Campisi v Gambar Food Corp.
2015 NY Slip Op 31719(U)
September 2, 2015
Supreme Court, Suffolk County
Docket Number: 09-36614
Judge: Jr., Andrew G. Tarantino

[* 1]

SHORT FORM ORDER

INDEX No. 09-36614

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 1-30-15 (#008)
MOTION DATE 2-27-15 (#009)
MOTION DATE 3-17-15 (#010)
ADJ. DATE 4-7-15
Mot. Seq. # 008 - MD
009 - MD
010 - XMD

PAULINE CAMPISI and ALBERT CAMPISI,

Plaintiffs,

- against -

GAMBAR FOOD CORP. and MONTAUK PROPERTIES, LLC,

Defendants.

MONTAUK PROPERTIES, LLC,

Third-Party Plaintiff,

- against -

JAY CARDS & GIFTS 2001, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 46 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 26 - 35, 40 - 42 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15 - 17, 18 - 21, 36 - 39, 43 - 44 ; Replying Affidavits and supporting papers 22 - 23, 24 - 25, 45 - 46 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by the defendant Gambar Foods Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion by the third-party defendant Jay Cards & Gifts 2001, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (incorrectly designated as a cross motion) by the defendant/third-party plaintiff Montauk Properties, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied.

This action was commenced to recover damages, personally and derivatively, allegedly sustained by the plaintiff Pauline Campisi (Campisi) on May 6, 2009, when she tripped and fell on the sidewalk of a shopping center located at 870 Montauk Highway, Copiague, New York. The shopping center, often described as a strip mall, consists of a line of stores with a parking lot located in front of the stores, and a sidewalk running between the parking lot and the entrances to those stores. Campisi allegedly fell while intending to enter the IGA Supermarket located in the shopping center. The IGA Supermarket is operated by the defendant Gambar Foods Corp. (Gambar). The shopping center is owned by the defendant/third-party plaintiff Montauk Properties, LLC, (Montauk), and the store adjacent to the IGA Supermarket is operated by the third-party defendant Jay Cards & Gifts 2001, Inc. (Jay Cards). The plaintiffs allege, among other things, that the defendants failed to properly operate, manage, control, inspect, repair, and maintain the sidewalk, and allowed a portion of the sidewalk to become broken, loose, dilapidated, jagged and crumbled, causing a dangerous and defective condition to exist, resulting in her injuries.

After issue was joined by all parties and discovery completed, Montauk moved for summary judgment dismissing the complaint and alleging that it was entitled to contractual indemnification from Gambar and Jay Cards, and Jay Cards cross-moved for summary judgment dismissing the third-party summons and complaint. By order dated June 12, 2013, the Court (LaSalle, J.) denied said motion and cross motion. Thereafter, Montauk filed an appeal of the subject court order solely on the ground that it is entitled to contractual indemnification from Gambar. The determinations made by Justice LaSalle in his order, and the results of Montauk's appeal, will be discussed below.

Gambar now moves for summary judgment dismissing the complaint on the grounds that Campisi's failure to look where she was walking is the sole proximate cause of her accident, and that it had no duty to maintain or repair the subject sidewalk. In addition, Gambar seeks to dismiss all cross

claims against it, including Montauk's cross claim for contractual indemnification. In support of its motion, Gambar submits, among other things, the transcripts of the parties' deposition testimony, and a copy of the lease agreement between Gambar and Montauk. At her deposition, Campisi testified that she goes to the subject IGA Supermarket daily, that Jay Cards is located next to and to the left of the supermarket when one views the shopping center from the parking lot, and that she parked her motor vehicle in front of the store to the left of Jay Cards. She stated that she walked towards the supermarket, that she said hello to a supermarket employee standing on the sidewalk, that her right foot got stuck in a hole in the sidewalk causing her to trip and fall, and that she was "looking straight ahead" at the time of her fall. She indicated that, after she fell, she turned around to look at the hole which she described as an oblong shape which was about one foot wide and an inch or an inch and a half deep, and that the concrete of the sidewalk was broken up, with debris, such as bottle caps and cigarette butts, in the hole. Campisi further testified that five photographs of the location of her accident were taken by her husband the next day, and that her accident happened in front of the garbage can shown in those photographs, which is located to the left of a column which lies between the stores operated by Gambar and Jay Cards. She stated that she had walked the same sidewalk many times before and did not see the hole before the date of the accident.

James Dalto (Dalto) was deposed on March 16, 2012, and testified that he is a member of Montauk, a real estate holding company that owns the strip mall that includes the IGA Supermarket and Jay Cards, and that he would visit the location six to eight times a year. He stated that his duties included maintenance of the strip mall, which involved seeking contractors to do various work, that he would not walk the property looking for hazards, and that he never observed any broken concrete on the sidewalk at the site. He indicated that, pursuant to Montauk's leases with Gambar and Jay Cards, the tenant is responsible for repairing the sidewalk in front of its store. Dalto further testified that he had never seen the garbage can shown in the subject photographs in any other location, and that he could not tell whether the area marked by Campisi as the area of her fall in said photographs is located in front of the store operated by Gambar or Jay Cards.

At his deposition, William Lukeman (Lukeman), an employee of Gambar and manager of the subject IGA supermarket, testified that his duties include inspecting the store, the sidewalk, and the parking lot area outside of the supermarket, that he never observed any cracks or broken concrete in the subject sidewalk, and that he did not inspect in front of the Jay Cards store. He indicated that he worked approximately 20 hours a week at the store, and that he did not have specific days that he worked there. He stated that Montauk is responsible for repairing the sidewalk in front of the supermarket, and that, prior to this incident, he had observed others repairing the sidewalk and parking lot in front of his store. Lukeman further testified that the column shown in the subject photographs delineates the boundary between the supermarket and the Jay Cards store, that the garbage can shown in the photographs is entirely in front of the Jay Cards store, and that the area indicated by Campisi on the photographs as the location of her fall is not in front of the IGA Supermarket.

Haresh Shah (Shah) was deposed on March 16, 2012, and testified that he is the manager of Jay Cards, a card and gift store. He stated that he thought that Montauk was responsible for repairs to the sidewalk, that he did not "know that it's my responsibility," and that he did not have an understanding as to whose responsibility it was. He indicated that he never observed any broken concrete or missing

pieces of concrete in the sidewalk in front of his store. Shah further testified that the area indicated by Campisi on the subject photographs as the location of her fall "looks like it could be in between" his store and the supermarket, that he did not know if the sidewalk to the left of the column in the photographs is in front of his store, and that he could not determine if the subject garbage can is in front of his store, in front of the supermarket, or partially in front of both.

The lease agreement between Montauk and Gambar dated January 6, 2009 provides in paragraph "Second" as follows:

> That throughout said term the Tenant will take good care of the demised premises, fixtures and appurtenances and all alterations, additions and improvements to either ... [and] forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto.

In addition, pursuant to subsection B of paragraph 44 of said lease, titled "Tenant's Obligation to Repair" the tenant shall at its own expense "make all repairs and replacements to any sidewalks and curbs adjacent to the Premises made necessary by the negligence of Tenant, and Sub-Tenant or concessionaire or their respective employees, agents, invitees, licensees, or contractors, or by the use or occupancy of the Premises."

On July 22, 2015, the Appellate Division, Second Department decided Montauk's appeal of the court order dated June 12, 2013 (***Campisi v Gambar Food Corp.***, 130 AD3d 854, 13 NYS3d 567 [2d Dept 2015]). The Appellate Division held that the lease between Montauk and Gambar requires Gambar to indemnify Montauk "for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto," and that Campisi's accident falls within the scope of the subject indemnification provision, "which ... obligates [Gambar] to indemnify [Montauk] for its own negligence." In addition, the Appellate Division held that General Obligations Law 5-321, "which provides that an agreement that purports to exempt a lessor from its own negligence is void and unenforceable," does not render the subject indemnification provision unenforceable, as this is a "provision in a commercial lease negotiated at arm's length between two sophisticated parties ... coupled with an insurance procurement requirement." (all citations omitted).

In the order dated June 12, 2013, the Court (LaSalle, J.), determined that the lease provision regarding repair of the subject sidewalk "is ambiguous as to who is responsible for maintaining the subject area," and that there was an issue of fact requiring a trial of this action as to whether Montauk was obligated to undertake such maintenance and repair. The Court further determined that Montauk had failed to establish that the alleged defect in the sidewalk was created by either Gambar or Jay

Cards's negligence, or their use and occupancy of the premises. Finally, the Court denied Jay Cards's cross motion on the ground that it failed to include a copy of its lease with Montauk, and to submit evidence that the alleged defect was not on its property.

Because the Appellate Division decision establishes only that Montauk is entitled to contractual indemnification from Gambar, and the court order dated June 12, 2013 has not been vacated or otherwise appealed, Montauk's right to contractual indemnification herein and the remaining determinations in the Court order dated June 12, 2013 are the law of the case. "The doctrine of 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, 950 NYS2d 175 [2d Dept 2012], quoting ***Martin v City of Cohoes***, 37 NY2d 162, 165, 371 NYS2d 687 [1975]; ***Brownrigg v New York City Hous. Auth.***, 29 AD3d 721, 815 NYS2d 681 [2d Dept 2006]).

Turning to that branch of Gambar's motion which seeks to dismiss the complaint, it is determined that Gambar has failed to establish its prima facie entitlement to summary judgment. Generally, owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Herman v Lifeplex, LLC***, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; ***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]). However, the party moving for summary judgment in a trip and fall action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Herman v Lifeplex, LLC***, 106 AD3d 1050, 966 NYS2d 473 [2d Dept 2013]; ***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Kielty v AJS Const. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]).

Gambar contends that it is not liable herein as Campisi's failure to look where she was walking is the sole proximate cause of her accident, that it had no duty to maintain or repair the subject sidewalk, and that it had no notice of the allegedly defective condition. The gravamen of Gambar's first contention is that the alleged defect was open and obvious. Whether a hazard is open and obvious cannot be separated from the surrounding circumstances (*see* ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 864 NYS2d 554 [2d Dept 2008]). A condition that may be apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (***Mazzarelli v 54 Plus Realty Corp.***, *id.*; ***Mauriello v Port. Auth. of NY & NJ***, 8 AD3d 200, 779 NYS2d 199 [1st Dept 2004]). Campisi's testimony raises an issue of fact as to whether the defect posed a tripping hazard or constituted a trap or snare (*see* ***Gerber v W. Hempstead Convenience, Inc.***, 303 AD2d 212, 756 NYS2d 553 [1st Dept 2003]; ***Argeno v Metropolitan Transp. Auth.***, 277 AD2d 165, 716 NYS2d 657 [1st Dept 2000]). Moreover, a determination that the alleged defect in the sidewalk was open and obvious would not entitle Gambar to summary judgment as it would not foreclose the plaintiffs' negligence claim, but is relevant only to a determination of Campisi's

comparative fault herein (***Saretsky v 85 Kenmare Realty Corp.***, 85 AD3d 89, 924 NYS2d 32 [1st Dept 2011]; ***Gradwohl v Stop & Shop Supermarket Co., LLC***, 70 AD3d 634, 896 NYS2d 85 [2d Dept 2010]).

In addition, there is an issue of fact whether Gambar had a duty to to maintain or repair the subject sidewalk. It is the law of the case that the relevant provision in Gambar's lease is ambiguous. There is an issue of fact whether the alleged defect, if it is located on the sidewalk in front of the supermarket, was made necessary by the "use or occupancy of the Premises," making Gambar potentially liable herein. Finally, Gambar has failed to establish that it did not have constructive notice of the alleged defect in the sidewalk. In order 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 discover and remedy it (*see* ***Chianese v Meier,*** 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986], *citing* ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). On a motion for summary judgment to dismiss the complaint, however, it is the defendant who bears the burden of proving the absence of notice as a matter of law (*see* ***Campbell v Great Atl. & Pac. Tea Co.***, 257 AD2d 642, 684 NYS2d 572 [1998]).

Here, Gambar's showing is devoid of any evidence regarding inspection of the subject area and, therefore, is insufficient to establish the absence of notice. Where no evidence of the last inspection is offered, a defendant fails to establish its prima facie burden, and summary judgment is properly denied without regard to the sufficiency of the plaintiff's submission on the issue of notice (***Marchese v. St. Martha's R.C. Church, Inc.***, 106 AD3d 881, 965 NYS2d 557 [2d Dept 2013]; ***Jackson v Jamaica First Parking, LLC***, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]). Campisi testified that the alleged defect was approximately one foot wide and an inch or an inch and a half deep. The defendants all deny ever seeing any hole or defect in the sidewalk. Viewing the evidence in a light most favorable to the plaintiffs and resolving all reasonable inferences in their favor, the photographs of the sidewalk and the conflicting testimony raise an issue of fact as to the existence of constructive notice of the alleged defect (*see* ***Batton v Elghanayan***, 43 NY2d 898, 403 NYS2d 717 [1978]; ***Taylor v New York City Tr. Auth.***, 48 NY2d 903, 424 NYS2d 888 [1979]). "Photographs may be used to prove constructive notice of an alleged defect if the photographs are taken reasonably close to the time of the accident, and if there is testimony that the conditions at the time of the accident were similar to the conditions shown in the photographs" (***Salvia v Hauppauge Route 111 Assoc.***, 47 AD3d 791, 791-792, 849 NYS2d 630 [2008]; *see* ***DeGruccio v 863 Jericho Turnpike Corp.***, 1 AD3d 472, 767 NYS2d 264 [2003]). Accordingly, that branch of Gambar's motion for summary judgment which seeks to dismiss the complaint is denied.

The remaining branch of Gambar's motion for summary judgment seeks to dismiss all cross claims against it, "including contractual and common-law indemnification". As previously determined, it is the law of the case that Gambar is obligated to contractually indemnify Montauk should Montauk be found liable at a trial of this action. In addition to common-law indemnification, Montauk has also asserted cross claims for contribution and "insurance coverage." In its third-party answer, Jay Cards has asserted a cross claim for contribution against Gambar. The "critical requirement" of a valid claim for contribution is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997] *quoting* ***Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.***, 71 NY2d 599, 528

NYS2d 516 [1988]; *see also* ***Nelson v Chelsea GCA Realty***, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Similarly, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; quoting ***Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola***, 134 NY 461 [1892]; *see also* ***Charles v William Hird & Co., Inc.***, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]). Because the predicate of common-law indemnity is vicarious liability without actual fault on part of the proposed indemnitee, a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (***Ferguson v Shu Ham Lam***, 74 AD3d 870, 903 NYS2d 101 [2d Dept 2010]).

Here, Gambar has failed to establish its prima facie entitlement to summary judgment dismissing the remaining cross claims against it. There are issues of fact requiring a trial of this action including, but not limited to, whether Montauk or Jay Cards' conduct had a part in causing Campisi's injury, and whether Gambar had a duty to maintain and repair the subject sidewalk and breached that duty.[1] In addition, Gambar has not addressed the issues raised by Montauk in its cross claim for "insurance coverage." Accordingly, that branch of Gambar's motion for summary judgment which seeks to dismiss all cross claims against it is denied, and the motion is denied in its entirety.

Jay Cards now moves for an order granting summary judgment in its favor and dismissing all claims asserted by Montauk against it. In support of its motion, Jay Cards submits the third-party pleadings, a copy of its lease agreement with Montauk, a copy of the court order dated June 12, 2013, portions of the brief filed by Montauk in its appeal of the court order dated June 12, 2013, and the notice of cross motion and affirmation in support relative to its earlier cross motion for summary judgment. The plaintiffs and Montauk oppose Jay Cards' motion on the ground that it violates the rule against multiple summary judgment motions. It is well established that there is a "general proscription against successive summary judgment motions" ***Auffermann, v Distl***, 56 AD3d 502, 867 NYS2d 527 [2d Dept 2008]; *see also* ***Central Equities Credit Corp. v B & Northerly Props.***, 66 AD3d 943, 888 NYS2d 107 [2d Dept 2009]). However, a successive motion for summary judgment does not violate the general proscription when it is based on a showing of newly discovered evidence or sufficient cause (*see* ***Oppenheim v Village of Great Neck Plaza, Inc.***, 46 AD3d 527, 846 NYS2d 628 [2d Dept 2007]; ***Lapadula v Sang Shing Kwok***, 304 AD2d 798, 757 NYS2d 869 [2d Dept 2003]).

The court order dated June 12, 2013 denied Jay Cards' original cross motion on the ground that it referenced its lease agreement with Montauk but actually referenced a copy of the Gambar lease agreement instead, and that Jay Cards failed to produce evidence that the alleged defect was not on its property. Jay Cards contends that the error in its original cross motion was inadvertent, and that the language in the two leases is identical. It is determined that Jay Cards has shown good cause why its second motion for summary judgment should be considered and, upon such consideration, the motion is

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[1] The issues may appear academic as to Montauk in light of the fact that Gambar has been found responsible pursuant to the lease agreement to indemnify Montauk herein. However, the parties should have the opportunity to determine the course of the trial of this action.

denied.

Here, Jay Cards has not submitted any substantive evidence beyond that already reviewed by the undersigned or submitted in its original application for summary judgment. Based on its admission that the language in its lease is identical to that already considered in the Gambar lease, the testimony of the parties, and for the reasons set forth above, it is determined that there are multiple issues of fact requiring a trial as to the plaintiffs' causes of action and the respective cross claims herein. In essence, Jay Cards and Gambar stand in the same position regarding the relevant issues in this action. In addition, Jay Cards' contention that, because Montauk only appealed the issue of contractual indemnification in relation to Gambar, the issue must be revisited is not only without merit, but belied by its admission that the language in the two leases is identical. Accordingly, Jay Cards' motion for summary judgment is denied.

Montauk now moves for summary judgment dismissing the complaint and all cross claims against it, submitting the affirmation of its attorney. In his affirmation in support of the motion, counsel for Montauk "joins in that portion of the motion of [Gambar]" which seeks summary judgment dismissing the plaintiffs' complaint, and incorporates by reference the exhibits attached to said motion. The plaintiffs oppose Montauk's motion on the ground that it violates the rule against multiple summary judgment motions. It is determined that the instant cross motion is procedurally defective. Here, Montauk has failed to proffer any newly discovered evidence or to contend that there is sufficient cause to consider its second motion for summary judgment. More importantly, the issues raised by Gambar in its motion, adopted by Montauk herein, have already been determined to preclude summary judgment on the part of Montauk in the court order dated June 12, 2013. That determination remains the law of the case. In addition, for the reasons set forth above, with the exception of Montauk's cross claim for contractual indemnification, all of the cross claims asserted by the parties involve issues of fact requiring a trial of this action. Accordingly, Montauk's motion for summary judgment is denied.

Dated: SEP 02 2015

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION