

Harris v New York Univ.

2024 NY Slip Op 34923(U)

September 30, 2024

Supreme Court, Bronx County

Docket Number: Index No. 20181/2020E

Judge: Alison Y. Tuitt

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5**

-----X
BARBARA HARRIS,

Plaintiff,

-against-

NEW YORK UNIVERSITY, et al.,

Defendants.
-----X

NEW YORK UNIVERSITY,

Third-Party Plaintiff,

-against-

COLLINS BUILDING SERVICES, INC.,

Third-Party Defendant.
-----X

Index No. 20181/2020E

Hon. ALISON Y. TUITT

Justice Supreme Court

The following papers were read on this motion (Seq No. 2) for **SUMMARY JUDGMENT** submitted on May 8, 2024.

Notice of Motion – Affirmation and Exhibits, Statement of Material Facts	NYSCEF Doc. # 42 – 60
Affirmation in Opposition and Response to Statement of Material Facts	NYSCEF Doc. # 77 – 79
Affirmation in Opposition, Response to Statement of Material Facts and Exhs.	NYSCEF Doc. # 90 – 92
Affirmation in Reply	NYSCEF Doc. # 93

Upon the foregoing papers, defendant/third-party plaintiff NEW YORK UNIVERSITY (Owner or NYU) moves pursuant to CPLR 3212, for summary judgment dismissing Plaintiff BARBARA HARRIS (Harris)'s complaint, for summary judgment on its claims for contractual defense and indemnification against third-party defendant COLLINS BUILDING SERVICES ("CBS"), and for other relief. This motion is decided in accordance herewith.

Plaintiff's complaint seeks damages for personal injuries arising out of an alleged slip and fall on a raised sidewalk slab near the entrance to the premises, a dormitory owned by NYU and located at 110 East 14th Street, New York County, New York. The incident is alleged to have occurred on September 4, 2019, at which time Plaintiff was employed as a porter at the premises by third-party defendant CBS.

In support of the motion, NYU submits, inter alia, counsel's affirmation; the pleadings; Plaintiff's Bill of Particulars and Supplemental Bill of Particulars, Plaintiff's deposition transcripts; the deposition transcript of

James York ("York"); photographs, an incident report, a copy of NYU's contract with CBS and related documents, the Note of Issue, the Affidavit of James York dated September 21, 2023, and a tender letter.

SUMMARY JUDGMENT

To be entitled to the drastic remedy of summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). Under the Administrative Code of the City of New York, a commercial landowner's duty to maintain its property is extended to the adjoining sidewalk (Administrative Code of City of N.Y. § 7-210).

DISMISSAL OF COMPLAINT

NYU argues that it neither created nor had actual or constructive notice of the alleged dangerous condition which caused Plaintiff physical injury. NYU also argues that the alleged defect of the sidewalk, such as it was, was open and obvious and/or trivial in nature.

NYU asserts that it has met its burden to prove it did not have actual or constructive notice of any alleged defect in the sidewalk adjoining the premises, by virtue of its witness testifying that he had never received a complaint about the sidewalk. Mr. York, NYU's facilities manager for the premises, testified that he did not recall any inspections of the sidewalk in front of the premises (NYSCEF Doc. No. 54, p. 29). He also testified that the construction department of NYU would be responsible for any repairs or maintenance of the sidewalk adjoining the premises (NYSCEF Doc. No. 54, p. 23). He did not testify, however about when the area was inspected last prior to the alleged accident (see *Birnbaum v New York Racing Ass'n, Inc.*, 57 A.D.3d 598, 598-99, [2d Dept 2008] ["To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell"]). Having failed to eliminate this potential source of negligence liability, NYU has not made a prima facie showing of entitlement to summary judgment dismissing Plaintiff's complaint (*Kellogg v All Saints Hous. Dev. Fund Co., Inc.*, 146 AD3d 615 [1st Dept 2017]; *Gurwitz v Claridge House LLC*, 2022 NY Slip Op 31338[U], *2 [Sup Ct, NY County 2022]; see also *Abramson v Eden Farm, Inc.*, 70 AD3d 514 [1st Dept 2010]).

In support of its motion, NYU cites case law relating to transient or temporary dangerous conditions (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010] [Plaintiff slipped on plastic strap on the sidewalk]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986] [Plaintiff slipped on paper wrapper from concession stand]). The condition of the sidewalk complained of herein is not analogous to spilled liquid or garbage which has been strewn or blown onto the ground. As the alleged defect was not transient, temporary or moveable in nature, defendant's claim that they did not have actual or constructive notice of the alleged defect,

even if properly established, would not demonstrate entitlement to summary judgment here (*see Langston v Gonzalez*, 39 Misc3d 371, 375 [Sup Ct Kings County 2013]).

NYU also argues that they have no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous, averring that the alleged defect, i.e., a one and one-half inch difference in height across the expansion joint between the sidewalk slabs, is not inherently dangerous. This argument also misses the mark. “The case law provides numerous examples of factors that may render a small defect actionable, including ... a location—such as a parking lot, premises entrance/exit, or heavily traveled walkway—where pedestrians are naturally distracted from looking down at their feet” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]). A difference in elevation of less than one inch was still actionable as the “defect ... was located close to the entrance to the bank, where a person's attention would be drawn to the door, not to the sidewalk” (*Tesak v Marine Midland Bank, N.A.*, 254 AD2d 717 [4th Dept 1998]). Here, the Plaintiff alleges that she slipped and fell just as she was approaching the entrance to the building and she did not see the defect. Given the circumstances, NYU cannot establish as a matter of law that the alleged defect was not inherently dangerous.

