

Alvarez v 3769 10th Ave. Realty Corp.

2023 NY Slip Op 32240(U)

July 5, 2023

Supreme Court, New York County

Docket Number: Index No. 153326/2017

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

CARLOS ALVAREZ,

Plaintiff,

- v -

3769 10TH AVENUE REALTY CORP., CLIFF NEW YORK,

Defendant.

-----X

CLIFF NEW YORK

Plaintiff,

-against-

HIRAN AUTO REPAIR SHOP CORP.

Defendant.

-----X

INDEX NO. 153326/2017

MOTION DATE 04/12/2023

MOTION SEQ. NO. 005 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596056/2020

The following e-filed documents, listed by NYSCEF document number (Motion 005) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 158, 160, 161, 162, 163, 164, 165, 170, 171, 172, 175, 177, 180, 182, 183, 184, 185, 186, 187, 189, 191

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 166, 167, 168, 169, 173, 174, 176, 178, 179, 181, 188, 190, 192, 193, 194, 195

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this action seeking damages for personal injuries sustained on December 30, 2016, when he slipped and fell in the course of his employment. Plaintiff alleges that he slipped on a patch of black ice, in a parking lot whose ownership, occupation and control is a matter of dispute amongst the parties.

At the time of the accident, plaintiff was employed by non-appearing third-party defendant Hiran Autobody Repair Corp. (Hiran). Plaintiff alleges that the subject parking lot was owned by defendant 3769 10th Avenue Realty Corp. (Avenue), who owns the adjoining premises located at 440 West 202nd Street in Manhattan. Defendant/third-party plaintiff La Chimosa Corp., d/b/a Cliff New York (Cliff) is Avenue's commercial tenant, who owns and operates a discotheque at the premises.

RELEVANT DEPOSITION TESTIMONY

Plaintiff testified that the accident occurred around 9:00 am, and that the weather was "very cold," but there was no rain or snow. He stated that he slipped and fell on black ice that had originated as water that came from inside Cliff and subsequently froze. He testified that "the water always comes out of there because they clean every day," but that he never complained or notified anyone about the condition and had never seen ice at that location before. When asked if there were any other portions of the concrete in the yard that were icy, he responded, "It was only a direct line to the other extreme." He testified that Cliff used the lot for valet parking in the evenings, and that Hiran also used the lot but did not wash vehicles in it. Plaintiff testified that he walked with a cane because one of his legs was shorter than the other, but that he did not use the cane at the time of his accident because it was inside the vehicle that he had parked.

Cliff's owner Dora Russo testified that workers at Cliff would regularly hose down the rubber floor in the kitchen mornings before opening with a mixture of water and degreaser, although she did not know the brand of degreaser used. She stated that the liquid would flow into the drains in the kitchen. She testified that the emergency exit door in the kitchen opened out into the parking lot, but that the lot had nothing to do with Cliff, and its employees had no access or

use of the lot. However, Cliff had the right to enter exit or enter from the emergency exit in an emergency, and it had a security camera by the door.

Toy Eng, owner of the property management company that provided property management services at 440 West 202nd Street, testified that the company that owned the parking lot “had nothing to do with Cliff.” She testified that her contact person at Cliff was a man named Dario Olegria, who she assumed was partnered with Dora Russo, although she did not meet her. She said that the parking lot was owned by 3761 Tenth Avenue Realty Corp., and that there were no permanent structures on it. She testified that “Dario” was also the tenant for the lot, although she did not recall the name that was put on the lease, and that the lot was operated for parking and tire sales. She testified that Paul Gagliardi was the controlling owner of both adjoining properties, and that she was the property manager for both properties.

PENDING MOTIONS

On December 13, 2022, Avenue moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all crossclaims and counterclaims against them and granting summary judgment on their cross claims against Cliff on its crossclaims for contractual and common law defense and indemnification. (Mot. Seq. 5).

On December 15, 2023, Cliff moved for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and Avenue’s crossclaims against it. (Mot. Seq. 6).

The motions are consolidated herein and determined as set forth below.

AVENUE’S MOTION FOR SUMMARY JUDGMENT

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR 3212(b); *Matter of New York City Asbestos Litig.*, 33

NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” *O’Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Contentions

Avenue argues that as it was an out of possession landlord, its lease agreement delegates maintenance of the premises to Cliff, and it had no actual or constructive notice of the condition that caused plaintiff’s accident, there is no basis to hold it liable to plaintiff. It also contends that it does not own the subject parking lot, which it claims is owned by non-party 3761 10th Avenue Realty Corp., the owner of the adjoining property on the other side of the parking lot and occupied and controlled by its commercial tenant Hiran. It argues that it is entitled to indemnity as Cliff had sole responsibility for maintenance under the lease.

