

Sparagi v ACP Amsterdam II, LLC
2022 NY Slip Op 34006(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 150831/2020
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

ANGELA SPARAGI,

Plaintiff,

- v -

ACP AMSTERDAM II, LLC, CITIBANK,

Defendant.

-----X

CITIBANK

Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.

Defendant.

-----X

DECISION + ORDER ON MOTION

Third-Party
Index No. 595564/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 129, 130

were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury she alleges she suffered when she tripped on a sidewalk adjacent to the premises located at 162 Amsterdam Avenue, New York, New York (Subject Premises) on June 2, 2019. Citibank is the occupant and lessee of the Subject Premises. Citibank and Cushman & Wakefield (Cushman) had a full-service facility maintenance agreement pertaining to many properties including the Subject Premises.

PENDING MOTION

Citibank initially moved for summary judgment on its third-party claims for common law and contractual indemnification as against Cushman, by way of motion dated May 4, 2021. That motion was denied on the record by Judge D'Auguste without prejudice until depositions and discovery were completed. Citibank made a second motion for summary judgment after depositions were complete. However, the initial decision by Judge D'Auguste was not attached to the second summary judgment motion, and said motion was denied without prejudice renewal with a copy of the transcript.

On November 15, 2022, Citibank renewed its motion with a copy of the transcript. The motion was fully briefed and marked submitted on that date and the court reserved decision.

For the reasons stated below, the motion is granted.

ALLEGED FACTS

This action arises out of an incident that took place on June 2, 2019, at approximately 11:30 p.m. when the plaintiff alleges, she tripped over a broken, uneven and cracked sidewalk and fell in front of 162 Amsterdam Avenue in Manhattan.

Citigroup Technology, Inc. (Citi) had a Facilities Management Services Agreement with Cushman that was entered into on March 1, 2018. The Agreement was in full force and effect at the time of the incident with regards to the Citibank branch located at the Subject Premises on the date of the incident.

The Agreement has an indemnification clause in Article 18 that provides in pertinent part:

Contractor (Cushman & Wakefield) shall indemnify, hold harmless and defend Citi, its affiliates and their respective officers, directors, employees, agents, contractors, landlords and property agents (Citi indemnitees) on a continuing basis against any liability, including any interest, fines, damages, expenses or costs incurred including reasonable attorneys' fees made by a third-party against or suffered by the Citi indemnitees arising from any or all of the following matters:

(a) the death or personal injury of any person which was caused by the negligence of the contractor or its affiliates or the negligence of any of the contractor's staff thereof; or

(c) the contractor's breach of any of its obligations under this agreement (including any sub-contractor's failure to perform its obligations required by the applicable agreement with the contractor.

Starting on page 97 of the agreement is a list of various hired services and the contractor's obligation. For all roads, drives, paths, steps, ramps, and kerbs, the contractor is responsible to keep all areas safe and free of debris.

Cushman maintained the Citibank branch located at the Subject Premises on and prior to June 2, 2019, including maintenance and repairs of the sidewalks. Mario Delgado (Delgado) is employed by Cushman as a facilities manager and has been employed at this job for 8 years. His job duties include maintaining the Citibank branches located in Manhattan, including the Subject Premises and performing quarterly inspections. These inspections include the sidewalk. Delgado looks to see if there is any broken concrete or tripping type hazards. If he sees a tripping hazard, he will note it and take photographs. Cushman would then repave the sidewalks if there was a mis-leveled sidewalk. Delgado was shown a photograph he recognized to depict the sidewalk in front of the Subject Premises. He identified what he described as a "lip" in the photograph and testified that if he had seen that condition, he would have that condition repaired.

Although contractually obligated to inspect the sidewalk on a quarterly basis, as a practice Delgado would inspect the sidewalk of the Subject Premises monthly. If he saw a condition on the sidewalk that needed a repair, Delgado would either contact MEM (Cushman employees) or an outside contractor, depending on the job. If a necessary repair was found during a quarterly inspection, it would have been noted in the area of the inspection report titled "walkway". Delgado testified that there are no circumstances under which Cushman would need the approval of Citibank to make the sidewalk repairs. The last page of the Cushman

Inspection Reports reflects that sidewalks are part of the inspected area. The inspection reports has an area titled "Parking Lots/Sidewalks" and inspections for hazards, cracks, potholes. The inspection reports are dated January 24, 2018, July 18, 2018 and October 23, 2018.

Paul Dack (Dack) has been employed by Citibank since November of 2017. He is an asset manager for Citibank's NY Real Estate Portfolio. His duties include managing the day-to-day property management of the branches including the subject branch. Dack confirmed that Cushman handles all preventive systems, electrical, HVAC, roof and sidewalk repairs, and is expected to make quarterly inspections. Dack is familiar with the Agreement between Cushman and Citibank, and with the lease agreement between the Landlord and Citibank for the Subject Premises. Under the terms of the lease agreement, Citibank performs the sidewalk maintenance, which Citibank delegates to Cushman pursuant to the Facilities Agreement. Dack was shown photographs of the alleged defect and testified that if he saw such a condition, he would notify Cushman, who would repair this type of condition.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial”

(*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535,544 [1st Dept 2008]).

Cushman asks the court to deny summary judgment because the Facilities Management Agreement between the parties does not use the word sidewalk. Cushman acknowledges that it was its custom and practice to make sidewalk repairs at the Subject Premises but argues that this was not contracted-for work. Finally, Cushman argues that Judge D’Auguste held that the Agreement only requires that it keep the sidewalks free from debris and not necessarily safe and that the parties are bound by such holding.

At the outset, this Court notes that Judge D’Auguste denied the initial motion as premature and without prejudice to renewal after the completion of discovery. Anything else stated by the court on the record on that date is mere *dicta* and not law of the case as argued by Cushman.

It is undisputed that the word "sidewalk" does not appear in the Facilities Management Agreement. Instead, other words are used such as paths and kerbs.

The Courts have the authority to determine whether the word paths or kerbs are meant to include sidewalks and may use outside evidence such as testimony and documents to determine the intent of the contract. If a contract term is ambiguous, the Court may consider extrinsic evidence to determine the intent of the parties. (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Whether a contract is ambiguous presents a question of law for resolution by the Courts. Courts should adopt an interpretation of a contract which gives meaning to every provision of the

contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

While the word choice in the Agreement of paths or kerbs may be unusual in nature, the intent of the parties is clear. The Agreement concerns Cushman's obligation to maintain Citibank retail bank branches in the New York City Metropolitan area including numerous branches in Manhattan including the branch that is the subject matter of this litigation. Given that the Agreement applied to branches in the New York Metropolitan area, the term path should be understood in an urban context. The terms should be used in the context of the Agreement, which is paths used by pedestrians or sidewalks as more customarily used. Contracts are always supposed to be read in light of "common speech" and the reasonable expectations of a businessperson. *Ace Wire and Cable Company v. Edna Cas. Asur. Company*, 60 N.Y.2d 390, 398 (1983). In Manhattan, the reasonable expectation of a property owner or commercial tenant such as Citibank would be that the term path referred to the sidewalk and this indeed would also be consistent with common speech as parties, for example, frequently speak of shoveling a path along a sidewalk. Thus, the word paths should be understood to mean sidewalk. This is also how both parties interpreted and applied the Agreement in practice.

A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. *Drzewinski v. Atlantic Scaffold and Ladder, Co.*, 70 N.Y.2d 774. The indemnity provision in the Agreement between Citibank and Cushman is triggered when there is an omission on the part of the Cushman. Since Cushman failed to repair the sidewalk under the terms of the Agreement, Cushman owes Citibank defense and indemnification under the terms of the agreement.

Per the undisputed testimony of the parties, Cushman was required to inspect, maintain and repair the sidewalk which is the basis of this lawsuit. Thus, the indemnity agreement is triggered and the motion for summary judgment against third party defendant Cushman & Wakefield is granted.

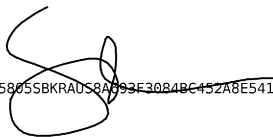
WHEREFORE it is hereby:

ORDERED that Citibank is granted summary judgment on its third-party claims for common law and contractual indemnification; and it is further

ORDERED that, within 20 days from entry of this order, Citibank shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.

<u>11/28/2022</u>			
DATE		SABRINA KRAUS, 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