SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: [redacted] Justice PART 35

Peralta, Ana

-v-

Hawthorne

INDEX NO. 115005/10
MOTION DATE 8/21/13
MOTION SEQ. NO. 001

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

In this personal injury action arising from a trip and fall accident on a sidewalk, defendants 4879 Deli Corp. d/b/a Fidel Gourmet Deli, incorrectly sued herein as Fidel Gourmet Deli Inc. and Fadhl Aldilam a/k/a Fadal Aldilam d/b/a Fidel Gourmet Deli (collectively, "4879 Deli Corp.") move to dismiss the complaint and all cross-claims asserted against them.

In this action, plaintiff Ana Peralta ("plaintiff") asserts that she tripped and fell on a raised portion of the sidewalk located on W. 204th Street, adjacent to the corner building located at 4879 Broadway a/k/a 660-662 West 204th Street, New York, New York (EBT, Exh. H, pp. 56-57, 63-64).

It is uncontested that the building is owned by the co-defendant Hawthorne Gardens LLC, and managed by co-defendant Parkoff Operating Corp. (collectively, "Hawthorne Parkoff") and that 4879 Deli Corp. leased the first floor portion of the building pursuant to a written lease (between Hawthorne and Fadhl Aldilam).[1] Yahia Aldailam testified on behalf of 4879 Deli

[1] The lease demised "Store #18 and Store #19."

Dated: _____ _____, 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

Corp. that he was assigned the lease in 2005 from his brother Fadil Adailam and operated the leased premises as a Deli since then (EBT, Exh. J, p. 13). The lease requires the "Tenant [to] obtain and keep in full force and effect during the during the Term: (a) Comprehensive General Liability Insurance" and "Property" insurance (¶39.2(a) and (b)). The lease also requires the tenant to "defend all actions . . . against Landlord . . . and pay . . . indemnify and save harmless Landlord . . . . from and against all liabilities, losses, damages, costs, and expenses . . . incurred in connection with or arising from any Actions of any nature to which Landlord is subject . . . .and which are attributable to or arise from any: (i) injury . . . by reason of the activity on the Demised Premises or adjoining sidewalks . . . ." (¶46).

In support of dismissal, 4879 Deli Corp. contends that the depositions of the parties, photographs, and agreements submitted, established that is not liable to plaintiff for her injuries. Section 7-210 of the Administrative Code of the City of New York places the duty to maintain and repair New York City sidewalks on the owners of the property abutting the sidewalk. As a commercial tenant, it does not have a duty to plaintiff under either section 7-210 or the facts in this case. And, inasmuch as 4879 Deli Corp. occupies only the demised premises storefront, and did not occupy the sidewalk, did not damage it, and did not attempt to repair it, it cannot be liable to plaintiff or to co-defendants for this accident.

In opposition, Hawthorne Parkoff argues that 4879 Deli Corp. failed to establish any basis to dismiss the cross-claims asserted against it for contribution, common law indemnification, contractual indemnification, and breach of contract for failure to provide insurance.

In reply, 4879 Deli Corp. argues that Hawthorne Parkoff fails to submit any evidence in opposition to dismissal of their cross-claims.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 908 NYS2d 33 [1st Dept 2010]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b];*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d at ; 927; *Meridian Management Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 894 NYS2d 422 [1st Dept 2010]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]).

The evidence also establishes that 4879 Deli Corp. did not own of the abutting property,

cause, create the condition or special use of the subject condition on the sidewalk; and it did not maintain, operate or control the subject sidewalk. Plaintiff does not oppose dismissal of her action against 4879 Deli Corp. and Hawthorne Parkoff did not submit any evidence raising an issue of fact as whether 4879 Deli Corp. is liable to plaintiff. Therefore, having established that 4879 Deli Corp. owed no duty to plaintiff to maintain the subject sidewalk, and that it did not cause or create the alleged defect which allegedly caused plaintiff's injuries, dismissal of the complaint as against said defendants is warranted.

As to dismissal of the cross-claims, the absence of any duty or liability to the plaintiff precludes the common-law indemnification cross-claim by Hawthorne Parkoff, as a matter of law. "Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] *citing Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]; *Espinoza v Federated Dept Stores, Inc.*, 73 AD3d 599, 904 NYS2d 3 [1st Dept 2010]). Since the record establishes that 4879 Deli Corp. was not negligent with respect to plaintiff's alleged injuries, the common-law indemnification cross-claim must be dismissed (*San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 942 NYS2d 104 [1st Dept 2012]).

The same holds true for common law contribution. "[T]wo or more persons who are subject to liability for damages for the same personal injury . . . may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought" (CPLR 1401; *Schauer v Joyce*, 54 N.Y.2d 1, 444 N.Y.S.2d 564 [1981]; Siegel, New York Practice, § 172, p. 213; see McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 1401, pp. 362-363). In light of the dismissal of the complaint against 4879 Deli Corp., Hawthorne Parkoff's common law contribution claims against 4879 Deli Corp. must be dismissed (*see Casey v New York Elevator & Elec. Corp.*, 107 AD3d 597, 968 NYS2d 58 [1st Dept 2013] (holding that "[b]ecause the amended complaint against NYE should have been dismissed . . . Winoker's cross claim for contribution against NYE . . . should also have been dismissed")).

However, dismissal of Hawthorne Parkoff's cross-claims for contractual indemnification and breach of contract for failure to obtain insurance is denied. It is well settled that in order to prevail on a motion for summary judgment, the moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York,* 49 NY2d 557, 562, 427 NYS2d 595; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 165 NYS2d 498), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Johnson v CAC Business Ventures, Inc.*, 52 AD3d 327, 859 NYS2d 646 [1st Dept 2008]; *Murray v City of New York*, 74 AD3d 550, 903 NYS2d 34 [1st Dept 2010]). As noted above, the lease contains obligations for 4879 Deli Corp. to provide certain insurance, and to indemnify Hawthorne Parkoff under certain circumstances, and plaintiff failed to address these lease provisions or such cross-claims in any manner.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants 4879 Deli Corp. d/b/a Fidel Gourmet Deli, incorrectly sued herein as Fidel Gourmet Deli Inc. and Fadhl Aldilam a/k/a Fadal Aldilam d/b/a

Fidel Gourmet Deli to dismiss the complaint and all cross-claims asserted against them is granted solely to the extent that (1) plaintiff's complaint as asserted against said defendants is dismissed, and (2) the cross-claims by co-defendants Hawthorne Gardens LLC and Parkoff Operating Corp. for common law contribution and common law indemnification are hereby severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendants 4879 Deli Corp. d/b/a Fidel Gourmet Deli, incorrectly sued herein as Fidel Gourmet Deli Inc. and Fadhl Aldilam a/k/a Fadal Aldilam d/b/a Fidel Gourmet Deli shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 9.5.2013

J.S.C.

CAROL EDMEAD
J.S.C.

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☒ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE