Holiday v 1165 Broadway Corp.
2015 NY Slip Op 31333(U)
June 29, 2015
Supreme Court, Queens County
Docket Number: 22461/11
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

PHYLLIS HOLIDAY and ROBERT HOLIDAY,

Plaintiffs,

-against-

1165 BROADWAY CORP. and G.N. PERFUMES,

Defendants.

Index No: 22461/11

Motion Date: 4/21/15

Motion Seq. No.: 5

The following papers numbered 1 to 14 read on this motion by defendant, 1165 Broadway Corp.(hereinafter Broadway) for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against it and for conditional summary judgment on its cross-claim for contractual indemnification and summary judgment on its cross-claim for breach of contract by failure to obtain insurance naming Broadway as an additional insured.

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Upon the foregoing papers it is ordered that this motion is determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained on January 28, 2011 between 8:00-8:15 a.m. when she allegedly slipped and fell on ice on the sidewalk abutting the premises located at 1171 Broadway. Plaintiff commenced this action against Broadway, the owner of the property and against G.N. Perfumes, Inc. incorrectly denominated herein as G.N. Perfumes (hereinafter GN) the tenant of the premises pursuant to a lease dated December 7, 2010 for the period commencing January 1, 2011 through December 31, 2013.

The defendant, Broadway now moves for summary judgment in its favor dismissing the complaint relying on the storm in progress rule and/or on the ground that it neither created nor

have actual or constructive notice of the condition on which plaintiff fell. In support of its motion, defendant submitted the deposition testimonies of the plaintiff, the principals of the defendant corporations, Broadway's superintendent Frank Vella, the lease between Broadway and GN and certified climatological data for January, 2011.

Administrative Code of the City of New York § 7-210 imposes upon the owners of real property abutting the public sidewalk (with some exceptions not relevant here) a non-delegable duty to maintain the sidewalk, including removal of snow and ice, and makes the owner liable for injuries arising out of its failure to do so (see Serano v. New York City Housing Authority, 66 AD3d 867, 868 [2009]; James v. Blackmon, 58 AD3d 808 [2009]; Cook v. Consolidated Edison Co. of N.Y., 51 AD3d 447, 448 [2008]). While the duty is non-delegable, section 7-210 does not impose strict liability upon the property owner, thus, the owner may be held liable for injury arising out of the failure to remove snow and ice on the sidewalk only if the owner created or had actual or constructive notice of the condition causing the injury (see Khaimova v. City of New York, 95 AD3d 1280, 1281 [2012]; Harakidas v. City of New York, 86 AD3d 624, 627 [2011]).

Pursuant to the "storm in progress" rule, the duty to remove snow and ice while a storm is in progress is suspended and does not arise until a reasonable time after the storm has ended (see Rabinowitz v. Marcovecchio, 119 AD3d 762, 762 [2014]; Abramo v. City of Mount Vernon, 103 AD3d 760 [2013]; Marchese v. Skenderi, 51 AD3d 642, 642 [2008]). A lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety (see Fenner v. 1011 Route 109 Corp., 122 AD3d 669, 670 [2014]; Rabinowitz v. Marcovecchio, supra; Mazzella v. City of New York, 72 AD3d 755 [2010]; DeStefano v. City of New York, 41 AD3d 528 [2007]). However, "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied" (Mazzella v. City of New York, supra at 756, quoting Powell v. MLG Hillside Assoc., 290 AD2d 345, 345-346 [2002]; see Fenner v. 1011 Route 109 Corp., supra; Rabinowitz v. Marcovecchio, supra).

The certified climatological data and the plaintiff's deposition testimony demonstrate that snow began to fall from about 8 to 9 a.m. January 26, 2011 and continued with only a short lull until about 5 a.m. January 27, 2011, when all precipitation stopped. At the time that the plaintiff fell, between 8:00-8:15 a.m. on January 28, 2011, there was no snow or

any other precipitation. Although "trace" amounts of snow fell between 5 p.m. and 11 p.m. on January 28, 2011, beginning eight hours after plaintiff's fall, the storm ended about 28 hours prior to plaintiff's fall.

This evidence, which is undisputed, demonstrates that the storm in progress rule does not apply since the storm ended at about 5:00 a.m. on Janaury 27, 2011 and that at the time plaintiff fell there was not merely a "lull" in the storm(see Mazzella v. City of New York, supra).

To establish its entitlement to summary judgment, the defendant, as the movant, has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy it (see Harakidas v. City of New York, supra; Martinez v. Khaimov, 74 AD3d 1031 [2010]; James v. Blackmon, supra). "To meet its initial burden on the issue of lack of constructive notice, Broadway must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Rodriquez v. Shoprite Supermarkets, Inc., 119 AD3d 923 [2014] quoting Birnbaum v. New York Racing Assn., Inc., 57 AD3d 598, 598-599 [2008]).

To establish its defense, Broadway relied upon the deposition of its superintendent, Vellar, and the lease with GN. Vellar testified that he has no specific memory of January 28, 2011, however, it was his general practice to arrive at work at 5:00 a.m., Monday - Friday, and inspects the sidewalk down Broadway by standing on the corner of Broadway and 27th Street. He further testified that because it was the tenant's obligation to maintain the sedewalk abutting their premises, including removing removing snow and ice, he never performed snow removal in front of any tenant's premises, but, if he noticed any snow or ice, he would bring it to the attention of the tenant.

While Vellar's deposition testimony regarding his general practices may be sufficient to demonstrate, prima facie, that it did not create nor have actual knowledge of the condition that allegedly caused plaintiff's fall, it is insufficient to demonstrate lack of constructive notice as a matter of law. "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (Herman v. Lifeplex, LLC, 106 AD3d 1050, 1051-1052 [2013]). In addition, considering the severe weather conditions which occurred between January 26-January 27, 2011, the

climatological reports showing that the storm ended about 28 hrs. before plaintiff's fall, Vellar's testimony that he arrives at work at 5:00 a.m., about 3 hours before the plaintiff's fall and before the GN opened the store, there exist issues of fact as to whether Broadway, fulfilled its non-delegable duty imposed by the Administrative Code to exercised reasonable care to maintain the sidewalk (see Powell v. MLG Hillside Associates, L.P., supra at 346; see also McBryant v. Pisa Holding Corp., 110 AD3d 1034 [2013]).

Accordingly, Broadway's motion for summary judgment dismissing the complaint insofar as it is asserted against it is denied.

Broadway's motion for a order granting conditional summary judgment on its cross-claims for defense and common law and contractual indemnification is denied.

To establish its claim for common-law indemnification, the defendant must prove not only that it was not negligent, but also that the proposed indemnitor, GN, was negligent and that its negligence was a proximate cause of the injury (see Benedetto v Carrera Realty Corp., 32 AD3d 874, 875 [2006]).

A party's right to contractual indemnification depends upon the specific language of the relevant contract (see Sawicki v. GameStop Corp., 106 AD3d 979, 981 [213]). To establish its claim for contractual indemnification defendant must prove that it was not negligent and that its liability is solely vicarious arising from the non-delegable duty imposed by a statute, ordinance or rule, because to the extent its negligence contributed to the accident, it cannot be indemnified therefore (see General Obligations Law § 5-322.1; Bellefleur v. Newark Beth Israel Med. Cntr., 66 AD3d 807, 808 [2009], quoting Cava Constr. Co., Inc. v. Gealtec Remodeling Corp., 58 AD3d 660, 662 [2001]).

The subject lease provides in relevant part that the "[t]enant covenants and agrees to indemnify and hold harmless Landlord *** fee owner *** from and against any and all liability (statutory or otherwise), claims suits, demands, damages, judgments, costs, interest and expenses (including but not limited to counsel fees and disbursements incurred in the defense of any action or proceeding) *** for any injury to, *** any person *** arising from *** any default by Tenant in the performance of Tenant's obligations under under this lease *** {but not} for damages resulting from the negligence or act of Landlord *** ."

Although the lease provides for contractual indemnification, Broadway is not entitled to summary judgment on its cross-claim for common-law or contractual indemnification from GN because it failed to establish, prima facie, that it was not negligent (see generally Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). While the lease requires GN to indemnify GN for, among other things, all costs and expenses including attorney's fees, the lease does not require that GN to provide a "defense" (compare Sawicki v. GameStop Corp., supra at 981). In addition, since GN is not an insurer, any duty to defend would be no broader than its duty to indemnify (see Bellefleur v. Newark Beth Israel Med. Ctr., supra; George v. Marshalls of MA, Inc., 61 AD3d 625, 930 [2009]; Bryde v CVS Pharmacy, 61 AD3d 907, 908 [2009]).

The branch of the defendant's motion for summary judgment on the issue of liability on its cross-claim for breach of contract for failure to obtain insurance is granted.

An agreement to purchase insurance coverage is distinct from and treated differently from the agreement to indemnify (see, Kinney v. Lisk Co., 76 NY2d 215 [1990]; DiBuono v. Abbey, LLC, 83 AD3d 650, 652 [2011]; Kennelty v. Darlind Const., Inc.,260 AD2d 443 [1999]). "A party seeking summary judgment based on an alleged failure to procure insurance *** must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (DiBuono v. Abbey, LLC, supra). Broadway established, prima facie, its entitlement to summary judgment by submitting the lease and the deposition testimony of Singh. The subject lease at Art. 8 provided that the tenant, GN, during the term of the lease was required to maintain commercial general liability policy in favor of Owner and Tenant effective from the date tenant enters into possession of the premises and during the terms of the lease. Singh, testified that he did not obtain any insurance at all.

However, since it appears that Broadway has procured its own insurance, the measure of damages recoverable by Broadway is not full indemnification of the amount of any settlement or judgment and defense costs in the underlying personal injury action but rather its out-of-pocket expenses, including any deductible under its policy (see Inchaustegui v. 666 5th Avenue Ltd. Partnership [Inchaustegui], 96 NY2d 111, 114-115 [2001]). Thus, the amount of Braodway's damages must await the outcome of the trial of this action (see, Inchaustegui v. 666 5th Avenue supra; Wong v. New York Times Co., 297 AD2d 544 [2002]).

In opposition, GN failed to raise a triable issue of fact. GN's claims that it did not breach the provision of the lease

which required that it obtain a policy effective from the date tenant enters into possession, because it did not enter into possession until February 1, 2011 when his lease for his prior store expired, regardless of the fact that the lease was effective from January 1, 2011 is without merit. Singh testified that beginning on January 1, 2011 he was in the process of moving into the subject premises by, among other things, cleaning and setting up shelves at the subject premises. Although GN may not have begun to operate its business from the subject premises until February 1, 2011, the activities that GN undertook at the subject premises constitutes actual possession and control of the premises. The meaning of the lease is clear and unambiguous, and the alternative interpretation GN offers is not a reasonable one (see W.W.W. Assoc. v. Giancontieri, 77 NY2d 157, 162-163 [1990]; McCabe v. Witteveen, 34 AD3d 652, 653-654 [2006]).

Dated: June 29, 2015
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J.S.C.