SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

WINKEYA WINDLEY,

Plaintiff,

- v -

THE CITY OF NEW YORK and THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

(And a third-party action).

INDEX NO. 100182/05

MOTION DATE 6/28/12

MOTION SEQ. NO. 008

The following papers, numbered 1 to 5 were read on this motion for summary judgment

Notice of Motion—Affirmation — Exhibits A-I, J [Affidavit], K- O	No(s). 1-3
Affirmation in Opposition—Exhibits A-D	No(s). 4
Replying Affirmation–Exhibits A-C	No(s). 5

Upon the foregoing papers, it is ordered that this motion for summary judgment by third-party defendant 4761 Broadway Associates, LLC is denied.

In this action, plaintiff alleges that, on November 5, 2003 at approximately 7:40 A.M., she slipped and fell down the subway staircase designated O2-A, while walking to enter the A train subway station located at the northwest corner of Dyckman Street and Broadway in Manhattan. Defendant New York City Transit Authority (NYCTA) impleaded third-party defendant 4761 Broadway Associates, LLC (Broadway Associates), alleging that Broadway Associates is the owner of the staircase. Broadway Associates is the owner of the premises located at 4761-79 Broadway in Manhattan. (Leichleitner Affirm. ¶ 4.)

Broadway Associates moves for summary judgment dismissing the third-party complaint, on the grounds that it did not cause or create any defective condition within staircase O2-A, and that it did not maintain, operate, control or repair staircase O2-A. In support of its motion, Broadway Associates submits, among other things, the affidavit of Stanley Wasserman, who avers that he is a member of Broadway Associates. (Lechleitner Affirm., Ex J [Wasserman Aff.] ¶ 1.) According to Wasserman, Broadway Associates "has

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

never maintained, operated, controlled or repaired the stairway located at the premises of 4761-79 Broadway on the north west corner of Dyckman Street and Broadway that exclusively leads to the Dyckman Street Station of the 8th Avenue New York City Subway System on Broadway." (*Id.* ¶ 4.) Wasserman states that "all maintenance and repair of the stairway . . . have been performed by the Metropolitan Transportation Authority." (*Id.* ¶ 5.)

Broadway Associates also submits maintenance and repair records of the subway station, obtained through discovery in *Sanchez v New York City Tr. Auth.*, Index No. 107304/2006. The plaintiff in *Sanchez* alleged that, on October 13, 2005, she tripped and fell due to a garbage condition and defective step condition on staircase "O2A." NYCTA's discovery response in *Sanchez* states, in pertinent part: "Enclosed find maintenance and repair records for the subject station for a period of one year post accident. The records make reference to maintenance performed on the subject stairs as suggested by Plaintiff's counsel. Said repairs were undertaken by NYCTA personnel, not outside contractors. . . ." (Lechleitner Affirm., Ex K.)

By decision and order dated June 10, 2010, this Court granted, without opposition, Broadway Associates's motion for summary judgment dismissing the *Sanchez* action as against it. The decision states, "Movants have demonstrated that they do not own or control or maintain the subject stairway from street to subway and that they did not act so as to cause or create a defective or dangerous condition." (*Id.*, Ex O.) Broadway Associates therefore argues that the third-party action is barred by the doctrine of collateral estoppel.

In opposition, NYCTA submits the EBT testimony of Irving Freilich, who testified that he works in the real estate department of the MTA. (Coffey Affirm., Ex C, at 6.) According to Freilich, "[t]he staircase is an O staircase, which means it's the responsibility to be maintained by the building owner. O stands for building owner, that's the designation of stairways." (*Id.* at 12.) Freilich testified that, pursuant to a 1926 agreement between "Broadway Dikeman Building Corporation," the building owner, and the City of New York, "Broadway Dikeman" was responsible to maintain the stairway at issue. (*Id.* at 13.)

Article "First" of the 1926 indenture between the City of New York and

(Continued . . .)

Broadway-Dyckman Building Corporation states, in pertinent part:

> "The Owner [Broadway-Dyckman Building Corporation] hereby grants, conveys and releases unto the City, its successors and assigns, forever, except as hereinafter provided, an exclusive right of way and easement, in through over and upon the Premises, and also in, through, over, and upon any future building or buildings erected in substitution therefor, for the purposes of constructing, maintaining and operating the means of access, ingress, and egress, (hereinafter called the 'Approach') between the Station and the Street, and all necessary or appropriate appurtenances thereof shown on the substantially [*sic*] in accordance with the drawings annexed hereto and made a part of this Indenture . . ."

(Coffey Opp. Affirm., Ex B.) Article "Eighth" states, in pertinent part,

> "The Owner covenants with the City, that whenever the Entrances provided for in Article Sixth[1] shall be open, *the Owner shall keep any means of access from such Entrances into the Premises or through the premises to the street* and any portions of the premises immediately accessible from such Entrances or from such means of access *in a thoroughly clean, neat, dry, safe, and attractive condition, in thorough repair*, well-heated during cold weather, adequately lighted with electricity whenever artificial light is necessary. . . ."

(*Id.* [emphasis supplied].)

Broadway Associates contends that, notwithstanding NYCTA's contention that Broadway Associates had to maintain the stairway pursuant to an easement, NYCTA assumed an obligation to maintain and repair it, as is reflected in cleaning records and maintenance and repair records.

(Continued . . .)

---

[1] Article "Sixth" states, in pertinent part, "The City will permit the Owner, at the costs and expense of the Owner to construct and maintain entrances between the Premises and the Approach (hereinafter referred to as 'Entrances'). . .."

Alternatively, Broadway Associates argues that NYCTA had a duty to maintain the stairway because the stairway is used exclusively as a means of ingress and egress to the subway, citing *Bingham v New York City Tr. Auth.* (8 NY3d 176 [2007].)

Broadway Associates's motion for summary judgment is denied. Contrary to Broadway Associates's argument, NYCTA is not collaterally estopped from asserting that Broadway Associates, the purported successor-in-interest to Broadway-Dyckman Building Corporation, owns stairway O2-A, notwithstanding this Court's decision in *Sanchez v New York City Transit Authority.*

> "Under New York law, collateral estoppel effect will only be given to matters actually litigated and determined in a prior action. An issue is not actually litigated if there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation.
>
> . . . this Court has carved out a limited exception where the party against whom collateral estoppel is sought to be invoked has appeared in the prior action or proceeding and has, by deliberate action, refused to defend or litigate the charge or allegation that is the subject of the preclusion request."

(*Matter of Abady*, 22 AD3d 71, 83-84 [1st Dept 2005]; *Academic Health Professionals Ins. Assn v Lester*, 30 AD3d 328, 329 [1st Dept 2006].)

Here, collateral estoppel does not apply because this Court's decision in *Sanchez* was granted on default, and therefore the issue of the ownership of stairway O2-A was not a matter actually litigated. The limited exception recognized in *Matter of Abady* does not apply here, because Broadway Associates has not offered any evidence from the record in *Sanchez* to show that NYCTA failed to oppose its motion in *Sanchez* because it "willfully and deliberately refuse[d] to participate in those litigation proceedings, or abandon[ed] them, despite a full or fair opportunity to do so." (*Matter of Abady*, 22 AD3d at 85.) Moreover, the default determination that Broadway

(Continued . . .)

Associates did not own staircase O2-A was not a binding determination that NYCTA was liable. *Sanchez* does not appear to be the situation where NYCTA willfully abandoned the litigation in the hopes of avoiding or minimizing the repercussions of adverse determinations.

A reasonable inference could be drawn on this motion in favor of NYCTA, that Broadway Associates is the successor in interest to Broadway-Dyckman Building Corporation under the 1926 indenture. Broadway Associates is the admitted current owner of the premises located at 4761-79 Broadway in Manhattan, and Broadway Associates did not dispute that the metes and bound description contained in the indenture includes the stairway at issue. Although Broadway Associates objects to the copy of 1926 indenture as unauthenticated, a certification accompanies the document from the City of New York Department of Finance, Office of the City Register, New York County. (Coffey Opp. Affirm., Ex B.) "[C]ase law makes clear that '[a] grantee of land takes title subject to duly recorded easements that have been granted by his [or her] predecessors-in-title.'" (*Stasack v Dooley*, 292 AD2d 698, 700 [3d Dept 2002], citing *Pomygalski v Eagle Lake Farms*, 192 AD2d 810 [3d Dept 1993].)

Broadway Associates has not met its burden of demonstrating that the covenants in Article "Eighth" with respect to the easement granted may be modified solely by the conduct of the parties. Finally, the possibility that NYCTA has a duty to maintain stairway O2A under *Bingham* would not relieve Broadway Associates of any duty separately created under the 1926 agreement.

Therefore, Broadway Associates's motion for summary judgment dismissing the third-party action is denied.

Dated: 7/19/12

New York, New York

_____, J.S.C.

HON. MICHAEL L. STALLMAN

1. Check one: .....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ■ NON-FINAL DISPOSITION

☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE