Nunziata v City of New York
2013 NY Slip Op 31455(U)
June 19, 2013
Sup Ct, NY County
Docket Number: 101312/2009
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN — **PART 21**

Justice

Index Number : 101312/2009
NUNZIATA, PENNY
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 101312/09

MOTION DATE 3/14/13

MOTION SEQ. NO. 003

The following papers, numbered 1 to 3 were read on this motion for summary judgment

Notice of Motion— Affirmation of Service; Affirmation — Exhibits A-L | **No(s).** 1-2; 3

Upon the foregoing papers, this motion for summary judgment by defendant New York City Transit Authority is decided in accordance with the annexed memorandum decision and order.

This action is respectfully referred to the Trial Support Office for reassignment to a City Part.

FILED
JUL 11 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6/19/13
New York, New York

_____, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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PENNY NUNZIATA,

Plaintiff,

- against -

Index No. 101312/2009

THE CITY OF NEW YORK, WEST 23RD STREET REALTY LLC, GEORGE BUTSIKARIS REALTY, INC., and 10,000 REALTY LLC,

Decision and Order

Defendants.

----------X

WEST 23RD STREET REALTY LLC, GEORGE BUTSIKARIS REALTY, INC.,

Third-Party Plaintiffs,

- against -

WEST 23RD STREET FOOD FAIR, INC.,

Third-Party Defendant.

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WEST 23RD STREET FOOD FAIR, INC,

Second Third-Party Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY,

Second Third-Party Defendant.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on January 25, 2008, she tripped and fell on the sidewalk located at the southwest corner of Sixth Avenue and West 23rd Street

in Manhattan, as she was exiting from the subway station. The sidewalk allegedly abuts the premises located at 100 West 23rd Street.

On January 30, 2009, plaintiff commenced this action against the City of New York (City) and the alleged abutting owners, West 23rd Street Realty LLC and George Butsikaris Realty, Inc. In their answer, West 23rd Street Realty LLC and George Butsikaris Realty, Inc. admitted that "West 23rd Street Realty, LLC owned 100 West 23rd Street, New York, New York." (Petersen Affirm., Ex C [Verified Answer] ¶ 4.)

West 23rd Street Realty LLC and George Butsikaris Realty, Inc. impleaded the alleged tenant of the corner store located at 100 West 23rd Street, third-party defendant West 23rd Street Food Fair, Inc. (Food Fair). Food Fair impleaded the New York City Transit Authority (NYCTA).

NYCTA moves for summary judgment dismissing the second third-party action. (Motion Seq. No. 003.) Food Fair moves for summary judgment dismissing all claims and cross claims against it. (Motion Seq. No. 004.) West 23rd Street Realty LLC and George Butsikaris Realty, Inc. move for summary judgment dismissing the complaint as against them, or in the alternative, granting them summary judgment or conditional summary judgment against Food fair for contractual indemnification. (Motion Seq. No. 005.) This decisions addresses all three motions.

BACKGROUND

At the 50-h hearing, plaintiff stated that she came up out of the subway, walked two steps, and then tripped and fell. (Feinstein Affirm., Ex E [Nunziata Tr.], at 5-6, 13-14.) When asked, "Do you know what caused your accident?", plaintiff answered, "No." (*Id.* at 13.) Plaintiff testified as follows:

> "Q. Did you see what you tripped on before you tripped?
> A. It was crowded.
> Q. You have to answer the question yes or no or you don't know.
> A. No, I don't know."

(*Id.* at 14.) According to the notice of claim to the City and the bill of particulars, the incident occurred around 12:30 p.m. (Ferrara Affirm., Exs A, C.) According to the transcript of the 50-h hearing, plaintiff testified that the accident happened "Approximately 1, 1:30" in the afternoon. (Nunziata Tr., at 5.)

At her deposition, plaintiff was shown photographs marked as A1 and A2 for identification. (Petersen Affirm., Ex E [Nunziata EBT] at 27.) Plaintiff testified as follows:

> "Q. . . . I'm going to ask you to take a look at these two photos and ask you if you recognize what's depicted in these two photos.
> A. Yes.
> Q. And what do you recognize it to be?
> A. Where I tripped (indicating)."

(*Id.*) Plaintiff stated, "I took a couple of steps and then tripped on that (indicating)."

(*Id.* at 32.)

Plaintiff was asked to mark on photographs A1 and A2 the location where she allegedly tripped, and to put her initials on the photographs. (*Id.* at 32.) The marks on photographs A1 and A2 appear to indicate the area between two sidewalk flags. (*See* Petersen Affirm., Ex E.) Plaintiff testified at her deposition that there was a difference in height between the sidewalk flags, i.e., "it was more rised [*sic*] up that the rest of the sidewalk." (Nunziata EBT, at 103.)

At his deposition on September 30, 2010, George Butsikaris testified that 23rd Street Realty, LLC is the owner of a building located at 100 West 23rd Street, and that George Butsikaris Realty, Inc. is the managing agent for 23rd Street Realty, LLC. (Ferrara Affirm., Ex F [Butsikaris EBT], at 8.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

The NYCTA argues that it is entitled to summary judgment because it had no duty to maintain the area where plaintiff allegedly tripped and fell. West 23rd Street Realty LLC, George Butsikaris Realty, Inc., and Food Fair argue that they are entitled to summary judgment on the grounds that plaintiff initially had no idea what caused her to fall and failed to specify where she fell at her 50-h hearing, and that the height differential is a trivial defect as a matter of law. West 23rd Street Realty LLC and George Butsikaris Realty, Inc. additionally argue that plaintiff has not offered any proof that they had actual or constructive notice of the alleged defective condition. Food Fair additionally asserts that it was the duty of the Port Authority of New York and New Jersey to maintain the area where plaintiff allegedly tripped and fell.

West 23rd Street Realty LLC and George Butsikaris Realty, Inc. claim that they are entitled to contractual indemnification from Food Fair pursuant to Article 4, Article 30, and Article R44 of Food Fair's lease. Food Fair maintains that the lease requires Food Fair to make only non-structural repairs to the sidewalk.

I.

The NYCTA's motion for summary judgment is granted without opposition. The NYCTA maintains that it had no duty to maintain the area where plaintiff

allegedly tripped and fell. No party disputes the NYCTA's contention that plaintiff exited from a stairway that is not maintained by the NYCTA, but rather is a "PATH" stairway. Therefore, the NYCTA is granted summary judgment dismissing the second third-party action.

II.

"It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury." (*Siegel v City of New York*, 86 AD3d 452, 454-455 [1st Dept 2011].) "Although a plaintiff bears no burden to identify precisely what caused [her] slip and fall, mere speculation about causation is inadequate to sustain the cause of action." (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009].)

Here, at the 50-h hearing, plaintiff was unable to state what caused her to fall. However, the Appellate Division, First Department has held that a plaintiff is not required to identify, at the time of the accident, exactly where she fell and the precise condition that caused her to fall. (*Tomaino v 209 East 84th St. Corp.*, 72 AD3d 460 [1st Dept 2010].)

In *Tomaino*, the plaintiff claimed that she slipped on steps because of worn treads, which she had discovered when she returned to the scene of her alleged

accident a few weeks later. The plaintiff identified the location of her fall at her deposition. Here, like the plaintiff in *Tomaino*, plaintiff was able to identify where she tripped and fell and the alleged defect at her deposition.

Tomaino is applicable here, and the Court is constrained to follow *Tomaino*. The cases that West 23rd Street Realty LLC and George Butsikaris Realty, Inc. cite predate *Tomaino*. The differences between plaintiff's testimony at the 50-h hearing and at her deposition raise issues of credibility.

To the extent that West 23rd Street Realty LLC, George Butsikaris Realty, Inc. and Food Fair argue that they are also entitled to summary judgment on the ground that plaintiff did not testify at the 50-h hearing where she fell, it does not appear from the cited 50-h hearing testimony that plaintiff was specifically asked where she allegedly fell. Rather, in the 50-h hearing testimony that is cited in the moving papers, plaintiff was asked which direction she fell, if she looked at the area where she fell while she was waiting for the ambulance, and whether she told anyone in her family specifically where she fell.

III.

"There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises." (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]).

"Instead, whether 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." (*Trincere v County of Suffolk*, 90 NY2d 976, 977 (internal quotation marks and citation omitted). Thus, the Court must examine the facts presented, "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." (*Ibid.* [citation omitted].) "[F]actors which make the defect difficult to detect present a situation in which an assessment of the hazard in view of 'the peculiar facts and circumstances' is appropriate." (*Argenio*, 277 AD2d at 166.)

Here, movants submit an affidavit from Marlon Weingrad, an investigator, who avers that he took photographs of the alleged accident location, and that he measured the height differential between the adjoining sidewalk flags and the caulk space between the flags. (Petersen Affirm., Ex J [Weingrad Aff.] ¶¶ 5-7.) According to Weingrad, the height differential was a quarter of an inch, and the width of the caulk space was three-quarters of an inch. (*Id.*) Weingrad also attached 13 photographs to his affidavit, some of which depict a measuring tape next to a sidewalk flag and across the caulk space of sidewalk flags. (*See id.*)

However, the location of the height differential is near the entrance to a subway and PATH station, and plaintiff testified at the 50-h hearing that the accident

occurred mid-day, and that the sidewalk was crowded. (Nunziata Tr., at 11.) In the Court's view, the circumstances of plaintiff's alleged trip and fall present a triable question as to whether this particular height differential was a defect that was not trivial as a matter of law. (*See Argenio*, 277 AD2d at 166 ["the location of the depression in a heavily traveled pedestrian walkway renders observation of the defect less likely"]; *George v New York City Tr. Auth.*, 306 AD2d 160, 161 [1st Dept 2003] [defective step with a piece of concrete missing, in an area heavily traveled by pedestrians, especially during peak transportation time periods, was not trivial as a matter of law]; *see also Abreu v New York City Hous. Auth.*, 61 AD3d 420 [1st Dept 2009] ["[E]ven a trivial defect can sometimes have the characteristics of a snare or a trap"].)

Therefore, movants are not entitled to summary judgment dismissing the complaint on the ground that the alleged height differential was a trivial defect as a matter of law.

IV.

West 23rd Street Realty LLC and George Butsikaris Realty, Inc. did not meet their prima facie burden with respect to lack of constructive notice, because they did not produce any affidavit or records, nor cite any testimony, indicating when the area was last inspected before plaintiff was allegedly injured. (*Ross v Betty G. Reader*

Revocable Trust, 86 AD3d 419, 421 [1st Dept 2011].) West 23rd Street Realty LLC and George Butsikaris Realty, Inc. "cannot obtain summary judgment by pointing to gaps in plaintiff['s] proof." (*Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617, 618 [1st Dept 2009], citing *Torres v Indus. Container*, 305 AD2d 136 [1st Dept 2003].)

V.

Turning to the third-party claims for contractual indemnification, West 23rd Street Realty LLC and George Butsikaris Realty, Inc. argue that, under its lease, Food Fair was solely responsible for maintaining the abutting sidewalk, and that they are entitled to contractual indemnification from Food Fair under the lease. Food Fair argues that the indemnification provision of the lease is unenforceable by virtue of General Obligations Law § 5-322.1, and that the lease required Food Fair to make only non-structural repairs to the sidewalk.

On their face, the lease and rider to the lease is between Food Fair and 23rd Street Realty, LLC, not West 23rd Street Realty LLC. (Petersen Affirm., Ex B.) However, on these motions, both West 23rd Street Realty LLC and Food Fair represent that this lease and rider is the agreement between Food Fair and West 23rd Street Realty LLC. (*See* Petersen Affirm. ¶ 8; Ferrara Affirm. ¶ 52.) George Butsikaris Realty, Inc. is not a party to the lease or to the rider to the lease.

Article R44 (in the rider to the lease) states:

"*Tenant covenants and agrees, at its sole cost and expense, to indemnify, and hold Landlord harmless against any and all claims by or on behalf of any person, firm, or corporation, arising out of or in connection with*: (a) the conduct or management of, and the payment for any work or thing whatsoever done in or about the demised premises by or on behalf of Tenant . . . ; *(b) the condition of the demised premises during the term of this lease, or any use, nonuse, possession, management or maintenance of the demised premises*; (c) any breach or default on the part of Tenant in the performance of the Tenant's covenants or obligations under this lease; (d) any act, negligence, or default of Tenant . . . ; (e) any accident, injury or damage whatsoever caused by any person, firm, or corporation occurring as the result of any work or thing whatsoever done by Tenant . . . in or about the demised premises, or upon or under the streets, sidewalks, or land adjacent thereto. . .. Further, Tenant agrees to indemnify and hold Landlord harmless against and from all costs, counsel fees, expenses and liabilities incurred in or about any such claim or any action or proceeding brought thereon, and in case any action or proceeding shall be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, agrees to resist or defend such action at Tenant's sole cost and expense"

(Petersen Affirm., Ex B [emphasis supplied by West 23rd Street Realty LLC and George Butsikaris Realty, Inc.].)

Article 4 of the lease states, in pertinent part:

"Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at is sole cost and expense, make all *non-structural* repairs thereto as when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire, or other casualty, excepted."

(Petersen Affirm., Ex B [emphasis supplied by Food Fair].)

Food Fair's reliance on General Obligations Law § 5-322.1 is misplaced. General Obligations Law § 5-322.1 is not applicable because the lease agreement is not an agreement that is "in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building . . ." (General Obligations Law § 5-322.1)[1]

Although Article 4 of the lease appears to require Food Fair to make only nonstructural repairs to the sidewalk, Article 30 of the lease states, in pertinent part:

> "Tenant shall at Tenant's expense, keep the demised premises clean and in order, to the satisfaction to Owner, and *if the demised premises are situated on the street floor*, at Tenant's own expense, make *all repairs and replacements to the sidewalks and curbs adjacent thereto . . . .*"

(*Id.* [emphasis supplied].)

