

Harris v IG Greenpoint Corp.

2012 NY Slip Op 32161(U)

August 15, 2012

Supreme Court, New York County

Docket Number: 100776/07

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 100776/2007
HARRIS, LISA
vs.
IG GREENPOINT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, It is ordered that this motion is

is decided in accordance with the annexed decision.

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

RECEIVED

AUG 16 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED

Dated: 8/15/12

AUG 16 2012 09K, J.S.C.

1. CHECK ONE: CASE DISPOSED BY COUNTY CLERK'S OFFICE NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
LISA HARRIS,

Plaintiff,

Index No. 100776/07

-against-

DECISION/ORDER

IG GREENPOINT CORP., THE CHINA CLUB LATE
NIGHT MANAGEMENT, INC. and
NIGHTLIFE ENTERPRISES, L.P.,

Defendants.
-----X

FILED

AUG 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Motion	<u>3</u>
Affirmations in Opposition to the Cross-Motion.....	<u>4</u>
Replying Affidavits.....	<u>5</u>
Exhibits.....	<u>6</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk in front of a building located at 268 West 47th Street (a/k/a 760-766 Eighth Avenue), New York, New York (the "building") on February 26, 2006. Defendant IG Greenpoint Corp. ("IG") now moves for summary judgment dismissing the complaint and any cross-claims against it on the ground that it is not liable because it was an out-of-possession owner of the building which neither created nor had notice of the alleged defective condition nor was contractually obligated to maintain or repair the sidewalk on which plaintiff fell. Defendants The China Club Late Night Management, Inc. ("The China

Club”) and Nightlife Enterprises, L.P. (“Nightlife”) cross-move for summary judgment dismissing the complaint and any cross-claims against them on the ground that they did not have a duty to maintain the sidewalk pursuant to the lease agreement and they did not cause and create the condition. For the reasons set forth below, IG’s motion and The China Club and Nightlife’s cross-motion are denied.

The relevant facts are as follows. On or about February 26, 2006, plaintiff alleges that she tripped and fell on a “defect and/or tripping hazard” in the sidewalk in front of the building, “approximately 15-18 inches from the curb line...on the southern side of West 47th Street...” Plaintiff commenced the instant action in January 2007 against IG, The China Club and Nightlife. IG was/is the owner of the building adjacent to the sidewalk on which plaintiff allegedly tripped and fell. On October 1, 1996, a lease agreement (the “Lease”) was entered into between IG, as owner, and Late Night Management, Inc., as tenant, for the second and third floors and portions of the roof in the building known as 760-766 Eighth Avenue. On August 15, 1997, the parties signed an amendment to the Lease in which IG agreed to the assignment of the Lease from Late Night Management, Inc. to Nightlife, a New York limited partnership, the sole general partner of which limited partnership is Late Night Management, Inc.

By Notice of Motion dated June 3, 2008, The China Club and Nightlife moved for an Order pursuant to CPLR §§ 3211(a)(1) and (a)(7) dismissing plaintiff’s complaint and any cross-claims asserted against them by IG, claiming that IG was contractually obligated to maintain the sidewalk on which plaintiff tripped and fell. In opposition to that motion, plaintiff submitted an Affidavit in which she set forth that the condition which caused her to fall was “a cracked and broken portion of the sidewalk” located “just outside the main entrance to the premises where

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THE CHINA CLUB is located.” Specifically, plaintiff affirmed that her accident occurred “within the area cordoned off by defendant THE CHINA CLUB as the area where people line up to gain entry.” She also stated that the sidewalk cracks on which she tripped emanated from the exact location where metal posts, which held up ropes cordoning off the area, were set out by the operator of the nightclub. IG opposed the motion on the ground that pursuant to the lease agreement, it was the tenant’s responsibility to maintain the sidewalk.

By an Order of the Honorable Jane S. Solomon dated November 19, 2008, The China Club and Nightlife’s motion was granted. Both plaintiff and IG appealed the decision. Pending appeal, Nightlife d/b/a China Club filed for bankruptcy protection under Chapter 11 on February 24, 2010. This case was then stayed pending bankruptcy resolution. By Decision and Order dated April 19, 2010, the Appellate Division, First Department, reversed, on the law, the Order granting the motion to dismiss the complaint and cross-claims. By Order of the United States Bankruptcy Court, Southern District of New York, dated November 5, 2010, the bankruptcy action was dismissed. Following a conference with this Court on April 11, 2011, the stay was lifted and the matter restored to active status.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his

claim.” *Id.*

The court first turns to IG’s motion for summary judgment. Pursuant to § 7-210 of the Administrative Code of the City of New York (“§ 7-210”), effective September 14, 2003, liability for injuries arising from defective sidewalk conditions in front of certain properties shifted from the City to abutting property owners. Specifically, the section provides in part that:

(a) It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.

(b) Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

(c) Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

Moreover, it is well-settled that “§ 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk.” *Collado v. Cruz*, 81 A.D.3d 542 (1st Dept 2011).

In the instant case, IG has failed to establish its prima facie right to summary judgment as it has failed to show that it does not have a duty to maintain or repair the sidewalk in front of the building. Although IG asserts that pursuant to the Lease, The China Club and Nightlife are responsible for making repairs to the sidewalk, that argument is without merit as a property

owner's duty to maintain and repair the sidewalk in front of its property is a non-delegable one. *See Collado*, 81 A.D.3d at 542. Thus, even if the Lease obligated the building's tenant to maintain and repair the sidewalk in front of the building, IG would still not be entitled to summary judgment unless it can show that it did not own the building in front of which plaintiff tripped and fell. As it is undisputed that IG is the owner of the building, IG's motion for summary judgment must be denied.

The court next turns to The China Club and Nightlife's cross-motion for summary judgment. In the context of a trip and fall case, a tenant/lessee generally has no legal duty to maintain the abutting sidewalk of a premises. *See id.* As more fully stated above, under Admin. Code § 7-210, it is the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition. In order to determine whether a tenant has the duty to maintain the area of a sidewalk where a plaintiff's accident occurred, a court will look to the language of the governing lease agreement between the tenant and the building owner. *See id.* If the evidence shows that the tenant was not contractually responsible for maintaining the area where a plaintiff's accident occurred such that it did not owe a duty to that plaintiff, then that tenant is entitled to summary judgment. *See Cucinotta v. City of New York*, 68 A.D.3d 682 (1st Dept 2009); *see also Morrison v. Gerlitzky*, 282 A.D.2d 725 (2d Dept 2001). Further, a tenant can be held liable if it caused or created the defect. *See Collado*, 81 A.D.3d 542.

In the instant case, The China Club and Nightlife have failed to establish their prima facie right to summary judgment as they have failed to show that they were not contractually responsible for maintaining or repairing the area where plaintiff's accident occurred as a matter of law. Pursuant to Paragraph 4 of the Lease,

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Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

Thus, pursuant to the Lease, the tenant would be obligated to make repairs to the sidewalk in front of the building if the repairs were considered non-structural. However, The China Club and Nightlife have failed to provide any evidence that the repair of the defect on which plaintiff tripped and fell would be structural, and thus, not their responsibility. Thus, there exists an issue of fact as to whether The China Club and Nightlife are required to repair the defect under the Lease.

Further, The China Club and Nightlife have failed to establish their prima facie right to summary judgment as they have failed to show that they did not cause or create the defect. Rider provision # 47 to the Lease, denominated "Repair," states that the tenant is obligated to make repairs, including sidewalk repairs and structural repairs, where such repairs were made necessary by the "negligence, acts or omission of Tenant or its servants, invitees, licensees, agents or employees." The China Club and Nightlife have provided no evidence showing that it did not cause the defect or that it was caused by another party. It only asserts that it was not responsible for repairing the defect. In response, plaintiff has raised an issue of fact that suggests that the defect in the sidewalk on which she tripped and fell was caused by The China Club and Nightlife dragging around the "heavy metal posts" which they used to "hold up the ropes cordoning off the line" in front of the club. As there exists an issue of fact as to the causation of the defect, The China Club and Nightlife's motion for summary judgment must be denied.

Accordingly, IG's motion and The China Club and Nightlife's motion for summary judgment dismissing plaintiff's complaint and all cross-claims against them are denied. This constitutes the decision and order of the court.

Dated: 8/15/12

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