Plaintiff argues that Avenue fails to establish as matter of law that it did not own or occupy the parking lot, as it cites no evidence verifying the boundary lines of its property. Plaintiff argues that a letter from Cliff to Avenue acknowledging that the leased premises includes “parking areas” as well as plaintiff’s testimony that Cliff used the lot for valet parking raise issues of fact as to Avenue’s ownership and control. Plaintiff notes that the entities which owned both adjoining properties were controlled and managed by the same individuals, arguing that a jury could find this gave Avenue full access, control, and use of the parking lot. Plaintiff contends that Avenue did not fully part with control of the premises, as the lease agreement

requires its consent for certain changes to the premises and gives it a right to enter the premises to examine it and make repairs or improvements. Finally, plaintiff argues that as there is evidence that liquid would frequently emanate from the inside of the premises to the parking lot, it constitutes a recurring condition for which Avenue can be charged with constructive notice.

In partial opposition, Cliff contends that Avenue is not entitled to contractual indemnification absent a showing that it was negligent under the lease agreement. It agrees with Avenue's position that neither Avenue nor Cliff owned or controlled the parking lot and contends it did not make any special use of or benefit from the lot. It submits an affidavit of meteorologist George Wright, who sets forth that it was meteorologically impossible for ice to have been present in the parking lot on the date of the accident based on the weather conditions on the preceding days.

In reply, Avenue contends that there is no evidence in the record that it had actual knowledge of a recurring dangerous condition, such that it can be charged with constructive notice. It argues that the lease indemnification provision clearly entitles them to defense and indemnity from Cliff, and that if plaintiff's injuries were caused by a dangerous condition, it was the responsibility of Cliff or Hiran.

Analysis

The evidence submitted by Avenue to establish that it did not own the parking lot consists solely of its property manager's testimony that the lot was owned by a different entity, and the deed to 3769 10th Avenue, which includes a Schedule A describing the property boundaries. Where, as here, there is a dispute over the boundaries of a property line, such evidence, absent an accompanying expert affidavit, is insufficient to prove ownership, or lack thereof, of the disputed property. *70 Pinehurst Ave. LLC v RPN Mgmt. Co., Inc.*, 123 AD3d 621

(1st Dept 2011); *Thomson v Nayyar*, 90 AD3d 1024 (2d Dept 2011). Thus, Avenue fails to meet its burden of proving that it did not own the parking lot.

Under New York law, property owners have a non-delegable duty to maintain their premises in a reasonably safe condition for the protection of persons whose presence thereon is reasonably foreseeable. *Peralta v Henriquez, et al.*, 100 NY2d 139 (2003). However, a property owner is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant, unless: (1) the landlord is either contractually obligated to make repairs and/or maintain the premises, or has retained a right to re-enter, inspect, and make repairs; and (2) liability is based on a significant structural or design defect contrary to a specific statutory safety provision. *Johnson v Urena Serv. Ctr.*, 227 AD2d 325 (1st Dept 1996). See also *Henry v Hamilton Equities, Inc., et al.*, 161 AD3d 418, (1st Dept 2018); *Sapp v S.J.C. Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, 527 (1st Dept 2017); *Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489, 489 (1st Dept 1995); *Brooks v Dupont Associates, Inc.*, 164 AD2d 847, 848- 49 (1st Dept 1990).

Here, the alleged defect is indisputably not structural in nature, and plaintiff does not argue that Avenue committed any statutory violations. Thus, regardless of whether Avenue had a right of re-entry pursuant to the lease would not prevent it from invoking the out of possession landlord defense as to the leased premises. See *Kase v H.E.E. Co.*, 95 AD3d 568 (1st Dept 2012); *Raynor v 666 Fifth Ave. Ltd. Partnership*, 232 AD2d 226 (1st Dept 1996).

As plaintiff's theory of liability as to Avenue is that the parking lot was part of the premises owned by Avenue and leased to Cliff, and as Avenue would avoid liability as an out of possession landlord if it were the owner of the parking lot, there is no basis to hold it liable to plaintiff.

The defense and indemnification provision of the operative lease states, in pertinent part, that:

Tenant shall and does hereby defend indemnify, and hold harmless Owner... from and against any and all claims, actions, damages, liability and expense in connection with any and all loss, damage or injury to persons or property occurring in, on, or about, or arising out of, the Demised Premises and adjacent sidewalks and loading platforms or areas or occasioned wholly or in part by any act or omission of Tenant...

While Cliff argues that the indemnification provision is not triggered absent a finding of negligence against them, similar indemnification provisions have been interpreted to not contain a negligence trigger. *See Gonzalez v DOLP 205 Properties II, LLC*, 206 AD3d 468 (1st Dept 2022).

However, as there remain questions of fact as to the cause of the accident and the ownership, control and use of the parking lot, Avenue fails to meet its burden to support summary judgment its defense and indemnity claims against Cliff. *See Maggio v Eye Care Professionals of Western New York, LLP*, 118 AD3d 1317 (4th Dept 2014) (phrase “in or about the Leased Premises and common areas” in indemnification provision did not apply to separate rental unit over which tenant had no control or beneficial interest”).

CLIFF’S MOTION FOR SUMMARY JUDGMENT

Contentions

Cliff contends that the affidavit of its expert, meteorologist George Wright, establishes unequivocally that there was no ice on the ground, and that therefore it did not cause plaintiff’s accident. It asserts that as the parking lot was not part of the leased premises, and they did not own, occupy, control, or make special use of the lot, they had no duties or obligations which would give rise to premises liability with respect to the lot. It also argues that they had no actual or constructive notice of the condition that caused plaintiff’s accident. It contends that the

doctrine of *res ipsa loquitur* is inapplicable, as the parking lot was not in its exclusive control, and due to the possibility that plaintiff's fall could have occurred due to his own misstep.

In opposition, plaintiff notes that Cliff presents no evidence of the chemical makeup of the cleaning solution used to clean the kitchen and asks the court to take judicial notice of the fact that different liquids have different freezing and melting points. He also argues that his testimony that ice was present alone is sufficient to raise a triable issue of fact as to the existence of the condition. He contends that his testimony that Cliff used the lot for valet parking and Cliff's letter to Avenue affirming that it has accepted the leased premises and "all common areas (including, without limitation, parking areas...) are in compliance with the Lease and are satisfactory for Tenant's purposes" raises issues of fact as to whether it made special use of the lot. He argues that there is no need to establish notice where, as here, a defendant created the condition that caused plaintiff's accident, and that even if it did not it fails to meet its burden of establishing that it lacked notice, contending that there is proof that the condition was recurring, thus establishing constructive notice. He contends that *res ipsa loquitur* is applicable, as the alleged defect here, the ice, was in Cliff's control, which need not be exclusive, and as a finding that plaintiff was partially at fault would not preclude application of the doctrine.

In reply, Cliff argues that plaintiff's contention that the accident was caused by a mixture of water and soap constitutes a new theory of recovery, which is improperly asserted for the first time in its opposition papers. It contends that plaintiff's affirmation in opposition should be disregarded as it was prepared by plaintiff's counsel who lacked personal knowledge. It otherwise reiterates its arguments.

Analysis

Preliminarily, while an attorney's affirmation lacks evidentiary value on its own, it "may serve as a vehicle to introduce documentary evidence." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324 (1st Dept 2004). Thus, plaintiff's failure to submit an affidavit of a witness with knowledge in opposition is not fatal.

A court may take judicial notice to matters "of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof." *Dollas v W.R. Grace and Co.*, 225 AD2d 319 (1st Dept 1996) (internal citations omitted). It is a matter of common knowledge that different liquids have different freezing points. It is uncontroverted that Cliff cleaned its floors with a mixture of water and degreaser. As Cliff's expert failed to address what impact, if any, the inclusion of the degreaser would have on the freezing point of the resulting mixture, and as plaintiff testified that he observed black ice on the ground after the accident, plaintiff raises a triable issue of fact as to whether ice could have formed, even though the temperature was above the freezing point of water. *See Dollas*, 225 AD2d at 321.

Additionally, contrary to Cliff's contentions, plaintiff's argument in opposition that the ice that caused his accident did not purely consist of water does not constitute a new theory of recovery.

Where a defendant affirmatively creates the accident-causing condition, "questions of notice of the condition are irrelevant." *Cook v Rezende*, 32 NY2d 428, 429 (1973); *see Alonzo v City of New York*, 188 AD3d 1123 (2d Dept 2020). As plaintiff testified that the ice condition that caused his accident was created by Cliff, there remain triable issues of fact as to Cliff's negligence regardless of its use or control of the parking lot. *See Kase*, 95 AD3d at 570.

To invoke the doctrine of *res ipsa loquitur*, the event: 1) must be of a kind which ordinarily does not occur in the absence of someone's negligence; 2) must be caused by an agency or instrumentality within the exclusive control of the defendant; and 3) must not have been due to any voluntary action or contribution on part of the plaintiff. *Kambat v St. Francis Hosp.*, 89 NY2d 489 (1997).

Here, it is uncontroverted that the area in which plaintiff fell was not within Cliff's exclusive control, as there is undisputed testimony that Hiran used the parking lot. Additionally, *res ipsa loquitur* does not apply where, as here, there is a possibility that plaintiff's accident was caused by his own misstep. *See Meech v Anthony*, 179 AD3d 1555 (4th Dept 2020); *Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950 (2d Dept 2016); *Anderson v Skidmore College*, 94 AD3d 1203 (3d Dept 2012) Thus, the doctrine of *res ipsa loquitur* does not apply.

CONCLUSION

Accordingly, it is hereby:

ORDERED that the motion for summary judgment of defendant 3769 10th Avenue Realty Corp. dismissing plaintiff's claims against it is granted; and it is further

ORDERED that the portion of 3769 10th Avenue Realty Corp.'s motion seeking dismissal of Cliff's crossclaims against it for defense and indemnification is denied; and it is further

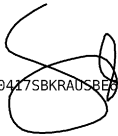
ORDERED that the motion to for summary judgment of defendant/third-party plaintiff La Chimosa Corp., d/b/a Cliff New York is denied; and it is further

ORDERED that, within 20 days from entry of this order, defendants 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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


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<u>7/5/2023</u> DATE					<hr/> SABRINA KRAUS, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE