Sillie v 250 E. 139th St. LLC.

2025 NY Slip Op 35343(U)

February 25, 2025

Supreme Court, Bronx County

Docket Number: Index No. 806515/2022E

Judge: Paul L. Alpert

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26

----------X Index No.: 806515/2022E

Hassan Sillie

Plaintiffs,

DECISION/ORDER

-against-

250 East 139th Street LLC., Marwa Tires Shop, Inc.,
d/b/a Marwa Tire Shop

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of the order to show cause as indicated below:

Papers	**Numbered**
Notice of Motion & Affirmation in Support & Exhibits	**1**
Affirmation in Opposition & Exhibits	**2**
Memorandum of Law in Opposition	**3**
Affirmation in Reply & Exhibits	**4**

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action for personal injuries arising from a trip and fall that occurred on June 9, 2021 at a tire repair shop located at 250 East 139th Street, Bronx, New York. The plaintiff claims that a hole or crack on the driveway/parking lot caused him to trip and fall. The defendant Marwa Tires Shop, Inc d/b/a Marwa Tire Shop (hereinafter "Marwa") moves for summary judgment dismissing the complaint and cross-claims. The motion is opposed by the plaintiff as well as co-defendant 250 East 139th Street LLC (hereinafter "250 East").

Marwa leased the property from 250 East and operates a tire repair shop on the premises. The plaintiff testified that he was walking towards the tire repair shop when he tripped and fell on a crack and fell on his right side (see Exhibit "E" pg. 28 lines 20 -24). He was looking

straightforward before the accident (see Exhibit "E" pg. 29 lines 22- 24). He said as he was walking and about to turn when his foot went inside the hole and he just fell (see Exhibit "E" pg. 38 lines 6-8). The plaintiff was shown a photograph of the area where he fell and he testified that the photo was a fair and accurate description of where he fell (see Exhibit "E" pg. 37 lines 4-11). There was a yellow measuring tape in the middle of the photo and he stated he fell straight down in the crack where the yellow line (measuring tape) was (see Exhibit "E" pg. 37 lines 14-21).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material, triable issues of fact and the right to entitlement to judgment as a matter of law (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Summary Judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (see *Assaf v. Ropog Cab Corp.*, 153 Ad2d 520 [1st Dept 1989]). It is well settled that issue finding, not issue determination, is the key to summary judgment (see *Rose v. Da Ecib USA*, 259 Ad 258 [1st Dept 1999]). Summary judgment will only be granted if there are no material, triable issues of fact (see *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). "The motion for summary judgment must be supported by an affidavit by "a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or the cause of action or defense has no merit" (see CPLR § 3212 [b]).

Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of the premises (*Gibbs v. Port Auth. of NY*, 17 AD3d 252).

"In the absence of ownership, occupancy, control or special use, a party generally cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Toner v. Trader Joe's East, Inc.*, 209 AD3d 690 [2nd Dept. 2022]).

In support of the motion, Marwa argues that 250 East was responsible for the maintenance and repair of the sidewalks and driveway/parking lot. It claims that subsequent to the accident 250 East repaired the area where the plaintiff fell. Marwa contends this demonstrates 250 East's ownership, control and a responsibility to maintain the area. It also claims the lease only obligates Marwa to clear the area of snow and ice pursuant to paragraph 55 (c) of the lease rider. Mr. Boyle, the property manager of 250 East, testified that he would drive by the property on a weekly basis without getting out of his car (see Exhibit "H" pg. 10 lines 21-25). He also testified that 250 East hired a contractor to repair the area where the plaintiff fell (see Exhibit "H" pg.). Marwa argues these actions demonstrate that 250 East knew they had a responsibility to maintain the area where the plaintiff fell.

Marwa also contends that the paragraph 55 (a) of the lease rider states "tenant is not obligated to make any structural repairs." It claims that it only leased the demised premises and not the sidewalk/driveway/parking lot where the plaintiff had his accident. The "Good Guy Guaranty" on page 15 of the lease indicates that Marwa leased the "demised premises known as the ground floor corner store. . ." It also argues that 250 East retained the right to enter the premises and had a duty repair structural defects under the lease.