It is undisputed that Food Fair's lease includes the ground floor. Thus, the issue presented is whether the language "all repairs and replacements to the sidewalks and curbs adjacent thereto" in Article 30 of the lease requires Food Fair to make

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[1] The Court notes that General Obligations Law § 5-321 deems void and unenforceable an agreement in lease "exempting the lessor from liability for damages or injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises . . . ." However, "[w]here, as here, a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity" (*Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]; *Gary v Flair Beverage Corp.*, 60 AD3d 413, 414-415 [1st Dept 2009]).

repairs to the sidewalk that are structural in nature.

In *Collado v Cruz* (81 AD3d 542 [1st Dept 2011]), the plaintiff tripped and fell on a broken sidewalk in front of a building, which was leased by the tenant for use as a grocery store. The tenant asserted that, under paragraph 4 of the lease, and under paragraph 58 of the Addendum to the lease, the tenant was responsible only for non-structural repairs, and that the broken sidewalk flag was a structural repair. The Appellate Division rejected this argument, because paragraph 30 of the lease provided that the tenant shall "make all repairs and replacements to the sidewalks and curbs adjacent thereto." The Appellate Division stated, "The tenant may be held liable to the owner for damages resulting from a violation of paragraph 30 of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store." (*Collado*, 81 AD3d at 542.)

Here, the language in Article 30 of Food Fair's lease is identical to the language of paragraph 30 of the lease in *Collado*. The Court has reviewed the record on appeal in *Collado*, which reveals that paragraph 4 of the lease in *Collado* is the Standard Form of Store Lease (2/94-A) published by the Real Estate Board of New York, Inc. (Record on Appeal in *Collado v Cruz*, 81 AD3d 542, at 164.) Although the Standard Form of Store Lease in *Collado* appears to be an earlier version than the Standard Form of Store Lease in this case, the provisions of paragraph 4 in *Collado*

concerning the tenant's duty to take good care of the demised premises and sidewalks adjacent thereto are identical to the provisions of Article 4 in this case. Although one might argue that the provisions of Article 4 and Article 30 conflict, the Appellate Division ruled in *Collado* that Article 30 controls. This Court is constrained to follow *Collado*. Therefore, contrary to Food Fair's argument, the language "all repairs and replacements to the sidewalks and curbs adjacent thereto" in Article 30 of Food Fair's lease includes structural repairs.

Food Fair indicates that, at his further deposition on March 28, 2012, George Butsikaris testified that he hired a contractor, NZF Construction, Inc., to replace the concrete entrance to the building at 100 West 23rd Street in 2006. (Petersen Affirm., Ex F [Butsikaris 3/28/12 EBT], at 11-15.) Butsikaris stated, "It seemed that the sidewalk – I mean not the sidewalk, the concrete on the entrance right on the common area was sort of cracking up and we replaced it." (*Id.* at 12.) Food Fair submits copies of a letter dated May 15, 2006, purportedly from NZF construction INC Waterproofing. (Ferrara Affirm., Ex L.) The letter describes the scope of work as including, among other things: "A) Take off existing concrete Entrance front side of building . . C) Pour new concrete (PSI 4000) front entrance of building." (*Id.*)

To the extent that Food Fair is attempting to argue that West 23rd Street Realty LLC either had a duty or assumed a duty to perform structural sidewalk repairs to the

sidewalk abutting Food Fair's premises, Butsikaris's testimony and the letter evidences does not support that contention. When asked if the contract with NZF Construction, Inc. called for any work to be performed within ten feet of the subway entrance, Butsikaris answered, "To the best of my knowledge, no." (Butsikaris 3/28/12 EBT, at 18.)

However, neither Food Fair nor West 23rd Street Realty LLC and George Butsikaris Realty, Inc. have demonstrated that the height differential between sidewalk flags was, as a matter of law, a structural sidewalk defect that Food Fair was required to repair pursuant to Article 30 of Food Fair's lease. As discussed above, there are issues of fact as to whether the height differential was a trivial defect.

Therefore, neither Food Fair nor West 23rd Street Realty LLC and George Butsikaris Realty, Inc. are entitled to summary judgment concerning the third-party claims against Food Fair for contractual indemnification.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by second third-party defendant New York City Transit Authority (Motion Seq. No. 003) is granted, the second third-party complaint is severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter

judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion for summary judgment by third-party defendant West 23rd Street Food Fair, Inc. (Motion Seq. No. 004) is denied; and it is further

ORDERED that the motion for summary judgment by defendants/third-party plaintiffs West 23rd Street Realty LLC and George Butsikaris Realty, Inc. (Motion Seq. No. 005) is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this action is referred to the City Part.

Dated: June 19, 2013
New York, New York

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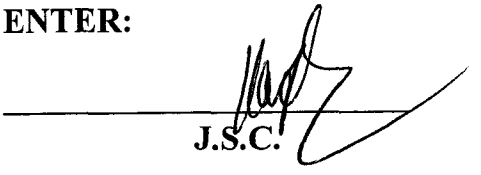

J.S.C.