Since NYU failed to demonstrate prima facie entitlement to judgment as a matter of law, we need not consider the sufficiency of Plaintiff's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Having failed to meet its initial burden, NYU's motion for summary judgment dismissing Plaintiff's complaint is denied.

INDEMNIFICATION, FAILURE TO DEFEND, AND FAILURE TO PROCURE INSURANCE

NYU also moves for summary judgment against CBS for contractual defense and indemnification. NYU argues that it is entitled to summary judgment on its claims for contractual indemnification, common law indemnification, breach of contract for CBS's failure to defend NYU in this action, and breach of contract for CBS's alleged failure to procure insurance.

NYU and CBS are parties to a contract (the Contract) which purports to contain an indemnification provision (NYSCEF Doc. No. 56). NYU cannot be entitled to summary judgment on its claim for contractual indemnification, as it has not yet been determined whether NYU or CBS were negligent. Such final determinations are necessary for demonstrating entitlement to contractual indemnity as a matter of law. Therefore, it would be premature to grant NYU's motion for summary judgment on its claim for contractual indemnification against CBS (*Pimentel v DE Freight LLC*, 205 AD3d 591 [2d Dept 2022]; *Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]). Further, “where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature” (*Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011]). Here, there is an issue of fact as to what extent, if any, CBS or NYU is liable for the hazardous condition that caused Plaintiff's injury (*see Cackett v Gladden Props., LLC*, 183 AD3d 419, 422 [1st Dept 2020]).

Defendant NYU's claim for common law indemnification against CBS is also not yet ripe for summary judgment. Any grant of summary judgment on common law indemnity at this stage of the litigation would be premature, as there has been no finding that the alleged indemnitor, i.e. CBS, was negligent (*Pimentel v DE Freight LLC*, 205 AD3d 591, 594 [1st Dept 2022]; *Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]). Accordingly, NYU's motion for summary judgment on its claim for common law indemnification is also denied.

Similarly, as an alleged indemnitor, CBS is not an insurer, and thus its duty to defend NYU is no broader than its duty to indemnify (*Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp.*, 128 AD3d 425, 426 [1st Dept 2015]). Hence, it is also premature to grant NYU's motion for summary judgment on its claim for CBS's alleged duty to defend.

NYU has shown that the Contract requires CBS to procure liability insurance in NYU's favor. Paragraph 12 of the Contract obligates CBS to procure and maintain liability insurance for the benefit of NYU (NYSCEF Doc. No. 56, pp. 16-17). In support of its motion, NYU presented the tender letter from its attorney to CBS's liability insurance carrier (NYSCEF Doc. No. 60). NYU argues that the carrier's refusal to indemnify or defend NYU supports its contractual claim against CBS herein. Where a party is contractually required to procure insurance, the carrier's denial of a claim brought thereunder does not demonstrate the party's failure to meet its obligation (*Perez v Morse Diesel Intern., Inc.*, 10 AD3d 497 [1st Dept 2004]).

However, under the terms of the contract, CBS was required to procure general commercial liability insurance with \$5MM per occurrence limits. A party moving for summary judgment on its claim for failure to procure insurance meets its prima facie burden by establishing that a contract provision requiring the procurement of insurance was not complied with (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). The certificate of insurance naming NYU as additional insured shows only \$2MM per occurrence limits, albeit with an umbrella policy for \$20MM in excess coverage. Similarly, the insurance policies proffered by CBS show insufficient coverage limits. The coverage demonstrated by CBS does not satisfy its contractual obligation, and thus CBS is liable to NYU for any damages resulting therefrom (*see Keelan v Sivan*, 234 AD2d 516, 617 [2d Dept 1996]). A determination of liability on this issue "need not await a factual determination as to whose negligence, if anyone's, caused plaintiff's injuries (*see Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575 [1st Dept 2012]). NYU has met its prima facie burden in moving for summary judgment on CBS's failure to procure insurance under the Contract (*see Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]). CBS's opposition does not raise any triable issue of fact capable of defeating NYU's prima facie showing. Accordingly, summary judgment is granted to NYU as to liability on its claim for CBS's failure to procure liability insurance with sufficient coverage.

Accordingly, it is hereby

ORDERED that NYU's motion (Mot. Seq. 2) for summary judgment is **GRANTED IN PART**, granting NYU summary judgment on its cause of action against CBS for breach of contract for its failure to procure liability insurance with sufficient coverage amounts and **DENIED** in all other respects.

This constitutes the Decision and Order of this Court.

Dated: 9/30/2024

Hon. 
ALISON Y. TUITI, J.S.C.

- 1. CHECK ONE.....
 - CASE DISPOSED IN ITS ENTIRETY
 - CASE STILL ACTIVE
- 2. MOTION.....
 - GRANTED
 - DENIED
 - GRANTED IN PART
 - OTHER
- 3. CHECK IF APPROPRIATE.....
 - SETTLE ORDER
 - SUBMIT ORDER
 - SCHEDULE APPEARANCE