Hernandez v Extell Dev. Co.
2017 NY Slip Op 30420(U)
March 2, 2017
Supreme Court, New York County
Docket Number: 155674/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55
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MAYRA HERNANDEZ,

Plaintiff,

-against-

EXTELL DEVELOPMENT COMPANY, EXG 12W48 LLC and CENTRAL PARKING SYSTEM OF NEW YORK, INC.,

Defendants.
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Index No. 155674/2012

DECISION/ORDER

HON. CYNTHIA 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	1
Affidavits in Opposition	2,3
Replying Affidavits	4,5
Exhibits	6

Plaintiff Mayra Hernandez commenced the instant action seeking to recover for injuries she allegedly sustained when she tripped and fell on the sidewalk in front of the premises owned and/or operated by defendants Extell Development Company ("Extell"), EXG 12W48 LLC ("EXG") (hereinafter collectively referred to as the "EXG Defendants") and Central Parking System of New York, Inc. ("Central Parking"). Defendant Central Parking now moves for an Order pursuant to CPLR § 3212 for summary judgment granting it contractual indemnification against the EXG Defendants; setting the matter down for a hearing to determine the amount owed to Central Parking by the EXG Defendants for the applicable defense costs; dismissing the complaint; and dismissing all cross-claims asserted against it. For the reasons set forth below, Central Parking's motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff alleges that on or about February 6, 2012, she was walking on the sidewalk in front of the premises located at 12 West 48th Street, New York, New York (the "premises") when she tripped and fell on a one-half inch or one inch defect in the sidewalk which caused an elevation differential (the "accident"). At the time of the accident, the premises was owned by the EXG Defendants and was being operated as a parking garage by Central Parking pursuant to an agreement between Central Parking and EXG (hereinafter referred to as the "Garage Management Agreement").

Plaintiff then commenced the instant action against Central Parking and the EXG Defendants asserting a claim for negligence and seeking damages. The EXG Defendants interposed an answer in which they asserted affirmative defenses and cross-claims against Central Parking for indemnification and contribution. Central Parking interposed an answer in which it asserted only affirmative defenses.

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.*

As an initial matter, that portion of Central Parking's motion for summary judgment granting it contractual indemnification against the EXG Defendants and setting the matter down for a hearing to determine the amount owed is denied as it is undisputed Central Parking has not asserted a cross-claim against the EXG Defendants for contractual indemnification and is therefore unable to make a motion for summary judgment on this claim.

However, that portion of Central Parking's motion for summary judgment dismissing the complaint is granted. It is well established that in order for a defendant to be held liable for negligence, the plaintiff must establish that said defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman,* 40 N.Y.2d 781 (1976); *see also Palsgraf v. Long Is. R. R. Co.,* 248 N.Y. 339, 342 (1928). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis,* 1 N.Y.2d 399, 405 (1956). Pursuant to Administrative Code § 7-210, owners, not tenants, have a nondelegable duty to maintain abutting sidewalks in "reasonably safe condition." Moreover,"[p]rovisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff." *Collado v. Cruz*, 81 A.D.3d 542 (1st Dept 2011) (citing *Tucciarone v. Windsor Owners Corp.*, 306 A.D.2d 162, 163 (1st Dept 2003)). Indeed, in the absence of a lease that is "so 'comprehensive and exclusive' as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk," *Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514 (1st Dept 2010) (quoting *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 140 (2002)), a tenant will be liable only if it "created the defective condition, negligently made repairs, or used the sidewalk for a special purpose," *Berkowitz v. Dayton Const., Inc.*, 2 A.D.3d 764, 765 (2nd Dept 2003); *see also Collado*, 81 A.D.3d at 542.

In the instant action, Central Parking has established its *prima facie* right to summary judgment dismissing the complaint on the ground that it did not owe plaintiff a duty of care. Patris Freycinet, Central Parking's former general manager, testified that Central Parking was not the owner of the premises on the date of plaintiff's accident but rather that it was a tenant leasing the premises from EXG; that it did not create the alleged condition of the elevation differential in the sidewalk which plaintiff alleges caused her accident; that it did not make any repairs to the area on the sidewalk where plaintiff alleges she fell; and that it did not create the alleged condition through a special use of the sidewalk. Further, EXG has provided an affidavit of Mr. Freycinet in which he affirms that "Central Parking did not perform any maintenance of the sidewalks adjacent to the parking facility except for snow and ice removal and cleaning before and/or on February 6, 2012" and that Central Parking did not undertake "activities with respect to maintenance and repair of sidewalk defects or conditions regarding the sidewalks adjacent to the parking facility." Additionally, the Garage Management Agreement did not "entirely displace [EXG's] duty to maintain the sidewalk" in front of the premises. Indeed, regarding sidewalk maintenance, the Garage Management Agreement provides as follows:

> [EXG] shall be obligated to maintain the sidewalks and curb cuts adjacent to the Parking Facility in accordance with applicable municipal statutes; provided, however, that...(ii) in the event that [EXG] receives notice that the sidewalks or curb cuts need to be altered or repaired in accordance with applicable municipal statutes, then upon notice thereof to [Central Parking], [Central Parking] shall have the alterations or repairs done as an expense of the Parking Facility.

In response, neither plaintiff nor EXG raises an issue of fact sufficient to defeat Central Parking's motion for summary judgment dismissing the complaint. Plaintiff and EXG assert that Central Parking's motion should be denied based on the provision in the Garage

Management Agreement that states that "[Central Parking] also agrees that it shall report to [EXG] any condition of any sidewalk or curb adjacent to the Parking Facility that is in need of repair and make recommendations to [EXG] with respect to the same" and that Central Parking failed to report the alleged dangerous condition on the sidewalk on which plaintiff tripped and fell. However, such provision fails to raise an issue of fact sufficient to defeat Central Parking's entitlement to summary judgment dismissing the complaint as it does not create a duty of care between Central Parking and plaintiff.

To the extent the EXG Defendants assert that Central Parking's motion should be denied because Central Parking owned the premises approximately two months before the accident, such assertion is without merit as it is undisputed that Central Parking did not own the premises at the time the accident occurred.

To the extent the EXG Defendants assert that Central Parking's motion should be denied on the ground that there is an issue of fact as to whether Central Parking created or exacerbated the alleged sidewalk defect, such assertion is without merit. Mr. Freycinet has affirmed that Central Parking did not do any maintenance or repair work on the sidewalk that could have caused the alleged dangerous condition and the EXG Defendants have not provided any evidence that such work was performed.

Finally, to the extent Central Parking's motion seeks summary judgment dismissing the cross-claims asserted by EXG in this case, such motion must be denied without prejudice. To the extent the court agrees with Central Parking's assertion that all negligence-based cross-claims should be dismissed, Central Parking has failed to provide adequate analysis as to why these claims should be dismissed.

Accordingly, the motion for summary judgment is granted solely to the extent that the complaint is dismissed as against Central Parking. This constitutes the decision and order of the court.

Dated: 3/2/17

Enter: _____
J.S.C.
HON. CYNTHIA S. KERN