Lanza v Avenue R Realty, LLC
2022 NY Slip Op 33927(U)
November 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 509307/2018
Judge: Debra Silber

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 18th day of November, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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EDWARD LANZA, AS ADMINISTRATOR OF THE ESTATE OF LAWRENCE LANZA, DECEASED,

Plaintiff,

- against-

AVENUE R REALTY, LLC, RADNET, INC., LENOX HILL RADIOLOGY MIDWOOD and DAVID FLAGLER,

Defendants.

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DECISION / ORDER

Index No.: 509307/2018
Mot. Seq. No. 5

RADNET, INC., AND LENOX HILL RADIOLOGY MIDWOOD,

Third-Party Plaintiffs,

-against-

DAVID FLAGLER,

Third-Party Defendant.

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The following e-filed papers were read herein:	NYSCEF Doc. No
Notice of Motion, Affirmation and Exhibits	94-104, 117
Opposing Affirmation and Exhibits	108-115
Reply	116

Upon the foregoing papers in this personal injury action, defendants Avenue R. Realty, LLC, Radnet, Inc., and Lenox Hill Radiology Midwood, move (in motion sequence 5), for an order, pursuant to CPLR 3212 granting them summary judgment and dismissing the plaintiff's complaint as well as all cross claims, or, if that is not granted, permitting defendants Radnet, Inc., and Lenox Hill Radiology Midwood to amend their answer to assert an affirmative defense of collateral sources. The motion is not opposed by defendant/third-party defendant Flagler, the owner of the adjacent property. After virtual oral argument, the branch of the motion for summary judgment is denied, and the branch of the motion for leave to amend is granted.

Factual Background and Procedural History

This action arises from a slip and fall on an allegedly icy sidewalk in front of the property known as 1230 Avenue R, Brooklyn, NY. The property owner is defendant Avenue R Realty, LLC. The accident occurred on January 10, 2018.

Plaintiff commenced the main action by filing the summons and verified complaint against the owner of the property and its commercial tenants. The owner filed an answer with cross-claims against its tenants. The tenants filed an answer with cross-claims against the owner. The tenants subsequently agreed to defendant and indemnify the owner, and now one law firm is representing all three defendants. On October 29, 2018, the tenants filed a third-party action against the adjacent property owner, David Flagler. Plaintiff subsequently amended his complaint as of right, on November 14, 2018, and added third-party Flagler as a direct defendant. Flagler answered both the third-party complaint and the main complaint on December 23, 2018. The property owner, Avenue R Realty, LLC, then

commenced a second third-party action against another entity on October 21, 2020, which has since been discontinued. The Note of Issue was filed on June 16, 2021. This motion was filed on June 27, 2022. Pursuant to the order of J. Knipel which denied movants' motion to strike the note of issue, dated June 29, 2022, the branch of the motion for an extension of time to move for summary judgment was "denied with leave to renew before the IAS judge in accordance with *Brill v City of New York*, 2 NY3d 648 [2004]." As the motion was filed two days before Justice Knipel's order, it makes no request for leave to make a late motion, nor does it set forth good cause for doing so. Plaintiff's opposition makes no mention of the fact that the motion was filed almost a year late. The court will consider the motion on the merits.

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 Lenox Hill Radiology. Photos taken by plaintiff are identified at his EBT. They are annexed as Doc. 102.

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]).

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.

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]).

Here, in acknowledgement of the lease provisions and the law, the moving defendants now have one law firm representing all of them and are united in interest.

On a motion for summary judgment involving a slip-and-fall on snow and/or ice, the moving defendant has the burden of establishing, prima facie, "that it neither created the alleged ice condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Zamora v David Caccavo, LLC*, 190 AD3d 895, 897 [2d Dept 2021]). Here, the owner of the subject property abutting the sidewalk where the plaintiff allegedly slipped and fell has failed to establish, prima facie, that it lacked constructive notice of the alleged ice condition. "To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident" (see *Zamora v David Caccavo, LLC*, 190 AD3d 895, 897 [2d Dept 2021]). Mere reference to general cleaning and inspection practices is insufficient to establish a lack of constructive notice (*see Saporito-Elliott v*

United Skates of Am., Inc., 180 AD3d 830, 832 [2d Dept 2020]; *Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948 [2d Dept 2019]).

Here, the evidence submitted by defendants merely references the general cleaning and inspection practices of the lessee with regard to snow and ice removal and fails to specifically state when the lessee or its agents last cleaned or inspected the sidewalk relative to when the plaintiff allegedly slipped and fell on the sidewalk. The witness provided by defendants for deposition, Sergey Shpillar, testified that he is employed by Midrockland Imaging Partners, a subsidiary of Radnet, Inc. He is the vice president of operations, and his office is in Queens. They have sixteen facilities in Brooklyn and Queens which he oversees. He said that there was a snow removal contractor for the premises, and "when the snow comes, the company comes." He did not know the name of the company. He was asked if someone needed to call them to come and he replied [Page 34] that the question "it's more of a question to corporate." He said the bills for the snow removal were sent to "corporate," that is, Radnet, in California. He also testified that there was a porter, Charley, who was employed by the company. Charley was not at the site on the date of the accident [Page 50]. He said he himself would only visit the property once or twice a month [Doc 103 Page 26]. Asked "do you know when you were last at the property before [the date of plaintiff's accident]," Mr. Shpillar said he did not recall and had no records to refer to that would help him answer this question. The office manager called him on his cell phone to tell him about the plaintiff's accident, but he did not go to the location to investigate. Accordingly, defendants Avenue R Realty, LLC, Radnet, Inc., and Lenox Hill Radiology Midwood's motion for summary judgment dismissing the complaint is denied.

Turning to the branch of the motion for leave to amend the answer, that branch of the motion is granted without opposition. Defendants Radnet, Inc. and Lenox Hill Radiology Midwood's Proposed Amended Answer annexed to the motion at Doc 104 shall be filed and served by electronic filing within 30 days.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.