18, 2019. B-K commenced the third-party action against Dynamic on November 12, 2019, seeking *inter alia* indemnification and contribution. Plaintiff subsequently amended her complaint as of right, on November 13, 2019, and added third-party Dynamic as a direct defendant. Dynamic answered both the third-party complaint and the first-party complaint on February 4, 2020. B-K then commenced a second third-party action against Hamilton on June 29, 2020, seeking indemnification and contribution, a defense to plaintiff's suit, attorneys' fees, and damages for breach of contract for failing to procure insurance. Plaintiff again amended her complaint, as of right on July 16, 2020, and added second third-party defendant Hamilton as a direct defendant. B-K and Dynamic answered the plaintiff's second amended complaint. Therein, Doc 24, Dynamic asserts cross-claims against the property owner, but not against Hamilton, as Hamilton was not yet a party. Hamilton answered the complaint on July 28, 2020 [Doc 35] and the second third-party complaint on July 29, 2020 [Doc 41]. Dynamic answered the second amended complaint on July 29, 2020 [Doc 40]. Therein, Dynamic asserts cross-claims in the main action against both B-K and Hamilton for contribution and indemnification and related relief. The Note of Issue was filed on June 10, 2022. This motion was filed on August 9, 2022, the last day to do so, and as such, is timely.

Plaintiff's deposition testimony and bill of particulars indicate that the incident occurred on the sidewalk in front of the portion of the property leased to Dynamic (see NYSCEF Doc. No. 67 [plaintiff's bill of particulars] Docs 70 and 71 [plaintiff's EBT

transcripts] and Docs 68 and 69 [photographs of the sidewalk]). Plaintiff testified [Doc 70 Page 14] that her accident occurred "in front of a building with the letters DMI." She then identified the photos. After being shown the Google photo that is Page 2 of Doc 69, she was asked,

> "Q. Do you see the doorway with the letters DMI over that doorway?
>
> A. Yes.
>
> Q. Did your accident occur somewhere between that tree and the doorway with DMI over it?
>
> A. Yes."

Movant Hamilton avers in counsel's affirmation in support [Doc 64 ¶4] that the motion should be granted "because the Plaintiff's accident did not occur on property owned, leased, occupied, or controlled by Hamilton Carpet, and because the alleged dangerous condition was not created by Hamilton Carpet."

Dynamic, in opposition to the motion, argues by counsel [Doc 82] that summary judgment is a drastic remedy, that Hamilton has not made a prima facie case for summary judgment, and that the motion is premature.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be

granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York,* 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp*., 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept

1987]; Strychalski v Mekus, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc*., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor,* 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc*., 43 AD3d 839 [2d Dept 2007]).

Here, it must first be noted that neither the plaintiff nor the defendant property owner B-K have opposed the motion. The only opposition is from Dynamic. However, in order for Dynamic to have asserted a valid claim against Hamilton, it would had to have alleged that if it bears any fault for the happening of the plaintiff's accident, that it would only be

because Hamilton had somehow caused or created the condition in front of Dynamic's store, which it has not done. Jorge Nieto provides an affidavit [Doc 77] which refers to his EBT [Doc 73] and states that he is the owner of Hamilton, and [¶6] that "As the owner of Hamilton Carpet & Floor, I take part in the snow removal needs for the sidewalk. I can confirm that Hamilton Carpet & Floor did not create the condition the Plaintiff slipped upon because my employees and I have never and would never push snow over the property boarder from Hamilton Carpet's property to Dynamic Medical Imaging's property. Therefore, Hamilton Carpet & Floors is not responsible for the snow and ice condition that existed upon Dynamic Medical Imaging's property at the time of the alleged accident."

Dynamic's deposition witness, Dr. Paresh Rijsinghani, testified at an EBT held on June 8, 2022, that he is the sole owner of Dynamic, and that he did not know the name of the landlord [Doc 72 Page 9] or the addresses of the two stores on either side of his business [Page12]. He was asked about his snow removal procedures, and responded [Page 14] that his office manager hires a service if "there is a need for snow removal and salting." He added, however, that "In the case that she -- that someone arrives at the facility first, that person will -- usually a technologist will do it herself in order to provide a safe path to the entrance of our building for the patients." Dr. Rijsinghani was asked what took place with regard to the snowfall prior to plaintiff's accident [Page 16]. He replied "That person would have called the service, who was my manager, Madilyn. She left many years -- a few years ago to a different state. I cannot get a hold of her. I'm not involved in these details of which service she hired or if she did it herself or what happened." He then said there were no records, checks, or anything else he could locate to help him to answer the question. He did

not know the name of the snow removal service, and did not know if there were any records with this information [Page 18]. Then, he was asked if he had been at the location around the time of the plaintiff's accident, and he responded [Page 19] that in 2019 he lived in New Jersey, had ten facilities in New Jersey, and stated that "my attendance at Dynamic was not required. However, I did work there probably two or three times a month." The doctor was then asked [Page 21] if anyone at Dynamic "would be aware of the snow removal process or companies used" and he said, "Not to my knowledge." The doctor was then questioned by the attorney for Hamilton. He specifically asked [Page 22] "Did you ever witness a person on the sidewalk over by Hamilton Carpet's property pushing snow over what would be the property line in front of what DMI is?" The doctor responded, "Not personally." He was then asked, "Did anybody on your staff ever complain about someone over at Hamilton Carpet pushing snow over at the property line in front of DMI? Dr. Rijsinghani responded, "I don't recall." Thus, there is not a shred of evidence that Hamilton caused or created the icy condition on the sidewalk in front of Dynamic's business.

As such, Hamilton's motion must be granted. NYC Administrative Code § 7-210, combined with § 19-152, imposes a non-delegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute (*see Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]. The Administrative Code does not impose any duty on a commercial tenant, leaving that issue to the property owner and his contract (lease) with the tenant. While B-K, as property owner, commenced third-party actions against both of the adjoining lessees, plaintiff's deposition was taken subsequently, in November of 2020, and

once it was taken, it became clear that the plaintiff slipped and fell in front of Dynamic's business, and not in front of Hamilton's business.

Because §7-210 of the Administrative Code is a derogation of the common law, the court notes that commercial leases must govern the parties' obligations to each other. To be clear, a property owner is no longer entitled to summary judgment on the ground that it is an out-of-possession landlord. The argument that a property owner is an out-of-possession landlord

> "is no longer sound in light of the Court of Appeals' decision in *Xiang Fu He v Troon Mgt., Inc.* (34 NY3d 167, 172-174 [2019]. Notwithstanding any lease provisions requiring [the commercial tenant] to remove snow and ice from the sidewalk, 50 East, as owner of the property abutting the sidewalk, had a nondelegable duty to keep that sidewalk in a safe condition including the removal of snow and ice (*Labiner v Jerome Florist, Inc.*, 189 AD3d 624, 625 [1st Dept 2020]" [internal citations omitted]).

Accordingly, it is **ORDERED** that third-party defendant Hamilton's motion for an order dismissing the complaint and the third-party complaint as against it is granted. The plaintiff's complaint is dismissed as against defendant Hamilton. As movant Hamilton is the sole second third-party defendant, he second third-party complaint of defendant/third-party plaintiff B-K against third-party defendant Hamilton is dismissed in its entirety.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.