

Conti v 153 New Dorp Lane LLC
2023 NY Slip Op 35280(U)
November 15, 2023
Supreme Court, Richmond County
Docket Number: Index No. 151592/2019
Judge: Wayne Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
ROSE CONTI,

Plaintiffs,

-against-

153 NEW DORP LANE LLC, CAR TUNES
CUSTOMS, LUCILLE CUCCO, JD DELI &
GROCERY II CORP.,

Defendants.
-----X

Part 23
Present:
Hon. Wayne Ozzi

DECISION AND
ORDER

Index No:151592/2019
Motion Seq. 001-004

The following e-filed documents, listed by NYSCEF as (Motions 001-004), document numbers 70-213, were marked fully submitted on September 15, 2023.

Motion Sequence 001 is granted, Motion Sequence 002, is denied, Motion Sequence 003 is denied as moot, and Motion Sequence 004 is denied as premature, for the reasons set forth below.

Motion Sequence 001 - Defendant Car Tunes Custom's motion for Summary Judgment

Defendant Car Tune Customs (herein Car Tunes) moves for an order granting summary judgment pursuant to CPLR 3212, dismissing the complaint and any crossclaims against it, alleging there are no triable issues of fact or law as to Car Tune's liability in this action. Plaintiff and co-defendant JD Deli & Grocery oppose the motion.

This action is for personal injuries allegedly sustained by the plaintiff on July 12, 2016 when she tripped and fell due to a defective sidewalk flag at the property line between 173 New Dorp Lane and 157 New Dorp Lane. 153 New Dorp Lane, LLC is the owner of the property located at 153 New Dorp Lane which is leased to Car Tunes Customs. Lucille Cucco is the

owner of the property located at 173 New Dorp Lane which is leased to JD Deli & Grocery II Corp.

Car Tunes moves for summary judgment alleging that contrary to the assertions in the complaint, there is no evidence that Car Tunes leased property caused or created the sidewalk defect, nor did Car Tunes have an obligation to repair or maintain the sidewalk.

In support of their motion, Car Tunes attaches the pleadings, the deposition transcripts of plaintiff, and her daughter, Donna Conti who witnessed the accident, Enzo Palmieri, owner of 157 New Dorp Lane, Martin Langan and James Sheherlis, co-owners of Car Tunes, Lucille Cucco owner of 173 New Dorp Lane, Robert Cicero the owner of the Deli, Brian Keyes, former employee of Car Tunes, and the Expert Affidavit of Joel Miele, Professional Engineer.

Plaintiff testified that on July 12, 2016 at approximately 11:45 a.m. she tripped and fell on a sidewalk that was cracked and uneven. She further testified that she fell in front of the deli that was next to an auto repair shop.

On January 23, 2023, plaintiff's daughter Donna Conti, who was with her at the time of the accident, testified that plaintiff fell on a raised, uneven sidewalk walking from John's Deli towards the auto place. She digitally marked the area which was attached as an exhibit.

On January 27, 2022, Martin Langon, co-owner of Car Tunes testified that on the day of the accident he was working on a vehicle at his shop, in the left bay garage. He was about 50 feet away with a clear view of the sidewalk when he observed the plaintiff fall from the Deli side onto the Car Tunes side of the property. He testified that the sunk in sidewalk in front of John's Deli was what caused her to fall.

James Sheherlis, co-owner of Car Tunes, testified on July 14, 2022. Mr. Sheherlis stated that since Car Tunes opened, the sidewalk in front of John's Deli has been uneven. He further

testified that he complained to the owner of John's Deli and not his landlord because it was the Deli's sidewalk.

On November 16, 2021, Enzo Palmieri testified that he is the owner of 157 New Dorp Lane and that there were no portions of the sidewalk that were uneven or broken in front of Car Tune's business. He further stated that he never told his tenants to fix or repair the sidewalk or make any repairs outside the building.

On June 1, 2022, Lucille Cucco, the owner of 173 New Dorp Lane, testified that Robert Cicero was the sole-tenant of the property. He had rented the first-floor commercial space as a deli since 2012. At the time he began his lease the sidewalk was in good condition. Ms. Cucco also testified that there was a written lease agreement that she believed stated that Mr. Cicero was responsible for maintaining the external sidewalk in front of 173 New Dorp Lane. Ms. Cucco had received documents from her tenant's insurance company dated March 11, 2015 regarding the cracks in the sidewalk needing repairs. She testified that she spoke to the tenant several times that he had to repair the sidewalk. The first time she became aware of the cracked sidewalk was when she received the 2015 letter. She also received a second notice from the tenant's carrier and informed the tenant that he had to repair the sidewalk. After she learned of the accident, she hired a contractor to fix the broken sidewalk. In 2018, the contractor installed new sidewalks in front of the building.

On July 18, 2022, Robert Cicero, the owner of John's Deli, testified that he had been at the location for a little less than ten years. He stated that the week he was going to sign the written lease he noticed a crack in the sidewalk and a little bit of an indent in front of the property and he mentioned to Ms. Cucco that she should have it fixed. She indicated that the damage was from the previous tenants. Cicero also testified that he asked that the sidewalk be

fixed multiple times to Ms. Cucco, her husband and her two sons, but it was never repaired. It was his understanding that the maintenance of the sidewalk was the landlord's responsibility.

On December 6, 2022, Brian Keyes, a former employee of Car Tunes, testified that he was working on the day the accident took place. He testified that he observed the plaintiff trip over the broken sidewalk in front of John's Deli and fall onto the Car Tune's side of the sidewalk.

Last, the plaintiff submitted the affidavit of Joel Miele, a professional engineer who reviewed the photographs marked at the deposition. Based upon that review as well as plaintiff identifying where she fell, the sidewalk abutting 153 New Dorp Lane was sunken, in that it was positioned lower than the surfaces of the adjacent flag abutting 153 New Dorp Lane. No cracks were observed in other areas on the sidewalk abutting 173 New Dorp Lane. Additionally, there were no cracks, broken, depressed, raised or loose areas along the flags in front of 153 New Dorp Lane. Based upon those observations, it was the engineer's opinion based upon a degree of engineering certainty that the tripping hazard presented is a result of the sidewalk settling as a result of erosion caused by storm water penetration through the significant cracking through the sidewalk abutting the property at 173 New Dorp Lane. The sunken area of the sidewalk abutting the 173 New Dorp Lane property was not caused or created by any condition adjoining 153 New Dorp Lane. The defective sidewalk at the adjoining sidewalk in front of 153 New Dorp Lane, is the responsibility of the property owner at 173 New Dorp Lane.

In opposition to Defendant Car Tune's motion, plaintiff argues that there are issues of fact as to whether Car Tune's made special use of the sidewalk in front of 157 New Dorp Lane, because the vehicles being serviced had to drive over a portion of the sidewalk for ingress and egress to the garage.

In opposition, defendant JD Deli argues that plaintiff tripped on the raised portion of the sidewalk which is the property line between 173 and 157 New Dorp Lane. In support of their motion, JD Deli attaches a survey conducted by Wohl & O'Mara LLP.

To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*).

Defendant Car Tunes has met its *prima facie* burden for summary judgment through the pleadings, depositions and affidavit of the professional engineer presented in support of their motion, that they did not cause or create the condition that was allegedly responsible for the accident.

Plaintiff argues that there is a triable issue of fact as to whether Car Tune's created and/or exacerbated the condition of the sidewalk because of "special use" in that customers had to drive over a portion of the sidewalk for ingress and egress from the shop garage.

The use of a sidewalk as a driveway "constitutes a special use" (*Katz v City of New York*, 18 AD3d 818, 819 [2d Dept 2005]; see *Nunez v City of New York*, 41 AD3d 677, 678 [2d Dept 2007]; *Breger v City of New York*, 297 AD2d 770, 771 [2d Dept 2002]). Where the defect which caused the accident is "adjacent" to a driveway, the Court has dismissed causes of action against an abutting landowner on the ground that there was no evidence that the driveway contributed to the defective condition (see *Ivanyushkina v City of New York*, 300 AD2d 544, 545 [2d Dept 2002]; *Benenati v City of New York*, 282 AD2d 418, 419 [2d Dept 2001]; *Winberry v City of New York*, 257 AD2d 618, 619 [2d Dept 1999]).

Here, no evidence has been presented that Car Tune's customers coming in and out of their driveway contributed in any way to the uneven sidewalk in front of the deli. This is supported by the testimony of James Shederlis, co-owner of Car Tune's, who testified that the condition existed from the first day they opened the shop and that he had complained to the owners of 173 New Dorp Lane on more than one occasion. In addition, the sidewalk in front of Car Tune's depicted in the photos marked as evidence during the depositions, appears to be flat and even.

Defendant JD Deli has also not met their burden. No evidence has been presented that plaintiff fell on any portion of the property line. All of the testimony presented as well as the photographs identified during the deposition as to where plaintiff fell, clearly show that she fell in front of the Deli located at 173 New Dorp Lane.

Accordingly, Car Tune's motion for summary judgment is granted.

Motion Sequence 002 – JD Deli & Grocery II Corp’s Motion for Summary Judgment

JD Deli & Grocery (John’s Deli) also move for summary judgment arguing that they did not owe or breach a duty to plaintiff in that they were not responsible for maintaining and repairing the sidewalk, nor did they create the alleged condition. In addition, John’s Deli did not have a contractual obligation to maintain and repair the sidewalk as owner Lucille Cucco had a nondelegable duty to maintain and repair the sidewalk pursuant to Administrative Code 7-210. John’s Deli further contends that they did not breach the lease rider agreement and do not owe Lucille Cucco indemnification or contribution.

Plaintiff opposes the motion arguing that there are triable issues of fact that preclude summary judgment as to whether John’s Deli made special use of the sidewalk in front of 173 New Dorp Lane thereby creating the defective condition.

Defendant Lucille Cucco also opposes the motion contending that John’s Deli breached both its contractual and common law duties of care when it damaged the sidewalk in front of 173 New Dorp Lane through special use in that delivery trucks would drive up on the sidewalk and this triggered the Deli’s duty to indemnify.

Section 7-210 of the Administrative Code of the City of New York (“Section 7-210”) provides, in relevant part,

“a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to

maintain such sidewalk in a reasonably safe condition shall include ... the negligent failure to remove snow, ice, dirt or other material from the sidewalk . . .

“Section 7-210 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 the owners are liable for personal injury that is proximately caused by such failure” (*Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797 [2016]). The requirements of Section 7-210 apply to all property owners, regardless of their out-of-possession status or whether they had contracted with the lessee or another to keep the sidewalk in reasonably safe condition (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 173 [2019]).

While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under Section 7-210 (*id.* at 175). Thus, contrary to Defendant Cucco’s assertion that the lease obligates John’s Deli to repair and maintain the sidewalk, a landowner’s duty under Section 7-210 is an affirmative, nondelegable obligation (*id.* at 174), and, therefore, Cucco may be held liable for any personal injuries proximately caused by its failure to maintain the 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 her lease with the tenant.

In support of their motion, John’s Deli refers to the deposition testimony as well as the Lease and Rider.

On February 1, 2012 Lucille Piazza (maiden name) and Robert Cicero entered into a lease for the first floor and a portion of the basement in the building located at 173 New Dorp Lane. The lease also contained a Rider which stated that if the Rider and lease conflict the Rider controls. It provided in paragraph 50 in relevant part:

...Tenant shall be responsible for refuse, snow, and ice removal at premises including the sidewalk, alley areas, and 18 inches into the street and curb and shall do so in compliance with all applicable statutes, laws, ordinances, rules and regulations of the City of New York and shall take such other and further steps that are reasonably necessary to protect persons using Premises, sidewalk and alley areas from harm.

The Rider is the only section that refers specifically to the sidewalks. There is no portion of the lease that indicates that John's Deli was obligated to make any sidewalk repairs under the lease. Moreover, even if John's Deli was obligated to make repairs under the lease, which it is not, that would not impose a duty to plaintiff, a third-party to the agreement (see, *Collado v. Cruz*, 81 AD3d 542, 542 (1st Dept 2011)).

In addition, after the accident occurred, Cucco repaired the sidewalk. Evidence that repairs were made, or remedial measures taken after an accident are not admissible to show that a party was negligent unless there is a disputed issue of maintenance or control (see, *Watson v. FHE Serv.*, 257 AD2d 618 [2d Dept 1999]; *Cleland v. 60-02 Woodside Corp.*, 221 AD2d 307 [2d Dept 1995]). Here, it is undisputed that it was the owner who hired the contractors to repair the sidewalk. Cucco also testified that she was aware of the defect and had notice of the defect as far back as 2015 when Cicero left the notice from his insurance carrier that the sidewalk needed to be repaired, on at least two occasions.

Both plaintiff and co-defendant Cucco contend that John's Deli made special use of the sidewalk because trucks would allegedly drive up onto the sidewalk in question while making deliveries to the deli and this is what caused it to become cracked and uneven.

As evidence of this argument, both plaintiff and defendant refer to the deposition testimony of Cucco who alleges that prior to entering into the lease with John's Deli in February 2012, the sidewalk was even and in good repair. The earliest google map search that could be found in September of 2012, showed the sidewalk was cracked and uneven. Cucco alleges that

in the time from February 2012 until September 2012, the sidewalk was caused to become cracked because of delivery trucks coming up on the sidewalk to unload deliveries.

During his deposition testimony, Robert Cicero, owner of John's Deli testified that the sidewalk was in a broken and defective condition before he signed the lease. He further testified that he had repeatedly asked the landlord, her sons and husband to fix it.

Where a defect that causes an accident "occurs in a part of the sidewalk which is used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did 'nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway" (*Katz v. City of New York*, 18 A.D.3d at 819, quoting *Breger v. City of New York*, 297 AD2d at 771; see *Adorno v. Carty*, 23 AD3d 590, 591 [2d Dept 2005]).

On a motion for summary judgement, the function of the court is not to determine issues of fact or credibility, but merely to determine the existence of such issues (see *Tunison v. D.J. Stapleton, Inc.*, 43 AD3d 910 [2d Dept 2007]; *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *Scott v. Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). Moreover, since summary judgment is the procedural equivalent of a trial, it must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable (see *Celardo v. Bell*, 222 AD2d 547, 548 [2d Dept 1995]). Further, in deciding such a motion, the facts alleged by the nonmovant and inferences that may be drawn therefrom must be accepted as true (see *Doize v. Holiday Inn Ronkonkoma*, 6 AD3d 573, 574 [2d Dept 2004]; *Mosheyev v. Pilevsky*, 283 AD2d 469 [2d Dept 2001]).

The conflicting deposition testimony of Lucille Cucco and Robert Cicero as to when and what caused the sidewalk to become in disrepair, among other things, presents a credibility issue for the jury (see, *Dykeman v Heht*, 52 AD3d 767, 770 [2d Dept 2008]).

Accordingly, defendant JD Deli's motion for summary judgment is denied.

Motion Sequence 003 – 153 New Dorp Lane's motion for summary judgment against Car Tunes

As the cause of action against Car Tunes Customs Inc has been dismissed, Motion 3 is moot.

Motion Sequence 004 – Defendant Lucille Cucco's Cross-Motion for Summary Judgment

Defendant Cucco's motion is not only untimely, but the crossclaim against Robert Cicero/JDD for contractual indemnification is premature. An "indemnification clause does not apply to the mere assertion of claims" (*JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC*, 101 AD3d 575, 575–576 [1st Dept. 2012]), which is all that presently exists here. The extent of Cicero/JDD's duty to indemnify depends upon the extent to which its negligence contributed to plaintiff's injuries (see *Cuomo v. 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept. 2013] an issue which is not yet determined. Defendant Cucco's motion for summary judgment is denied as premature.

Accordingly, it is

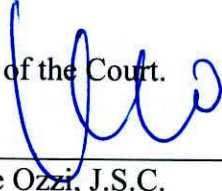
ORDERED, that Defendant Car Tunes Custom's motion for summary judgment (001) is granted and the complaint is dismissed against them, and it is further

ORDERED, that Defendant JD Deli & Grocery II Corp's motion for summary judgment (002) is denied, and it is further;

ORDERED, that Defendant 153 New Dorp Lane's motion for summary judgment (003) is denied as moot, and it is further;

ORDERED, that Defendant Lucille Cucco's cross-motion for summary judgment (004) is denied as premature.

The foregoing constitutes the Decision and Order of the Court.



Hon. Wayne Ozzi, J.S.C.

Dated: November 15, 2023