SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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DAVID GREENSTEIN and ANN PRIVAL,

Plaintiffs,

-against-

GLORIA FLANAGAN, CONSOLIDATED EDISON COMPANY OF NEW YORK and C&S HARDWARE, INC.,

Defendants.

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Index Number: 155547/2014

Sequence Number: 001, 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on defendant C&S Hardware Inc.'s motion for summary judgment:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition of Motion - Exhibits 2
Affirmation in Reply - Exhibits 3

Background

Plaintiff David Greenstein allegedly suffered significant personal injuries on April 12, 2014 when he tripped and fell over a defective shunt board that defendant Consolidated Edison Company of New York ("ConEd") installed across a sidewalk on Amsterdam Avenue between 97th and 98th Street, New York, NY 10025, more specifically in the vicinity of 788 Amsterdam Avenue ("the Building"). ConEd installed the shunt board to cover an electrical wire running from a worker hole in the street into the Building's cellar. Plaintiff alleges that his accident occurred when he caught the toe of his shoe under the shunt board, which had come loose and was slightly raised at one corner.

Defendant Gloria Flanagan owned the Building until she died in 2011, after which her husband, Edward, effectively owned and controlled it. The Building is multi-use; it has first floor commercial space and residential tenants on the upper floors. Defendant C&S Hardware, Inc. ("C&S") leased the street-level commercial space and adjoining cellar of the Building. ConEd owned and maintained the allegedly defective shunt board.

In 1982, C&S entered into a commercial lease ("Lease") with Gloria, which required C&S to make non-structural repairs to the sidewalk. The Lease also included a contractual indemnification clause obligating C&S to indemnify Gloria for any expenses arising out of C&S's breach of the Lease for which the owner's insurance would not reimburse.

The Instant Action

Plaintiff commenced this action on or about June 5, 2014 to recover for injuries allegedly sustained during his trip-and-fall accident. Plaintiff's wife, Ann Prival, asserted a derivative claim for loss of consortium. ConEd served an Answer on or about July 7, 2014; Gloria Flanagan served an Answer on or about July 11, 2014; and C&S served an Answer on or about September 9, 2014. Gloria Flanagan asserted two cross-claims against C&S based on the Lease: (1) C&S is liable to plaintiff because C&S is responsible for making sidewalk repairs; and (2) contractual indemnification. The parties apparently engaged in and completed discovery, and plaintiff filed a Note of Issue on October 6, 2015.

C&S now moves, pursuant to CPLR 3212, to dismiss all of plaintiff's causes of action, as well as all cross-claims asserted against it.

The parties' submissions on the motion, including deposition transcripts, establish the following undisputed facts. Edward first became aware of an electrical problem in the Building in December 2013 when residential tenants called the Building's superintendent to indicate there was a power outage. Edward then hired an electrician, ACP Electrical ("ACP"), to come diagnose the problem; ACP determined that it was a ConEd problem and notified ConEd. ConEd's witnesses testified at the deposition that ConEd came to the Building and found that the problem emanated from the street. ConEd then placed a shunt (i.e. an extension cord) spanning the width of the sidewalk in front of the Building, covered it with an orange and black shunt board, and inspected and maintained it.

C&S's Vice President, Paola Castro, inherited the hardware store from her father and currently owns the company. Paola testified that she was aware that ConEd came to the Building in December 2013 to install a shunt and shunt board but was not aware as to why, because the C&S space had power at all times.

Discussion

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to

the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

C&S is entitled to summary judgment because there is no genuine, triable issue of material fact. C&S did not have a duty (1) to maintain the sidewalk or shunt board; or (2) to warn passersby of the shunt board's alleged defect. See Pulk v Edelman, 40 NY2d 781, 782 (1976) ("In the absence of duty, there is no breach and without a breach there is no liability").

As a matter of law and fact, C&S cannot be found liable for plaintiff's alleged trip-and-fall accident because the duty to maintain the sidewalk in a reasonably safe condition is the owner's, not tenant's, nondelegable duty. See Admin. Code § 7-210(b) ("[T]he owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition"); Cook v Consolidated Edison Co. of NY, Inc., 51 AD3d 447, 448 (1st Dept 2008) ("owner was under a statutory nondelegable duty to maintain the sidewalk"); see also Collado v Cruz, 81 AD3d 542, 542 (1st Dept 2011) ("provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff").

The Lease obligates C&S to make sidewalk repairs to cure non-structural defects. The shunt board installed by ConEd is not a non-structural defect to the sidewalk, and, therefore, is not C&S's responsibility to cure. Rather, ConEd installed the shunt board on a temporary basis during repairs to the Building's electrical system, and it is undisputed that the required electrical repairs were structural in nature, and owner's duty to make. See Excel Assoc. v Excelsior 57th Corp., 2011 NY Slip Op 32117(U) (Sup Ct, NY County 2011) ("A persistent understanding in the law is that a structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated") (internal quotations omitted). As C&S did not have a duty to maintain the sidewalk, the issue of whether C&S had constructive notice of the defect is moot. See Vivas v VNO Bruckner Plaza LLC, 113 AD3d 401 (1st Dept 2014) ("As [tenant] had no duty to maintain the sidewalk, there is no need to address the issue of whether it had constructive notice of a dangerous condition"). Moreover, C&S has demonstrated that it did not make special use, or derive a benefit, from the placement of the defective shunt board. C&S was but one of a number of tenants in the Building, and it was the other tenants, not C&S, that had issues with their power; in fact, C&S never lost power to its leased premises as a result of the power outage. The record reflects that ConEd placed the shunt and shunt board, and was responsible for inspecting and maintaining both; if the shunt board was defective, ConEd, not C&S, created the condition.

The Doyley case, discussed in detail by both parties, is distinguishable from the case at hand; the Doyley court found that defendant owner, as part of its duty to maintain the sidewalk, should have requested ConEd to place a shunt board. See Doyley v Steiner, 107 AD3d 517, 519 (1st Dept 2013) ("plaintiff is only alleging that a protective board or other device covering up the

shunts was required, which device defendants could, at the very least, have easily requested [ConEd] to provide"). In the instant action, ConEd placed the shunt board of its own accord, and did not fail to adhere, as the Doyley owner did, to the requirement that a protective board be placed over a shunt. More importantly, C&S is the tenant, not owner, and is not subject to the same duty to maintain.

As C&S did not create the alleged defect in the shunt board, and did not own, control, or maintain it, C&S did not have a duty to warn, and the question of the defect's "open and obvious" nature is moot.

Accordingly, C&S is entitled to summary judgment dismissing plaintiff's complaint.

C&S is also entitled to summary judgment dismissing owner's cross-claims. As discussed above, C&S was not responsible for making repairs to the defective shunt board; therefore, C&S did not breach any Lease provision, and its duty to indemnify was not triggered.

In view of the dismissal of plaintiff's complaint as against C&S, C&S's motion to vacate the Note of Issue (see Motion Seq. 1) is denied, without prejudice, solely as moot.

The Court hereby dismisses all claims plaintiff's wife alleges against C&S because it is well established that a spouse's action for loss of consortium is derivative, not independent, of the injured spouse's claim. See Kaisman v Hernandez, 61 AD3d 565, 566 (1st Dept 2009) ("The failure of [plaintiff's] substantive claims is fatal to his wife's derivative claim for loss of consortium"). Since plaintiff no longer has a cause of action against C&S, his wife no longer has a derivative right to recover for loss of consortium due to plaintiff's alleged injuries.

Conclusion

Motion granted. The clerk is hereby directed to enter judgment dismissing all claims and cross-claims only as against defendant C&S Hardware, Inc.

Dated: April 8, 2016

Arthur F. Engoron, J.S.C.