

Bishop v City of New York
2023 NY Slip Op 35182(U)
March 13, 2023
Supreme Court, Richmond County
Docket Number: Index No. 151388/2019
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
KERRILYNN BISHOP,

Plaintiff,

- against -

THE CITY OF NEW YORK, JACKSON PARKING CORP.
AND ISLAND MEDICAL SPECIALISTS, PLLC,

Defendants.
-----X

PART 26

Present:

Hon. Orlando Marrazzo, Jr.

DECISION and ORDER

Index No. 151388/2019

Motion Nos. 003 and 004

The papers numbered NYSCEF Documents “73” to “137” were marked fully submitted on the 24th day of January 2023.

Upon the foregoing papers, the motion of defendant Jackson Parking Corp. (Seq. No. 003) for partial summary judgment on its cross claims against codefendant Island Medical Specialists, PLLC for contractual indemnification, common law indemnification, and contribution is denied; the branch of the motion for partial summary judgment on the cross claim against codefendant Island Medical Specialists, PLLC for breach of contract is granted; and the motion of defendant Island Medical Specialists, PLLC (Seq. No. 004) to dismiss the complaint as against it is granted; the branch of the motion to dismiss the cross claims against Island Medical Specialists, PLLC for breach of contract is denied; the branch of the motion of defendant Island Medical Specialists, PLLC to dismiss the cross claims against it for contractual indemnification, common law indemnification and contribution is granted; and it is further

BACKGROUND

Plaintiff Kerrilynn Bishop commenced this action to recover damages for personal injuries she sustained on June 14, 2018, when she tripped and fell on the sidewalk abutting commercial property located at 347 Edison Street, Staten Island, New York. A City-owned curbside tree at the location of the incident fell over in August of 2017 causing the sidewalk to become raised and deteriorated. The premises are owned by defendant Jackson Parking Corp. (“Jackson Parking”) and leased to defendant Island Medical Specialists, PLLC (“Island Medical”).

Island Medical moves for summary judgment dismissing the complaint and all cross claims against it on the grounds, *inter alia*, that as the lessee of the subject premises, it did not owe the injured plaintiff a duty to maintain the sidewalk and repair the defective condition. Defendant relies on section 7-210 of the Administrative Code of the City of New York that imposes an affirmative and nondelegable duty on the owner of commercial property to maintain the abutting public sidewalks. Island Medical further argues that the contractual obligations in the parties’ lease require the lessee to perform maintenance and repairs solely to the “demised premises”, which does not encompass the public sidewalk. Notably, there is no evidence that defendant’s employees, representatives and/or agents created the hazardous condition or made a special use of the area in question. For these reasons, Island Medical alleges it did not owe Ms. Bishop a duty to maintain and repair the sidewalk, therefore, her cause of action against it to recover damages for personal injuries, and the cross claims for indemnification and contribution must be dismissed.

Codefendant Jackson Parking opposes the motion and moves for partial summary judgment on its cross claims against Island Medical for contractual indemnification, common law indemnification, contribution, attorney fees and breach of contract for the failure of the lessee to procure general liability insurance coverage on behalf of the property owner.

In support of the motion, Jackson Parking alleges it is entitled to indemnification from codefendant because the parties’ triple net lease displaces the property owner’s statutory duty to

maintain the abutting sidewalk in good repair and free of hazards by contractually shifting that obligation to the lessee.

DISCUSSION

By its terms, “[s]ection 7-210 [of the Administrative Code of the City of New York] unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition and provides that said owners are liable for personal injury that is proximately caused by such failure” (*Xiang Fu He v. Troon Mgt. Inc.*, 34 NY3d 167, 171 [2019], citing *Sangaray v. West Riv. Assoc.*, 26 NY3d 793, 797 [2016]; see *Gambino v. 475 Pak Avenue South, LLC*, 197 AD3d 621, 622 [2d Dept]). The only exception where section 7-210 does not apply is in cases involving one, two or three-family residential real property that is in whole or part owner occupied and used exclusively for residential purposes.

The Court of Appeals in *Xiang Fu He v. Troon Mgt. Inc.* (34 NY3d 167, 171 [2019]) addressed the issue before the Court in this matter, *i.e.*, whether a landowner can avoid liability by contracting with a lessee to maintain the public sidewalks. The Court of Appeals held that “[w]hile an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift [to the lessee] the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210” (*Xiang Fu He v. Troon Mgt. Inc.*, 34 NY3d at 174).

In view of *Xiang*, Jackson Parking’s non-delegable duty under section 7-210 may not be avoided by the triple net lease which purportedly transfers to the lessee, the obligation to maintain and repair the public sidewalk abutting the leased premises (*see Xiang Fu He v. Troon Mgt. Inc.*, 34 NY3d at 174). Thus Island Medical did not owe Ms. Bishop a duty to remedy the sidewalk defect, therefore, defendant is not exposed to liability for her injuries caused by negligent maintenance of the sidewalk. Under these circumstances, Island Medical’s motion for summary judgment dismissing the complaint as against it must be granted.

Contractual Indemnification

Section 7-210 does not prevent the owner of commercial property from entering into a maintenance agreement with its lessees and third parties. Nor does section 7-210 preclude the owner from holding those responsible for personal injuries resulting from their negligence; and requiring them to adequately insure against personal injury and property damage. In the event litigation ensues, the landowner generally has an indemnification action against a lessee who covenants to maintain the property (*see Xiang Fu He v. Troon Mgt. Inc.*, 34 NY3d at 175).

Notably, in this case, Island Medical argues that the triple net lease does not contain a “specific” covenant whereby the lessee assumed the obligation to make any necessary repairs to the sidewalk. Jackson contends, to the contrary, that (1) the lessee’s obligation to maintain and repair the “demised premises and the fixtures and appurtenances therein” (Paragraph “4” of the lease, entitled “Repairs”) includes the abutting City owned sidewalk; and (2) the parties’ agreement to designate the lease as a “triple net lease” broadens the lessee’s obligations to encompass the abutting sidewalk.

Nevertheless, in either case, the ability of Jackson Parking to obtain contractual indemnification from Island Medial is, ultimately, based on the following consideration. “A party seeking contractual indemnification must prove itself free from negligence, because...it cannot be indemnified therefor” (*Velasquez v. Mosdos Meharam Brisk of Tashnad*, 189 AD3d 1655, 1657-1658 [2d Dept 2020] [citation omitted]; *see* General Obligations Law §5-322.1). Jackson Parking breached its statutory, nondelegable duty to maintain and repair the defective sidewalk abutting its property. The breach of that duty proximately caused plaintiff’s injuries. It does not appear that Jackson Parking took proper actions to remedy the defective condition of the sidewalk between August 2017 when the tree fell, and the date of the accident on June 14, 2018. Defendant fails to prove itself free from negligence, therefore, it is not entitled to summary judgment on its cross

claim against Island Medical for contractual indemnification (*see Roblero v. Bais Ruchel High School, Inc.*, 175 AD3d 1446, 1448-1449 [2d Dept 2019]).

Common Law Indemnification and Contribution

“The predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the [the proposed indemnitee’s] role in causing the plaintiff’s injuries is solely passive, and thus its liability is purely vicarious...In the classic indemnification case, the one seeking indemnification committed no wrong... and is liable solely on account of the negligence of another...Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tortfeasors is the only available remedy” (*Santoro v. Poughkeepsie Crossing, LLC*, 180 AD3d 12, 16 16-17 [2d Dept 2019] [internal citations and quotations marks omitted]).

In view of the Court’s determination that Jackson Parking was negligent in breaching its nondelegable duty under section 7-210 of the Administrative Code, its liability is not purely vicarious. Jackson Parking is not entitled to summary judgment on its cross claim for common law indemnification. Moreover, it has not been established that Island Medical is liable, to any degree, for plaintiff’s injuries because of its own negligence, therefore, Jackson Parking’s motion for summary judgment on its cross claim for contribution must also be denied (*Santoro v. Poughkeepsie Crossing, LLC*, 180 AD3d at 16-17).

Cross Claim for Breach of Contract

Jackson Parking’s cross claim for breach of contract is un rebutted. Island Medical fails to submit a Certificate of Insurance or other proof that it possesses a general liability insurance policy which provides coverage for the occurrence on behalf of the Jackson Parking, as an additional insured. As a result of the breach, Island Medical is contractually liable for any money damages

awarded to the plaintiff, and attorney's fees incurred by Jackson Parking in the defense of this action.

The cross claim against defendant Island Medical for breach of contract must be granted and the issue of damages shall be reserved until the time of trial unless stipulated to by the parties.

Accordingly, it is

ORDERED, the motion (Seq. No. 003) of defendant Jackson Parking Corp. for partial summary judgment on its cross claims against codefendant Island Medical Specialists, PLLC for contractual indemnification, common law indemnification, and contribution is denied; and it is further

ORDERED, the branch of defendant Jackson Parking Corp.'s motion for partial summary judgment on its cross claim against codefendant Island Medical Specialists, PLLC for breach of contract is granted; the issue of damages shall be reserved until the time of trial; and it is further

ORDERED, the motion (Seq. No. 004) of defendant Island Medical Specialists, PLLC to dismiss the complaint as against it is granted; and it is hereby

ORDERED, the complaint as against defendant Island Medical Specialists, PLLC is hereby severed and dismissed; and it is further

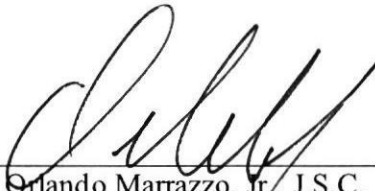
ORDERED, the branch of the motion of defendant Island Medical Specialists, PLLC to dismiss the cross claims against it for breach of contract is denied; and it is further

ORDERED, the branch of the motion of defendant Island Medical Specialists, PLLC to dismiss the cross claims against it for contractual indemnification, common law indemnification and contribution is granted; and it is further

ORDERED, the Clerk shall mark his records accordingly.

E N T E R,

Dated: 3/13/23



Hon. Orlando Marrazzo, Jr., J.S.C.