

<b>Evans v TD Bank, N.A.</b>
2014 NY Slip Op 33306(U)
December 16, 2014
Supreme Court, New York County
Docket Number: 159582/13
Judge: Donna M. Mills
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SUPREME COURT OF THE CITY OF NEW YORK  
 COUNTY OF NEW YORK: PART 58

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 ROSA EVANS,

Plaintiff,

Index No.: 159582/13

-against-

DECISION AND ORDER

TD BANK, N.A. d/b/a TD BANK, HUSA  
 MANAGEMENT CO., LLC, HUSA OPERATING  
 CO., LLC, HUSA MANAGING MEMBER, INC.,  
 COMMONWEALTH LOCAL DEVELOPMENT CORP.,  
 GOTHAM ORGANIZATION INC., HCC REALTY  
 FUNDING CORP. and GRID PROPERTIES,  
 INC.,

Defendants.

-----x  
 MILLS, J.

**FACTUAL BACKGROUND**

This is an action to recover for personal injuries allegedly sustained by plaintiff Rosa Evans on August 29, 2012, when she allegedly tripped and fell due to a sidewalk abnormality, specifically, pavers that were allegedly improperly built and/or repaired in front of the premises located at 300 West 125<sup>th</sup> Street in the county of New York. Plaintiff avers that TD Bank negligently allowed the sidewalk adjacent to its store to become a hazardous condition. The complaint also alleges causes of action against several real estate companies, including the store's landlord (collectively "HUSA").

Defendant TD Bank moves for summary judgment on its cross-claims for contractual indemnification against HUSA for reimbursement of TD Bank's defense costs and attorneys' fees

incurred in this lawsuit, and dismissal of all cross-claims against TD Bank. Plaintiff and defendant HUSA both oppose the motion on the ground that the motion is premature as no discovery has taken place.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In this action for personal injuries, plaintiff alleges that she tripped and fell over a defective sidewalk in front of TD Bank, where TD Bank is a tenant. However, the law is clear that as a tenant of the premises, not an abutting landowner, TD Bank has no statutory obligation to maintain the public sidewalk adjacent to its store (Administrative Code of City of NY § 7-210; see *Rothstein v 400 E. 54<sup>th</sup> St. Co.*, 51 AD3d 431 [2008]).

Accordingly, this court finds that TD Bank, as a tenant, made a prima facie showing of entitlement to judgment as a matter of law. TD Bank submitted sufficient evidence to demonstrate, prima facie, that it did not create the alleged defect nor make special use of the sidewalk.

Further, under the terms of the 2003 lease between TD Bank and HUSA, TD Bank has no obligation to maintain the sidewalk (see *Collado v Cruz*, 81 AD3d 542 [1<sup>st</sup> Dept 2011]).

In opposition to the motion, plaintiff and HUSA both argue that the motion is premature in that no discovery has been held to date and that it is too early in the litigation process to permit TD Bank to escape liability for the subject accident.

"A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 AD3d 769, 770 [2010]; see CPLR 3212[f]). A party's "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion" (*Woodard v Thomas*, 77 AD3d 738, 740 [2010]).

The plaintiff and co-defendants "failed to demonstrate that discovery may lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the TD Banks defendant

(*Boorstein v 1261 48<sup>th</sup> St. Condominium*, 96 AD3d 703, 704 [2012]; see CPLR 3212 [f]).

Here, it is undisputed that at the time of plaintiff's incident, TD Bank was the tenant of the premises abutting the sidewalk on which plaintiff fell and that TD Bank was not the abutting landowner. Although TD Bank may have been required pursuant to the lease to clean the sidewalk, TD Bank was not required to repair the sidewalk and keep it free of structural defects. Therefore, in the absence of any duty to maintain the sidewalk, and in the absence of any proof that TD Bank made "special use" or repair of such sidewalk, TD Bank established it's entitled to summary dismissal of the complaint as asserted against it.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the defendant TD Bank's motion for summary judgment is granted and the complaint and all cross claims are dismissed as against this defendant with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

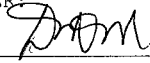
ORDERED that TD Bank's cross-claims for contractual indemnification and common-law indemnification against HUSA for reimbursement of TD Bank's defense costs and attorneys' fees incurred in this lawsuit is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of TD Bank; and it is further

ORDERED that the action is severed ad continued against the remaining defendants.

Dated: 12/16/14

ENTER:



**DONNA M. MILLS, J.S.C.**