Sokolov v Shelbourne Towers
2018 NY Slip Op 33423(U)
December 27, 2018
Supreme Court, Kings County
Docket Number: 503844/2012
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, 360 Adams Street, Brooklyn, New York, on the 27th day of December, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ILYA SOKOLOV,

Plaintiff,

- against -

THE SHELBOURNE TOWERS, and GAMBRINUS SEAFOOD CAFÉ', INC., A/K/A GAMBRINUS GRILL AND SUSHI PALACE, CORP.,

Defendants.

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DECISION AND ORDER

Motion Sequence #7, #8

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2, 3/4
Opposing Affidavits (Affirmations)	5, 6
Reply, Sur-Reply, Affidavits (Affirmations)	7, 8,
Memorandum of Law	9,10,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on May 19, 2012. The Plaintiff Ilya Sokolov (hereinafter "the Plaintiff") allegedly injured himself on the sidewalk adjacent to the premises located at 3100 Ocean Parkway, Brooklyn, New York (hereinafter "the Premises"). The Premises was apparently leased to Defendant Gambrinus Seafood Cafe, Inc., a/k/a Gambrinus Grill and Sushi Palace Corp., (hereinafter "Defendant Gambrinus") from the owner of the Premises, Defendant Shelbourne Towers (hereinafter "Defendant Shelbourne") by lease dated March 5, 2010 (hereinafter the "Lease").[1]

[1] A review of the Lease (Defendant Shelbourne's Motion, Exhibit U) reflects that it was between Defendant Shelbourne and Michael Geyfman, Eugene Kanovolo and Sergey Goloubenko, not Defendant Gambrinus. There appears to be no explanation for this, however, Defendant Shelbourne does admit in Paragraph Seventh of its Verified Answer (Defendant

Defendant Shelbourne now moves (motion sequence #7) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint and all cross claims as against it. Defendant Shelbourne argues that the complaint should be dismissed against them because it contends that the Lease between it and lessee Defendant Gambrinus provides that it was Defendant Gambrinus' responsibility to make any repairs on the sidewalk adjacent to the leased premises. In support of this argument, Defendant Shelbourne argues that the Lease explicitly provides that Defendant Gambrinus, as the tenant, was responsible for all non-structural repairs and as a result the landlord is not responsible for repairing cracks in the sidewalk. In the alternative, Defendant Shelbourne also argues that the alleged defect was too trivial to be actionable and that it did not have actual or constructive notice of the defect and did not create it. Finally, Defendant Shelbourne contends that the Lease provides that Defendant Gambrinus, as the tenant, is required to indemnify Defendant Shelbourne for the subject claims, as alleged by the Plaintiff.

Defendant Gambrinus opposes the motion and also cross moves (motion sequence #8) for an order pursuant to CPLR 3212 granting summary judgment and dismissal of the complaint and all cross claims as against it. In support of its motion, Defendant Gambrinus contends that the tenant it is not liable for the alleged incident at issue and that the Lease between the Co-Defendants does not permit the Plaintiff to recover against it. What is more, Defendant Gambrinus contends (Defendant Gambrinus Motion, Affirmation in Support, Paragrap 6) that Defendant Shelbourne's application for contractual indemnification should be denied given that it "did not create the condition, make a special use of the sidewalk, or assume any duty of care to third-parties, other than those duties assumed under the lease provision, namely, keeping the sidewalk free and clear of debris."

Shelbourne's Motion, Exhibit C) that Gambrinus was a lessee of a portion of the Premises. Notwithstanding, all parties contend that the subject lease is a material and operative document for the purposes of the motion.

The Plaintiff opposes both motions and accordingly argues that they should both be denied. In opposition to the motion by Defendant Shelbourne, the Plaintiff contends that Defendant Shelbourne has failed to meet its *prima facie* burden by failing to adequately show that the condition at issue was in fact trivial or that Defendant Shelbourne did not have actual or constructive notice of the said condition. In opposition to the motion by Defendant Gambrinus, the Plaintiff argues that Defendant Gambrinus did not meet its *prima facie* burden in showing that it did not have a contractual duty under the Lease between the Co-Defendants.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to 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.
>
> 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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

An owner subject to the Sidewalk Law must "provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff's injuries." *See James v. Blackmon*, 58 A.D.3d 808, 809, 872 N.Y.S.2d 179, 180 [2nd Dept, 2009]. Moreover, "a provision of a lease which obligates a tenant to repair a sidewalk does not impose on the tenant a duty to a third party, such as the plaintiff." *Martin v. Rizzatti*, 142 A.D.3d 591, 593, 36 N.Y.S.3d 682, 684 [2nd Dept, 2016]. "However, 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." *Paperman v. 2281 86th St. Corp.*, 142 A.D.3d 540, 36 N.Y.S.3d 488, 489[2nd Dept, 2016], quoting *Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514, 894 N.Y.S.2d 429 [2nd Dept, 2010].

Turning to the merits of the motion (motion sequence #8) by Defendant Gambrinus, the Court finds that Defendant Gambrinus has provided sufficient evidence to meet its *prima facie* burden. As an initial matter, as the property is utilized for a commercial purpose, the maintaining of the sidewalk abutting the premises is the obligation of the owner pursuant to the aforementioned Sidewalk Law. A review of the subject Lease does not serve to establish that Defendant Shelbourne was an out of possession landlord who had no obligation to maintain the sidewalk adjacent to its property. In fact, Paragraph Second of the Lease states that only non-structural repairs shall be the sole obligation of the Tenant (see Motion Defendant , Exhibit "H"). Given the non-delegable duty that a landlord maintains under the Sidewalk Law and the fact that the Lease provided that the tenant Defendant Gambrinus was only responsible for non-structural repairs, Defendant Gambrinus was not responsible for repairing a defect such as a defective sidewalk slab, which is a structural defect. *See Alayev v. Juster Assocs., LLC*, 122 A.D.3d 886, 887, 998 N.Y.S.2d 83, 84 [2nd Dept, 2014]; *Berkowitz v. Dayton Const., Inc.*, 2 A.D.3d 764, 765, 769 N.Y.S.2d 730 [2nd Dept, 2003]; *Salzberg v. Futernick*, 281 A.D.2d 467, 467, 721 N.Y.S.2d 403, 404 [2nd Dept, 2001]; *Wahl v. JCNYC, LLC*, 133 A.D.3d 552, 20 N.Y.S.3d 65 [1st Dept, 2015].

What is more, even assuming, *arguendo*, that Defendant Shelbourne is an out of possession landlord, "[a]n out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect which proximately caused the injury." *Spencer v. Schwarzman*, LLC, 309 A.D.2d 852, 766 N.Y.S.2d 74 [2nd Dept, 2003]. In the instant matter, the Lease provides, again in Paragraph Second, that Defendant Shelbourne shall have a right of re-entry to make repairs as necessary.

In opposition, Defendant Shelbourne and the Plaintiff have failed to raise an issue of fact that would prevent this Court from granting summary judgment in favor of Defendant Gambrinus. Defendant Shelbourne argues that it is not liable for the Plaintiff's injuries because it was Defendant Gambrinus' duty to repair the sidewalk pursuant to the Lease. However, as stated more specifically above, the Lease is not "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk..." *Paperman v. 2281 86th St. Corp.*, 142 A.D.3d 540, 36 N.Y.S.3d 488, 489[2nd Dept, 2016], quoting *Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514, 894 N.Y.S.2d 429 [2nd Dept, 2010]. As a result, Defendant Shelbourne and the Plaintiff have failed to raise a material issue of fact that would prevent this Court from granting Defendant Gambrinus's application for summary judgment.

Turning to the merits of the motion by Defendant Shelbourne, the Court finds that insufficient evidence has been provided for Defendant Shelbourne to meet its *prima facie* burden. First, it should be noted that Defendant Shelbourne provides insufficient evidence to show, as a matter of law, that the defect at issue is open and obvious and not inherently dangerous. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 A.D.3d 446, 446, 799 N.Y.S.2d 827, 828 [2nd Dept, 2005].

What is more, Defendant Shelbourne has provided insufficient evidence to show that it did not have actual or constructive notice of, or caused and created, the defect at issue. Defendant Shelbourne does provide the deposition testimony of Solomon Goldberger, the Property Manager employed by Eilat Management, the management company for the Premises. When asked (Defendant Shelbourne's Motion, Exhibit R, Page 15) what his responsibilities were he replied "[r]esponsible for overlooking [sic] complaints for the building and overlooking [sic] the

management at the premises." When asked (Page 16) how often he visited the property Mr. Goldberger stated "I have no set time for visiting the property." However, when asked if he had visited the property in May of 2012 he stated (Page 16) "I do not recall." When asked how much on average he visited the Premises in 2012 he stated (Page 17) "I do not recall." When asked if there were any repair reports for 2012, Mr. Goldberger stated "I do not recall." When asked whether he was aware of any repairs to the sidewalk, between 2009 when he was first employed and May 2012 when the alleged incident occurred, he stated (Page 25) "I do not recall." When asked whether the Premises received any City or State violations for the two years prior to May 2012, Mr. Goldberger stated (Page 27) "I do not recall." When asked whether he or another employee of the management company had completed an accident report for the two years prior to May 2012, Mr. Goldberger stated (Page 28) "I do not recall." This testimony is insufficient for Defendant Shelbourne to make its *prima facie* showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it, since there is no showing as to when the area at issue was last inspected relative to the accident. *See Bergin v. Golshani*, 130 A.D.3d 767, 768, 14 N.Y.S.3d 98, 100 [2nd Dept, 2015]; *Levine v. Amverserve Ass'n, Inc.*, 92 A.D.3d 728, 729, 938 N.Y.S.2d 593, 594 [2nd Dept, 2012].

The Court also denies that aspect of Defendant Shelbourne's motion seeking contractual indemnification. "A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010]. As stated above, it was the obligation of Defendant Shelbourne to repair the sidewalk pursuant to the Lease and the Sidewalk Law, assuming that there was a defect as alleged by the Plaintiff. As a result, the alleged incident did not arise as a

result of any breach by the tenant Defendant Gambrinus and Defendant Shelbourne has not made a showing that it is free from negligent conduct at this time. Accordingly, the application for contractual indemnification is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendant Shelbourne (motion sequence #7) is denied.

The motion by Defendant Gambrinus (motion sequence #8) is granted, and the complaint and any cross claims against it are dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
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