FILED Dec 14 2011 Bronx County Clerk

# SUPREME COURT OF THE STATE OF NEW YORK
# COUNTY OF THE BRONX - PART IA-29

----------X

BARBARA SCELZO,

Plaintiff,

-against-

ACKLINIS REALTY HOLDING LLC, ACKLINIS YONKERS REALTY, LLC, BEST BUY CO. INC., BEST BUY STORES, L.P. and LEWISTON CONSTRUCTION COMPANIES, LLC,

Defendants.

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ACKLINIS REALTY HOLDING LLC and ACKLINIS YONKERS REALTY, LLC,

Third-Party Plaintiffs,

-against-

ANDY LOPES BUILDING CORP.,

Third-Party Defendant.

----------X

**DECISION/ORDER**
Index No. 7654/07

Present:
**HON. ROBERT TORRES**
**J.S.C.**

The following papers numbered 1 to13 read on this motion on the calendar of July 20, 2011

**Papers Numbered**

Notice of Motion, Affidavits and Exhibits Annexed.....1-2.....
Defendant Best Buy's Memorandum of Law.....3.....
Cross-Motion, Affidavits and Exhibits Annexed.....4.....
Answering Affidavits and Exhibits Annexed.....5-10.....
Replying Affidavits and Exhibits Annexed.....11-13.....

Motion is decided in accordance with the annexed memorandum decision.

Dated: 12/7/2011

ROBERT E. TORRES, J.S.C.
JUDGE

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# SUPREME COURT OF THE STATE OF NEW YORK
# COUNTY OF THE BRONX - PART IA-29

----------X

BARBARA SCELZO,

Plaintiff,

-against-

**MEMORANDUM DECISION**
Index No. 7654/07

ACKLINIS REALTY HOLDING LLC, ACKLINIS YONKERS REALTY, LLC, BEST BUY CO. INC., BEST BUY STORES, L.P. and LEWISTON CONSTRUCTION COMPANIES, LLC,

Defendants.

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ACKLINIS REALTY HOLDING LLC and ACKLINIS YONKERS REALTY, LLC,

Third-Party Plaintiffs,

-against-

ANDY LOPES BUILDING CORP.,

Third-Party Defendant.

----------X

HON. ROBERT TORRES:

This action arose as a result of personal injuries sustained by plaintiff in a trip and fall at the edge of a tree well. The owner of the commercial property, defendant/third-party plaintiff, Acklinis Realty Holding LLC and Acklinis Yonkers Realty, LLC, (hereinafter, "Acklinis"), move pursuant to CPLR §2221(d) to reargue its motion that resulted in the decision and order of Justice Diane A. Lebedeff dated February 8, 2011, (hereinafter, "underlying decision"). Similarly, the tenant, defendant Best Buy Stores, L.P. s/h/a Best Buy Co. Inc. and Best Buy Stores, L.P., (hereinafter, "Best Buy"), moves pursuant to CPLR §2221(d) to reargue. Defendant, Lewiston Construction Companies, LLC, (hereinafter, "Lewiston"), cross-moves pursuant to CPLR

§2221(d) to reargue. Lewiston is the general contractor that built the Best Buy store and subcontracted with third-party defendant Andy Lopes Building Corp., (hereinafter, "Lopes"), to have concrete work performed at Best Buy's store. It is undisputed that the motions herein are timely. The motions and cross-motion are hereby consolidated for purposes of decision and disposition.

In the underlying motion, the moving defendants moved for summary judgment dismissing the plaintiff's complaint, and all cross-claims against them and for summary judgment on their cross-claims. The underlying decision adjudicated the underlying motions only to the extent of rendering a decision and order with respect to the defendants and third-party defendant, Lopes' motions, finding a factual issue as to who had responsibility for maintaining the tree wells. The underlying decision and order is silent with regards to movants' application to dismiss plaintiff's complaint on grounds that the alleged defective condition, if defective, is trivial.

Since Judge Lebedeff has retired and is unavailable to hear the motions to reargue herein, CPLR §2221(a), permits another judge to decide the motions to reargue. Since the branch of the underlying motions seeking dismissal of the plaintiff's complaint was not adjudicated, the underlying decision and order is patently ripe for reargument. Accordingly, the motions for reargument are granted.

The tree was about six or seven feet tall. The tree well cut out was four feet by four feet. Plaintiff was aware she was approaching a tree and tree well before she tripped. (Plaintiff's transcript pgs. 34-41.) Plaintiff testified she fell when her right foot twisted as she planted her right foot partially on the sidewalk and partially in the tree well. Plaintiff claims she tripped and fell as a result of an uneven surface created by wood chips in a tree well being two inches below the edge of the sidewalk. It is undisputed that the sidewalk itself was straight and level.

(Transcript, p. 46).

It has been repeatedly held that "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegation or assertions are insufficient." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

As in *Shohet v Shaaya*, 43 AD3d 816 (2nd Dept 2007), upon scrutiny of the photograph of the pertinent tree-well, submitted by plaintiff to substantiate her claim of a defective condition, it is clear that the "alleged defect did not constitute a trap or nuisance and was merely a trivial defect which was not actionable as a matter of law." *Id.*

> [W]hether a dangerous or defective condition exists on the property of another so as to create liability " 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Guerrieri v Summa* 193 AD2d 647 [citations omitted]). Of course, [in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury] (see, e.g., *Hecht v City of New York*, 60 NY2d 57, 61 [claim involving trivial gap between two flagstones of the sidewalk was properly dismissed]). However, a mechanistic disposition of a cased based exclusively on the dimension of the sidewalk defect is unacceptable.
>
> *Trincere v County of Suffolk*, 90 NY 2d 976, 977 (NY 1997)

Fully crediting plaintiff's averment that the difference between the height of the sidewalk and the wood chips in the tree well was two inches, two inches by itself does not constitute a defect. Other facts and circumstances include that the tree well itself is marked by a six to seven foot tree, the plaintiff's admitted knowledge that she was about to encounter a tree well just before she tripped on the edge of the tree well, the fact that the sidewalk itself, which was intended for people to walk upon, was admittedly straight and level, in other words, without

defect, and the photograph of the accident site depicts a palpably trivial defect that is neither a trap nor nuisance.

With respect to the cross-claims, the cross-claims as against cross movant Lewiston and the non-moving third-party defendant, Lopes, must be dismissed. "There is no evidence that [the contractors] breached its contractual obligations, or that it assumed a continuing duty to return to the premises after completing its work and remedy any defects that eventually developed there." *Fernandez v 707, Inc.*, 85 AD3d 926 (1st Dept 2011). In Fernandez there was a one month gap between the contractor's completion of the sidewalk and tree well. In the instant action, there is a gap of several years from the time the contractors' work was completed and plaintiff's fall. Even though Lopes is a non-moving party, summary judgment may be granted to a non-moving party entitled to such relief without the necessity of a cross-motion. CPLR §3212(b); *Video-Cinema Films, Inc. v Seaboard Surety Company*, 214 AD2d 433 (1st Dept 1995).

With respect to Best Buy's cross-claims for common law negligence against Acklinis Best Buy's cross-claims must be dismissed. In order for Best Buy to receive indemnification from Acklinis, Best Buy was "required to prove not only that they were not negligent, but also that the proposed indemnitor [Acklinis] was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury (*Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2006])." *Bellefleur v Newark Beth Israel Med. Ctr.* 66 AD3d 807, 808 (2nd Dept 2009). Given the dismissal of plaintiff's action, there will be no finding of negligence or wrongdoing on the part of Acklinis, a prerequisite to hold Acklinis in common law indemnity.

Acklinis seeks contractual indemnification and attorney fees and costs from Best Buy. The bald assertion by the attorney for Acklinis that Best Buy has already agreed to assume the defense and indemnity of Acklinis, that is directly contracted by the attorney for Best Buy, cannot

be credited in the absence of evidence of such agreement.

Article 27 of the lease between Acklinis and Best Buy, (hereinafter, "lease"),that is entitled, "Common Area," places the maintenance of "landscaping, sidewalks, driveways and other areas," under Acklinis care and control. Acklinis argues that a tree well is not part of the sidewalk but even if, *arguendo*, tree wells are not considered part of the sidewalk under the lease, a tree well is "landscaping" or "other areas," as specified by the lease, as under the care and control of Acklinis, not Best Buy.

Acklinis argues that the lease was modified by a letter from Acklinis to Best Buy dated October 24, 2000, in which Acklinis approved of the installation of the tree wells on condition that Best Buy would be responsible for the maintenance and repair of the "entire sidewalk, including but not limited to, the benches, the planters, the trees, snow removal and insurance of said sidewalk." However, it is undisputed that the letter was signed solely by a representative of Acklinis. Best Buy never signed the purported modification of the lease. The terms of the lease itself requires the terms of the lease be "modified by both parties in writing." (Article 39.3).

> [T]he alleged oral modification is barred by both the parties' contract merger clause and General Obligations Law §15-301, which specifically provides that changes to a written agreement which contains a provision to the effect that it cannot be changed orally, as here, may only be effected by an executory agreement in writing which is signed by the party against whom enforcement of the change is sought (*Levine v Trattner*, 130 AD2d 462, 463).

*Opton Handler Gottlieb Feiler Landau & Hirsch v Patel* 201 AD2d 72,73 (1st Dept 1994).

Furthermore, any modification of the lease by Acklinis against Best Buy was ineffective as against Best Buy as a violation of GOL §5-701(a), the Statute of Frauds.

The course of conduct of Acklinis in its maintenance of the tree well and tree, exclusive of any involvement of Best Buy, over the course of time from the installation of the tree well to the time of plaintiff's fall, belies any assertion maintaining that there was an agreement on the

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part of Best Buy to maintain the tree well and tree. From the time of installation to the date of plaintiff's accident, Acklinis maintained the tree wells by replacing the trees, watering the trees, sweeping the sidewalk and removing snow in front of Best Buy. After plaintiff's fall, Acklinis installed grates in the tree well, showing its further control and maintenance of the tree well. It should be noted that there is no assertion that a grate was required by statute or ordinance nor was there any evidence that a grate was needed to make the tree well safe. Therefore, Acklinis is not entitled to contractual indemnification from Best Buy for a trip and fall in an area actually maintained by Acklinis, pursuant to the terms of the lease.

Accordingly, the motions and cross-motion seeking reargument are granted and upon reargument plaintiff's action against the defendants, Acklinis, Best Buy and Lewiston is hereby dismissed. The cross claims of the hereinabove defendants are dismissed. The third party action of Acklinis against Lopes is dismissed in its entirety.

Plaintiff's medical malpractice action against defendants, Anthony V. Carella, M.D. and Anthony V. Carella, M.D., P.C. is hereby severed and continued.

This is the decision and order of the Court.

Dated: _____

ROBERT TORRES, J.S.C.