In further support of the motion, Marwa submits an affidavit by Mohammed Bennani. He claims he is the owner of Marwa. He states that he only leased the building wherein he operated his tire repair shop, and he did not lease the driveway/sidewalk/ parking lot in front of

the shop where the plaintiff fell. He states that Marwa's only duty was to sweep and clear snow from the driveway/sidewalk or parking lot and not to repair it. He also claims in the affidavit that the condition of the location where the plaintiff fell was in the same condition as it was when he leased the premises.

Marwa also moves to dismiss the cross-claim of indemnification against it. It incorrectly argues that there is no explicit statement that the tenant should indemnify the landlord for the landlord's negligence or acts or omissions and that the indemnity provision is void and violates General Obligations Law § 5-321. GOL § 5-321 states in pertinent part that "every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees . . . is void as against public policy and wholly unenforceable." In the instant matter, the indemnification clause in the lease does not obligate the tenant to indemnify the landlord for the landlord's own negligence. The relevant portion of the indemnification clause states that "(a) tenant shall indemnify and save harmless landlord and its agents against and from (a) any and all claims (i) arising from the conduct of business in or management of the demised premises or any work or thing whatsoever done or any condition created (other than by landlord, its agents, employees, representatives, or invitees for landlord's or tenant's account) in or about the premises. . ." The indemnification clause contained in the lease is a valid indemnification clause and does not violate GOL § 5-321. Marwa did not meet its prima facie burden for summary judgment dismissing the cross-claim for indemnification and this branch of the motion is denied.

Marwa has met its prima facie burden for summary judgment dismissing the plaintiff's

complaint. The burden now shifts to 250 East and the plaintiff to raise a triable issue of fact regarding Marwa's responsibility to maintain the location where the plaintiff's accident occurred.

The plaintiff opposes the motion and argues that Marwa incorrectly argues that the lease obligates 250 East to maintain and repair the parking lot. The plaintiff contends that paragraph 55 (a) of the lease rider indicates that Marwa had no duty to make structural repairs. This paragraph defines which repairs are considered structural and the subject defect is not included in that laundry list therefore is considered non-structural. Marwa had a responsibility to make non-structural repairs. Marwa's contention that paragraph 55 (c) of the lease rider only obligates Marwa to keep the area clear of snow and ice is also incorrect. The lease provision provides that " Tenant agrees to maintain those sidewalks abutting, adjacent to, or in front of the demised premises, up to and including the curb(s) and to keep them clean and free of snow, ice, garbage and other materials." The plaintiff argues this language clearly made it Marwa's responsibility to maintain the subject area "and to keep" it free of snow, ice, garbage and other material. The plaintiff also opposes Marwa's claim that it only leased the building and is not responsible for the area where the plaintiff fell. The GOOD GUY GUARANTY indicates that Marwa leased the demised premises and the term "demised premises" is not defined anywhere in the lease.

The landlord, 250 East, opposes the motion and argues that paragraph 55 (c) of the lease rider obligates Marwa to maintain the area where the plaintiff had his accident. This section states that Marwa is responsible for maintaining the sidewalks in good and safe condition. The fact that the word "and" is placed in the sentence places the responsibility for maintenance of the sidewalk solely on the tenant. 250 East also argues that section 4 of the lease obligates the tenant to make all repairs to the building, whether structural or non-structural caused by the

carelessness, omission, neglect or improper conduct of the tenant. It also contends that it repaired the area where the plaintiff fell in an effort to protect the general public after Marwa failed to repair the subject area in direct violation of the terms of the lease. The First Department has held that "an owner who is under no obligation to repair will do so for reasons of his own. It may be to avoid other accidents, to prevent further controversy or because of a tenant's failure to properly care for the premises, whose duty it was to remedy the condition which brought about the accident." (*Mulligan v. New York University*, 254 AD 107 [1st Dept. 1938]).

250 East also argues that Mr. Boyle testified that Marwa was responsible for repairing, maintaining, and inspecting the area where the plaintiff fell. He also testified that he does not think sidewalks are considered a structural repair because sidewalks are not included in the list in the lease describing structural repairs. It also relies on Mr. Boyle's testimony that he did weekly drive-bys and he always saw a car parked in the area where the plaintiff fell. It claims that section 44 (b) of the lease required Marwa to obtain General Liability Insurance for the benefit of the landlord and tenant against any liability occasioned by any occurrence resulting from the use, operation, and/or maintenance . . . of the sidewalks, passageways and other areas adjacent to the premises. Marwa did obtain General Liability Insurance and this demonstrates that Marwa understood its responsibility in relation to the subject sidewalk/driveway.

The landlord also contends that Marwa created the defective condition and owes a duty to the plaintiff. Marwa had special use of the driveway/sidewalk to perform its daily work activities and used the driveway/sidewalk as an entrance to its premises for parking. It also used the driveway/sidewalk as an area to do work on cars and trucks. This special use created the alleged defect. Courts have held that an abutting landowner or tenant will be held liable if it either

"created the defect, caused it to occur by a special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk." *Cannizzaro v Simco Management Co.*, 26 AD3d 401, 809 NYS2d 196 [2nd Dept. 2006) citing *Jeanty v. Benin*, 1 AD3d 566; see *Lowenthal v. Theiodore H. Heidrich Realty Corp.*, 304 AD2d 725 NYS2d 497). It contends that the photos annexed to Exhibit E confirm that the alleged defect was not present in photos taken prior to Marwa leasing the premises but the defect is present in photos during Marwa's lease of the premises. It argues that 250 East's cross-claims for contribution and indemnification against Marwa should not be dismissed.

250 East and the plaintiff have demonstrated that there are issues of fact with respect to the duty to maintain the area where the plaintiff fell. The Appellate Division has held that a landlord was not liable for repairing a driveway where the lease limited the repair obligation of the landlord to a specific list of structural repairs, and the driveway was not included in the list of structural repairs in the lease (see *Hecht v. Vanderbilt*, 141 AD2d 696 [2nd Dept. 1988]). In the instant matter, paragraph 55 (a) of the lease rider states that the "tenant is not obligated to make any structural repairs to the demised premises or the building. . ." The paragraph also defines structural repairs "solely as those repairs that are necessary to assure the integrity of the building's foundation, separating walls enclosing the demised premises (excluding the store front), vertical supporting beams and horizontal supporting beams of the roof, building systems, including but not limited to the heat, electrical, plumbing or other mechanical systems that generally service the building." The list in the paragraph does not include any defect in the sidewalk, driveway or parking lot. The parties agreed the landlord would only make the structural repairs as enumerated in the lease.

The parties refer to the area where the plaintiff fell as the sidewalk/driveway/parking lot. It appears from the google pictures annexed to the opposition papers that the area where the plaintiff fell is on the edge of a sidewalk and part of parking spaces designated for the customers of Marwa. Paragraph 55 (c) indicates that the "tenant agrees to maintain those sidewalks abutting, adjacent to, or in front of the demised premises, up to and including the curb(s) and to keep them clean and free of snow, ice, garbage and other materials. This paragraph clearly places the responsibility to maintain sidewalks in front of the demised premises up to and including the curbs on Marwa. Maintaining the area means to keep the area in good condition. This paragraph adds an additional responsibility for Marwa to also keep the area clean and free of snow, ice, garbage and other materials. The plaintiff and 250 East have raised an issue of fact regarding Marwa's responsibility to maintain the area where the plaintiff allegedly fell.

"A tenant cannot be held liable to a third party in tort absent a showing that (a) it affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a "special use" for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition" (*Kellogg v. All Saints Housing Development Fund Co., Inc.*, 146 AD3d 615 [1st Dept. 2017]; see also *Collado v. Cruz*, 81 AD3d 542 [1st Dept. 2011]; *Balsam v. Delma Eng'g. Corp.*, 139 AD2d 292 [1st Dept. 1988]). The photos annexed to Exhibit E of 250 East's opposition papers appear to demonstrate that the area where the plaintiff fell is on the edge of a sidewalk and designated spaces for customers to park at the tire shop. The photos also show that prior to the date of the accident, there were cars and trucks parked in the area where the plaintiff fell and it appears that Marwa is repairing the vehicles. This raises a question of fact as to whether Marwa created a special use of the sidewalk for its own benefit and

if that special use created the alleged defect that caused the plaintiff to fall. The branch of Marwa's motion for summary judgment dismissing the plaintiff's claim against it is therefore denied.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED, that Marwa's motion for summary judgment is denied in its entirety, and it is further,

ORDERED AND ADJUDGED, that the defendant, Marwa Tires Shop, Inc., d/b/a Marwa Tire Shop serve a copy of this decision and order with notice of entry upon all parties within twenty (20) days of the notice of entry.

This constitutes the decision and order of the court.

Dated: February 25, 2025

Hon. Paul L. Alpert, J.S.C.