Spektor v Caiati
2017 NY Slip Op 31076(U)
May 16, 2017
Supreme Court, Kings County
Docket Number: 508007/13
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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ALEKSANDR SPEKTOR,

Plaintiff,

-against-

BERARDINO CAIATI, MICHELINA CAIATI and RICHARD GINDI, D.M.D.,

Defendants.

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DECISION/ORDER

Index No. 508007/13
Mot. Seq. No. 3
Submitted: 3/9/17

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of defendant Dr. Richard Gindi's motion for summary judgment.

Papers	Numbered
Notice of Motion, Affirmation and Affidavits Annexed	1-11
Affirmations in Opposition.....	12, 13
Reply	14

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Dr. Richard Gindi moves for summary judgment and an order dismissing the complaint and all cross claim as against him. Plaintiff opposes the motion, as do co-defendants Berardino and Michelina Caiati. For the reasons which follow, the motion is granted.

This is a personal injury action concerning a trip and fall by plaintiff Aleksandr Spektor on November 2, 2013 on a sidewalk in front of 817 Avenue U in Kings County. The Caiati defendants owned the premises; Dr. Gindi rented the street level store for use as his dental office. There are apartments above the store.

Plaintiff testified at his EBT that he was walking on Avenue U between East 8th and East 9th Street when the front of his left foot came into contact with a raised sidewalk, causing him to trip and fall. A photo he identified shows it was near a tree in front of 817 Avenue U.

Co-defendant Berardino Caiati testified at his EBT that he owns 817 Avenue U. He purchased it 20 years ago. At around the time of the accident, he had a lease with Dr. Gindi for the street level premises. Shown the picture of where the accident occurred, Mr. Caiati testified that there were "small repairs" done to the sidewalk at that location. He said that concrete patchwork/repairs had been done because the tree grew and had lifted up the sidewalk. He said that, prior to the plaintiff's accident, he had made complaints to the City about the sidewalk and the tree. He himself then hired someone to make the repairs before plaintiff's accident. Caiati stated that Dr. Gindi never made any sidewalk repairs himself and he had never discussed sidewalk repairs with Dr. Gindi prior to the accident. If repairs were needed, Caiati stated that he personally would hire a contractor to do the repairs.

Movant Gindi testified at his EBT that he began operating a dental practice at the location in February, 1988. He entered into a written lease in August 1987. He would generally enter the building through a rear entrance. He occasionally cleaned the sidewalk in front of the store if it had snowed, and he has picked up trash that people had dropped there.

When asked about the language in the lease which states that he (Dr. Gindi) would take good care of the demised premises and the sidewalks adjacent thereto at his sole cost and expense and make all non-structural repairs thereto, Dr. Gindi responded that he had never had any discussions with the landlord concerning what

would be deemed a non-structural sidewalk repair and he does not recall discussing with the landlord who was responsible for sidewalk repairs. He was shown the photo and testified that, prior to the accident, he never noticed the sidewalk being either uneven, raised or previously replaced or repaired. Within the two years before the accident, he had never received any complaints about the sidewalk. He had no knowledge of any sidewalk repair work done within that time. He never had any discussions with the landlord concerning sidewalk repairs and, prior to the accident, the landlord had never contacted him requesting that he make any sidewalk repairs.

A copy of the store lease is annexed to Dr. Gindi's motion papers as Exhibit G. Its term runs from August, 1987 to July, 1992. Nonetheless, neither party is arguing that the lease is no longer in effect or that its terms have changed since 1992. Real Property Law § 232-c provides that, in such circumstances, where a tenant remains beyond the end of its lease without forming another agreement, a month-to-month holdover tenancy results. See, *Samson Mgt., LLC v Hubert*, 92 AD3d 932, 933 [2d Dept 2012]. Appellate case law demonstrates that, under common law, a holdover tenancy continues under the same terms and covenants created by the expired lease. See, *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300-301 [1975]; *Matter of Casamento v Juaregui*, 88 AD3d 345, 347 [2d Dept 2011]; *Logan v Johnson*, 34 AD3d 758, 759 [2d Dept 2006]; *McClenan v Brancato Iron & Fence Works,* 282 AD2d 722 [2d Dept 2001]. Thus, as is undisputed in any event, Dr. Gindi occupied the store on the date of the accident subject to the same terms and covenants (other than its duration) of the original lease.

The lease is a standard store lease promulgated by the Real Estate Board of New York, and ¶ 4 has a provision which states that the tenant shall take "good care of

the demised premises and ....the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto," and another provision which states that (¶ 30) the tenant shall make all repairs and replacements to the sidewalk and curb, with a typed-in change "except those occasioned by normal wear and tear."

Movant Gindi has made out a prima facie case for dismissal. Movant had no privity with plaintiff. Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property. See, *Zorin v City of New York*, 137 AD3d 1116, 1117 [2d Dept 2016]. Further, the landlord admitted at his EBT that he did all the necessary work to the sidewalk and that the work at issue was necessitated by the tree. As such, movant did not cause or create the condition and he did not negligently repair the sidewalk. There is also no evidence of a special use.

Generally, the provisions of a lease which may require a tenant to repair the sidewalk do not impose on the tenant a duty to a third party such as the plaintiff. See, *Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908, 909-910 [2d Dept 2014]. The provisions in the lease merely run between the parties to the lease, which can require a tenant to indemnify the landlord if the lease so provides.

In opposition, plaintiff and the co-defendant fail to raise a triable issue of fact. They aver that there is an issue of fact as to whether the lease is so comprehensive as to displace the landlord from his otherwise nondelegable duty, arguing that case law holds that where a lease agreement is "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk," the tenant may be liable to a third party. The co-defendant cites *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2nd Dept 2016]; *Abramson v Eden Farm, Inc.*, 70 AD3d 514

[1st Dept 2010]; *Bonilla v Bangert's Flowers*, 132 AD3d 618, 619 [2d Dept 2015].

The court finds these cases to be distinguishable. In *Paperman*, the owner demonstrated that a rider to the subject lease requiring the tenant (who leased the entire commercial building) to, at its own cost and expense, keep and maintain the sidewalk "in thorough repair and good order," was so comprehensive and exclusive as to entirely displace the owner's duty to maintain the sidewalk. *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541. By contrast, in the instant matter, the lease language, which left the landlord responsible for both structural sidewalk repairs and sidewalk repairs occasioned by ordinary wear and tear, in a building with several residential apartments, cannot, by its own terms, be construed as to be so comprehensive as to entirely displace the landlord's duty to maintain the sidewalk. As such, the branch of Dr. Gindi's summary judgment motion to dismiss the complaint as against him is granted.

With respect to the Caiatis' cross claims against Gindi for contribution and indemnification, Gindi correctly contends that he was not required under the lease to repair the alleged defect, a raised sidewalk slab, as such a repair is structural (see *Salzberg v Futernick*, 281 AD2d 467 [2001]; see also *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). Under the lease, Gindi is only required to make nonstructural repairs and repairs of damage he himself causes ("not caused by ordinary wear and tear"). Accordingly, Gindi is entitled to the dismissal of the Caiatis' cross claims asserted against him. See *Berkowitz v Dayton Constr., Inc.*, 2 AD3d764, 769 [2d Dept 2003].

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
May 16, 2017

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court