Richardson v Ascot Realty LLC
2023 NY Slip Op 30344(U)
January 30, 2023
Supreme Court, Kings County
Docket Number: Index No. 501364/2018
Judge: Richard J. Montelione
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At Part 99 of the Kings County Supreme Court of the State of New York, located at 360 Adams Street, Brooklyn, NY 11201 on the _____ day of _____ 2023.

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C. JAN 30 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION and ORDER

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CHAMP RICHARDSON,

Plaintiff,

-against-

ASCOT REALTY LLC and R.D.B. BAROUCK CORP.,

Defendant.

----------X

Index No.: 501364/2018
Mot. Date: 1/18/23
Mot. Cal.: 37
Mot. Seq.: 6

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendant R.D.B. Barouck Corp.'s Motion for Summary Judgment; Attorney Affirmation of Kenneth P. Skibinski, affirmed on 7/14/2022; Statement of Material Facts; Exhibits A-K	144-157
Defendant Ascot Realty LLC's Attorney Affirmation of Peter R. Bain in Opposition, affirmed on 9/7/2022	158
Plaintiff Champ Richardson's Attorney Affirmation of Herbret S. Subin in Opposition, affirmed on 9/7/2022; Response to Statement of Material Facts; Exhibits 1-3	160-164
Defendant R.D.B. Barouck Corp.'s Attorney Affirmations of Kenneth P. Skibinski in Reply, affirmed on 10/17/2022	165-166
Exhibit O: Complete Copy of Lease and Rider (submitted pursuant to Justice Motelione's instruction at oral argument)	170

Background and Facts

Plaintiff commenced this action by filing a summons and complaint on January 22, 2018, and an amended complaint on February 12, 2018. Issue was joined by defendant Ascot Realty LLC ("Ascot Realty") on March 14, 2018 and by defendant R.D.B. Barouck Corp. ("R.D.B.") on August 16, 2018. Plaintiff alleges that on May 21, 2017, he suffered personal injuries after he tripped and fell on the sidewalk abutting property owned by defendant Ascot Realty and rented by defendant R.D.B. to operate a beauty salon. Plaintiff alleges he fell due to a dangerous and defective condition. Specially, plaintiff states that he was jogging close to the curb of the sidewalk when he tripped on a hole in the sidewalk. (NYSCEF #152, page 142). Plaintiff estimates that the hole was approximately five inches in diameter and five to seven inches deep. (*Id.* at page 47). The hole was located near the curb, not in the middle of the sidewalk or near the buildings. (*Id.* at pages 37, 71, 142).

***RICHARDSON v. ASCOT REALTY LLC, et al*, Index No.: 501364/2018**

Before the court is defendant R.D.B.'s motion for summary judgment to dismiss plaintiff's complaint against it and to dismiss defendant Ascot Realty's crossclaim. Defendant R.D.B. argues that, as the commercial tenant, they had no duty to maintain and repair the sidewalk pursuant to New York City Administrative Code § 7-210(a) and that they were not responsible for structural repairs of the sidewalk pursuant to paragraph 4 of the lease and paragraphs R1 and R9 of the rider between R.D.B. and Ascot Realty.

Defendant Ascot Realty opposes the motion, arguing that defendant R.D.B. has a duty to repair, replace, and maintain the sidewalk in front of the store pursuant to paragraphs 4 and 30 of the lease and paragraph R1 of the rider. Defendant Ascot Realty contends this includes structural repairs pursuant to these provisions. Further, they assert a crossclaim for contractual indemnification in Ascot Realty's favor pursuant to paragraph R44 of the rider.

Plaintiff opposes the motion on the basis that defendant R.D.B. made special use of the sidewalk by placing a table and chairs in front of the salon, as evidence by an image from Google Street View, and that a genuine issue of fact exists as to whether the special use created the dangerous condition. Plaintiff also argues that paragraph R1 of the rider states that defendant R.D.B. was to install a new sidewalk and a question of fact exists as to whether the installation of the sidewalk caused the defect.

Applicable Law

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. (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 520 N.E.2d 512 [Ct. of Ap. 1988]; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 404 N.E.2d 718 [Ct. of Ap. 1980]). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. (*Spinelli v. Procassini*, 258 A.D.2d 577, 686 N.Y.S.2d 446 [2d Dep't 1999]).

Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. (*Hausser v. Giunta*, 88 N.Y.2d 449, 453, 669 N.E.2d 470, 471 [Ct. of Ap. 1996]). However, New York City Administrative Code § 7–210 imposes a duty on the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition.

"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." (*Langston v. Gonzalez*, 39 Misc. 3d 371, 377, 958 N.Y.S.2d 888, 893 [Kings Couty Sup. Ct. 2013]). "[W]here a lease agreement is 'so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk,' the tenant may be liable to a third party." (*Paperman v. 2281 86th St. Corp.*, 142 A.D.3d 540, 541, 36 N.Y.S.3d 488, 489 [2d Dep't 2016], quoting *Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514, 514, 894 N.Y.S.2d 429, 429 [Ct. of Ap. 2010]). A commercial tenant may also be found liable for an alleged defect in a sidewalk if it "either created the defective condition or caused the defect to occur because of a special use." (*Campos v. Midway Cabinets, Inc.*, 51 A.D.3d 843, 843, 858 N.Y.S.2d 742, 743 [2d Dep't 2008]).

Legal Analysis

The initial issue before the court is whether the lease and rider obligate defendant R.D.B. to maintain and make structural repairs to the sidewalk. Paragraph 4 of the lease states:

> Tenant shall, throughout the term of this lease, take good care of the demised premises . . . and the sidewalks adjacent thereto, and at its sole cost and expense, make all *non-structural* repairs thereto as and when needed to preserve them in good working order and condition. (Emphasis added).

This directly conflicts with paragraph 30 of the lease, which states:

> Tenant shall, at Tenant's expense, keep demised premises clean and in order, to the satisfaction to Owner, and if demised premises are situation on the street floor, Tenant shall, at Tenant's own expense, make *all* repairs and replacements to the sidewalks adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish. (Emphasis added).

Typically, "in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language." (*67 Wall St. Co. v. Franklin Nat. Bank*, 37 N.Y.2d 245, 249, 333 N.E.2d 184, 187 [Ct. of Ap. 1975]). However, here, paragraph R33 to the rider states:

> In the event of any conflict between the provisions of this rider and of the printed lease, the provisions of this rider shall prevail. This lease shall be construed to have been drafted mutually by both the Landlord and the Tenant, such that no presumptions shall be made against either party.

Pursuant to paragraph R33 of the rider, a presumption will not be made against the landlord with respect to the conflicting provisions in paragraphs 4 and 30 of the lease. Any provisions in the rider will override conflicting provisions in the contract, as expressly agreed by the parties. (*Blackburn Food Corp. v. Ardi, Inc.*, 189 A.D.3d 1329, 139 N.Y.S.3d 303, 305 [2d Dep't 2020]; *Home Fed. Sav. Bank v. Sayegh*, 250 A.D.2d 646, 647, 671 N.Y.S.2d 698 [2d Dep't 1998]).

Paragraph R1 of the rider states:

> Tenant shall, at the commencement of the lease, install a new sidewalk in front of the demised premises at the building line where the Tenant will be installing a brand new storefront, threshold and entrance, and thereafter keep same in good order and repair (but without obligation to replace same) as necessary. Tenant shall be responsible for keeping said sidewalk and eighteen (18) inches of

> the street and/or curb adjacent thereto clean and free from all trash, snow and debris of any nature at all times.

Paragraph R9 of the rider states:

> Tenant shall be responsible for all non-structural repairs to the premises, regardless of cause. Tenant will be responsible for those structural repairs necessitated by structural damage caused by Tenant, its employees, agents and/or invitees, and structural damage resulting from Tenant's alterations.

These provisions of the rider conflict with paragraph 30 of the lease, which requires tenant make *all* repairs to the sidewalk. The rider prevails pursuant to paragraph R33, and defendant R.D.B. was responsible for keeping the sidewalk free of trash, snow, and debris (paragraph R1), keeping the sidewalk at the building line in good order and repair (paragraph R1), for nonstructural repairs (paragraph R9), and for structural repairs necessitated by structural damage caused by defendant R.D.B. (paragraph R9).

Accordingly, the issue becomes whether defendant R.D.B. created structural damage resulting in the dangerous condition through their own alterations. Plaintiff argues that defendant R.D.B. did so through their installation of the sidewalk, as required by paragraph R1 of the rider, and/or through special use of the sidewalk. Defendant R.D.B. was required to install a new sidewalk "at the building line," (not the curb where plaintiff fell) at the commencement of the lease, which was signed December 12, 2001. (Paragraph R1 of the rider). Defendant R.D.B. was required to "thereafter keep same in good order and repair (but without the obligation to replace same)." (*Id.*) Tenant was obligated to keep the sidewalk at the building line in good repair, not the sidewalk near the curb where plaintiff fell. Additionally, there is no evidence in the record that shows that R.D.B.'s installation of a sidewalk at the building line over 20 years ago created the defective condition near the curb, or that the installation was done defectively, other than speculation.

Plaintiff also claims that there is a question of fact as to whether defendant R.D.B. caused structural damage resulting in the dangerous condition through special use of a portion of the sidewalk, by placing a small table and two chairs on said sidewalk, evidence by Google Images. (NYSCEF #163). Defendant R.D.B. claims that this image is not properly authenticated as plaintiff did not give notice of the intent to use such image pursuant to CPLR 4532-b. In any event, any special use did not extend beyond the tables and chairs to the curb where plaintiff fell. (*Taubenfeld v. Starbucks Corp.*, 48 A.D.3d 310, 311, 851 N.Y.S.2d 512, 514 [1st Dep't 2008]; *see also MacLeod v. Pete's Tavern, Inc.*, 87 N.Y.2d 912, 914, 663 N.E.2d 905, 906 [Ct. of Ap. 1996]). Moreover, plaintiff's contention that defendant R.D.B. made special use of the area of the sidewalk where the plaintiff fell was a theory raised by plaintiff for the first time in opposition to the motion for summary judgment, and thus cannot be considered as a basis for defeating summary judgment. (*Padarat v. New York City Transit Auth.*, 175 A.D.3d 700, 704, 107 N.Y.S.3d 389, 393 [2d Dep't 2019]).

Finally, defendant Ascot Realty contends that defendant R.D.B. is required to indemnify defendant Ascot Realty against plaintiff's claims. The relevant rider provision (R44) states:

> Tenant covenants and agrees, at its sole cost and expense, to indemnify, defend and hold Landlord harmless against any and all claims by or on behalf of any person, firm or corporation, arising out of or in connection with: . . . (e) any accident, injury or damage whatsoever caused to any person, firm or corporation *occurring as the result of any work or thing whatsoever done by Tenant* (or person holding or claiming through or under Tenant) in or about the demised premises, or upon or under the streets, sidewalks, or the land adjacent thereto. (Emphasis added).

Based on paragraph R44 of the rider, defendant R.D.B. is only required to indemnify defendant Ascot Realty against claims "occurring as the result of any work or thing whatsoever done by Tenant." As established above, there is no evidence in the record that R.D.B. created the hazardous condition through the sidewalk installation over 20 years prior, any alleged special use, or any other work performed.

Accordingly, defendant R.D.B. was not contractually obligated to make structural repairs to the sidewalk adjacent to the leased premises and is not contractually obligated to indemnify defendant Ascot Realty.

Based on the foregoing, it is

ORDERED that defendant R.D.B. Barouck Corp.'s motion for summary judgment (Motion Sequence #6) is **GRANTED** and the case is dismissed against defendant R.D.B. Barouck Corp.; and it is further

ORDERED that all crossclaims against defendant R.D.B. Barouck Corp. are dismissed.

Any additional relief not explicitly granted herein is denied.

The foregoing constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.

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