

Colyer v Midtown Convenience Store Inc.

2022 NY Slip Op 34896(U)

May 16, 2022

Supreme Court, Kings County

Docket Number: Index No. 503452/2019

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of May 2022.

PRESENT: HON. INGRID JOSEPH, J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

Julie Colyer,

Index No: 503452/2019

Motion Seq. 6

Plaintiff,

-against-

Midtown Convenience Store Inc. d/b/a
Midtown Smokeshop d/b/a Midtown Smoke
and Vape d/b/a Midtown Smoke & Vape Shop,
Noam Corporation d/b/a Noam Management
Group, Westfront Associates LLC, Novelty
Construction Corp., Triumph Construction
Corp. and NY1 Sarpanch Construction, Inc.,

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of the defendants' motion.

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion and	
Affidavits/Affirmations Annexed.....	142 – 163
Affirmation in Opposition Papers.....	165 – 177; 179
Reply to Opposition Papers.....	

Upon the foregoing papers, defendants, Noam Corporation d/b/a Noam Management Group (“property manager”) and Westfront Associates, LLC (“property owner”), move (MS #6) for an order, pursuant to CPLR § 3212 for summary judgment dismissing plaintiff, Julie Colyer’s (“plaintiff”), complaint in its entirety, as well as any cross-claims asserted against them and for

partial summary judgment against co-defendant, NYI Sarpanch Construction, Inc. (“general contractor”), and co-defendant Novelty Construction Corp. (“subcontractor”) for contractual and common law indemnification, contribution and breach of contract.

Plaintiff commenced this action to recover damages for personal injuries she sustained on August 7, 2018 after she allegedly tripped and fell as a result of walking onto a makeshift, temporary pedestrian walkway consisting of a plywood board at 454 9th Avenue, Brooklyn, New York (“the premises”). It is uncontested that at the time of the subject accident, the property manager retained the general contractor to perform repairs to the sidewalk at the subject premises. It is also uncontested that thereafter the general contractor entered into a contract with the subcontractor who was to perform work at the subject premises. However, it is the property manager and property owner’s position that they were not negligent, since it was the general contractor’s responsibility to supervise the subcontractor’s performance of the sidewalk repair.

Plaintiff opposes the property manager and property owner’s contention by arguing that the piece of plywood placed by the contractors was simply an effort to overcome an existing tripping hazard that was caused by a raised concrete lip adjacent to the steel cellar door, thereby raising an issue of fact concerning negligence. Therefore, the part of the property owner’s motion seeking contractual and common law indemnification from the general contractor and subcontractor is premature.

On a motion for summary judgment, the proponent must initially make a *prima facie* showing of entitlement to judgment as a matter of law through the submission of admissible evidence sufficient to show the absence of any material issue of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a showing requires denial of the motion

regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]).


As a general rule, it is well settled that a party who retains an independent contractor is not liable for that contractor's negligence inasmuch as it has no right to supervise or control the work of the contractor (*Kleeman v. Rheingold*, 81 NY2d 270, 273 [1993]). However, several exceptions to this general rule exist such that liability can be found to lie where a property owner or other hirer of the general contractor had actual or constructive notice of the dangerous condition (*Schwartz v. Merola Bros. Constr.* 290 NY 145 [1943]). Additionally, the nondelegable exception is applicable where the owner is under a duty to the public to keep the premises safe for travel while the work is in progress (*Rohlf's v. Weil*, 271 NY 444 [1936]). Unless an owner has alienated the entire property, the duty is imposed upon the owner to maintain the actual structure of the building and its usual appurtenances in such a condition that it shall not become dangerous to the traveling public. *Id.* Where, for example, premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress (*Backiel v. Citibank, N.A.*, 229 AD2d 504 [2d Dept 2002]). This duty may not be delegated by the owner, its agents or employees to an independent contractor (*Thomassen v J & K Diner*, 152 AD2d 421, 424-425 [2d Dept 1989]).

After oral argument and a review of the submitted documents, the court finds that an issue of fact as to what caused plaintiff to allegedly trip, whether it was due to the subcontractor's

placement of a piece of plywood on the sidewalk while the subject premise was undergoing repairs or due to an existing height differential on the sidewalk area at the concrete lip of the steel cellar doors. Notwithstanding the existence of issues of fact surrounding the accident, when an owner or a property manager has knowledge of the initial defect in the sidewalk, they would still be liable even if they delegated the obligation to repair to an independent contractor because the owner has a nondelegable duty to provide the public with a reasonably safe premises. Thus the branch of the property manager and property owner's motion for summary judgment dismissing plaintiff's complaint in its entirety, as well as any cross-claims asserted against them is denied. In addition, the portion of the property manager and property owner's motion for partial summary judgment against the general contractor and subcontractor for contractual and common law indemnification, contribution and breach of contract is denied without prejudice, since liability of the parties is still at issue or unresolved.

This constitutes the Decision and Order of the Court.

ENTER



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice