

Restrepo v ABC Properties Equities, LLC
2012 NY Slip Op 33036(U)
December 19, 2012
Sup Ct, New York County
Docket Number: 103939/10
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 103939/2010
RESTREPO, PIEDAD
vs.
ABC PROPERTIES EQUITIES
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

FILED
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NEW YORK
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is decided in accordance with the annexed decision.

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Dated: 12/19/12

CR, J.S.C.

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

1. CHECK ONE: CASE DISPOSED 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
PIEDAD RESTREPO,

Plaintiff,

Index No. 103939/10

-against-

DECISION/ORDER

ABC PROPERTIES EQUITIES, LLC, NOI DUE, INC.
and EQUITABLE COMPUTER COMPANY, INC.
d/b/a A CUT ABOVE,

Defendants.

-----X
ABC PROPERTIES EQUITIES, LLC,

Third-Party Plaintiff,

-against-

NOI DUE, INC. and A CUT ABOVE,

Third-Party Defendants.

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DEC 20 2012
NEW YORK
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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.....	1, 2
Answering Affidavits.....	3
Cross-Motion and Affidavits Annexed.....	4
Answering Affidavits to Cross-Motion.....	5
Replying Affidavits.....	6
Exhibits.....	7

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Plaintiff Piedad Restrepo commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on a patch of black ice in front of 143 West 69th Street, New York, New York (the "building") in the early morning of December 23, 2009. Defendant Equitable Computer Company, Inc. d/b/a A Cut Above ("Equitable") now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint on the ground that it did not cause the condition or have actual or constructive notice of the condition. Defendant NOI DUE, Inc. ("NOI") cross-moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint on the ground that it was not responsible for maintaining the sidewalk where plaintiff's accident occurred. Defendant ABC Properties Equities LLC ("ABC") also moves for an Order pursuant to CPLR § 3212 for summary judgment on its third-party claim and cross-claim for contractual indemnity against Equitable. The above motions are consolidated for disposition and are resolved as follows.

The relevant facts are as follows. Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she slipped and fell on a patch of black ice on the sidewalk in front of the building, which was owned by ABC, at approximately 12:15 a.m. on December 23, 2009. The building is a 40-unit residential building with two ground-floor units leased to two commercial tenants. One commercial tenant is Equitable, which operates a dog grooming salon known as A Cut Above and the second commercial tenant is NOI, which operates a restaurant/café. Plaintiff testified that her accident occurred on the sidewalk in front of the building to the left of a tree well, which it is undisputed was located in front of A Cut Above.

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.*

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not cause the condition and that it did not have actual or constructive notice of the condition. See *Branham v. Loews Orpheum Cinemas*, 31 A.D.3d 319 (1st Dept 2006). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837-838 (1986). Moreover, “a prima facie case of negligence must be based on something more than conjecture; mere speculation regarding causation is inadequate to sustain the cause of action. Conclusory allegations unsupported by evidence are insufficient to establish the requisite notice for imposition of liability.” See *Mandel v 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303 (1st Dept 2006). Finally, “the mere presence of ice does not establish negligence on the part of the entity responsible for maintaining the property.” *Lenti v Initial Cleaning Services, Inc.*, 52 A.D.3d 288, 289 (1st Dept 2008). Rather, “plaintiff must present evidence from which it may be inferred that the ice on which he slipped was present on the sidewalk for a long enough period of time before the accident that the party responsible for the

sidewalk would have had time to discover and remedy the dangerous condition." *Id.* at 289.

The court first turns to Equitable's motion for summary judgment. In the instant action, Equitable has failed to establish its prima facie right to summary judgment as it has failed to show that it did not cause the condition or have actual or constructive notice of the condition. Pursuant to the lease Equitable maintains with ABC (the "Lease"), "[Equitable] shall, at [Equitable's] own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish." Thus, Equitable is contractually obligated to clear the sidewalk in front of its premises. However, Clymena Liddle, the principal of Equitable, testified that snow and ice removal from the sidewalk in front of Equitable's premises was handled by Domingo Fernandez, the building's superintendent, and Louis Alba, the building's assistant superintendent, and that there was never a conversation with ABC about who was responsible for clearing the snow and ice from the front of the building, nor was any compensation paid to Mr. Fernandez or Mr. Alba for performing such tasks. Ms. Liddle also testified that she never instructed her staff to clear the sidewalk despite the fact that the Lease requires Equitable to do so. Ian De Fronze, the managing agent of the building, testified that Mr. Fernandez and Mr. Alba's duties did not include snow and ice removal from the sidewalk in front of the commercial tenants' premises and that if they did perform snow and ice removal in front of Equitable's premises, as alleged by Ms. Liddle, then it was due to an independent arrangement made with Equitable. As neither Equitable nor ABC claims to be the party responsible for clearing snow and ice from the sidewalk in front of Equitable's premises, neither party has presented evidence that the snow and ice in front of Equitable's premises was actually cleared subsequent to the snowfall earlier that day. Thus, as

Equitable has not established its prima facie right to summary judgment, its motion for summary judgment must be denied.

The court next turns to NOI's cross-motion for summary judgment. In the instant action, NOI has established its prima facie right to summary judgment as it has shown that it was not responsible for clearing the sidewalk in the area where plaintiff's accident occurred. Imma Mazella, the owner of NOI's restaurant/café, testified that NOI only shoveled snow and ice on the sidewalk in front of the restaurant/café pursuant to the lease it maintained with ABC. Ms. Mazella testified that she was never responsible for, nor was she ever informed by Ian De Fronze, the managing agent of the building, that NOI was responsible for snow removal and maintenance in front of the entire building, including the area where plaintiff's fell. In response, plaintiff has failed to raise an issue of fact as to whether NOI caused the condition or had actual or constructive notice of the condition as it is clear plaintiff did not fall in front of NOI's leased premises and plaintiff has not shown that NOI was responsible for clearing snow and ice from the sidewalk in front of Equitable's premises. Thus, NOI's motion for summary judgment must be granted.

Finally, the court turns to ABC's motion for summary judgment on its third-party claim and cross-claim for contractual indemnity against Equitable. In the instant action, ABC has established its prima facie right to summary judgment as it has shown that the Lease requires Equitable to indemnify ABC. Article 58 of the Lease states:

Indemnification. Tenant shall indemnify and hold harmless Owner...and its and their respective partners, directors, officers, agents and employees from and against any and all claims arising from or in connection with...(d) any breach or default by Tenant in the...performance of Tenant's obligations under this lease; together

with all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon, including, without limitation, all attorneys' fees and expense.

As stated above, Article 30 of the Lease contractually obligates Equitable to maintain the sidewalk in front of its premises free of snow and ice. Thus, Equitable must indemnify ABC from claims asserted against it by plaintiff arising from Equitable's negligence and breach of the Lease. Equitable asserts that ABC is not entitled to indemnification because there exists an issue of fact as to whether Equitable was negligent in failing to properly clear the sidewalk free of snow and ice as Mr. Fernandez and Mr. Alba routinely cleared the sidewalk in front of Equitable's premises. Thus, the court grants a conditional order of indemnification as follows. ABC's motion for summary judgment on its third-party claim and cross-claim for contractual indemnity against Equitable is granted to the extent that the jury in the trial of the underlying action finds Equitable liable based on its failure to clear the sidewalk in front of its premises. However, if ABC is found to be liable or in breach of the Lease for failing to clear the sidewalk in front of Equitable's premises, it will not be entitled to indemnification from Equitable.

Accordingly, Equitable's motion for summary judgment is denied, NOI's motion for summary judgment is granted and ABC's motion for summary judgment on its third-party claim and cross-claim for contractual indemnity against Equitable is granted to the extent that Equitable is found to be negligent and in breach of the Lease at the trial of the underlying action and ABC is found not to be liable. This constitutes the decision and order of the court.

Dated: 12/19/12

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