McClune v 72nd Assoc. LLC
2017 NY Slip Op 30896(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 150392/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55
---X
PAMELA GREENE MCCLUNE,

Plaintiff,

-against-

72ND ASSOCIATES LLC,

Defendant.
---X
72ND ASSOCIATES LLC,

Third-Party Plaintiff,

-against-

CONSOLIDATED EDISON CO. OF NEW YORK,

Third-Party Defendant.
---X
HON. CYNTHIA KERN, J.:

DECISION/ORDER
Index No. 150392/2014

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk abutting a building located at 1243 Third Avenue, New York, New York (the "premises"). Defendant/third-party plaintiff 72nd Associates LLC ("72nd Associates") now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint and any counterclaims against it or, in the alternative, granting it summary judgment on its claim for common law indemnification against third-party defendant Consolidated Edison Co. of New York ("Con Ed"). For the reasons set forth below, 72nd Associates' motion is granted.

The relevant facts are as follows. 72nd Associates is the owner of the premises. On February 13, 2013, plaintiff was walking on Third Avenue between 71st and 72nd Streets when she tripped and fell on the sidewalk abutting the premises (the "accident"). Specifically, during her deposition, plaintiff testified that she stepped into a hole with her right foot, causing her to fall and thereby sustain injuries. Photographs taken of the area after the accident show the existence of a hole or crack in the sidewalk at the location plaintiff claims to have tripped. The hole or crack is partially located on a vault cover containing a metal

grate, which is owned by Con Ed. Plaintiff testified that the hole or crack was approximately ten inches long and four to five inches wide.

The court first considers the portion of 72nd Associates' motion for summary judgment dismissing plaintiff's complaint. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

"To hold an abutting landowner liable to a pedestrian injured by a defect in a public sidewalk, the landowner must have either created the defect, caused it to occur by a special use, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk," such as Administrative Code of the City of New York ("Administrative Code") § 7-210. Administrative Code § 7-210 imposes upon the owner of premises abutting a sidewalk a "nondelegable duty...to maintain and repair the sidewalk." *See Collado v. Cruz*, 81 A.D.3d 542, 542 (1st Dept 2011). However, the owner of premises abutting a sidewalk does not have a nondelegable duty pursuant to Administrative Code § 7-210 to maintain and repair a sidewalk cover or grating or the area extending twelve inches outward from the perimeter of the cover or grating. *See Hurley v. Related Mgt. Co.*, 74 A.D.3d 648, 649 (1st Dept 2010); *Shehata v. City of New York*, 128 A.D.3d 944, 945-46 (2d Dept 2015). Instead, 34 RCNY § 2-07 requires the owner of the cover or grating to maintain and repair the cover or grating and the area extending twelve inches outward from the perimeter of the cover or grating.

In the present case, 72nd Associates has made a *prima facie* showing that it cannot be held liable to plaintiff for the accident as it did not create the alleged defect or cause the alleged defect to occur by a special use of the sidewalk and it did not have a duty pursuant to Administrative Code § 7-210 to maintain and repair the portion of the sidewalk where the alleged defect was located. 72nd Associates has shown that

it did not create the alleged defect or cause the alleged defect to occur by a special use of the sidewalk through its submission of the affidavit and deposition testimony of Jack Mulvey ("Mulvey"), the superintendent for the premises. In his affidavit, Mulvey states that "no employee of 72nd Associates LLC repaired, maintained, controlled or made a special use of the vault cover at any time." Further, Mulvey testified during his deposition that the only work 72nd Associates did to the sidewalk abutting the building before the accident was the replacement of a different portion of the sidewalk. He testified that 72nd Associates otherwise only kept the sidewalk in front of the building clean and free of debris. In addition, 72nd Associates has shown that the alleged defect was located on or within twelve inches of a sidewalk cover owned by Con Ed and thus that it did not have a duty pursuant to Administrative Code § 7-210 to maintain or repair of the portion of the sidewalk where the alleged defect was located. The pictures of the alleged defect submitted by 72nd Associates show that at least half of the hole or crack was located on the relevant sidewalk cover, which both Mulvey and Eric Michelstein, a representative of Con Ed, testified was owned by Con Ed. As plaintiff testified during her deposition that the hole or crack was approximately only ten inches by four to five inches in dimension, 72nd Associates has submitted evidence that the alleged defect was located on or within twelve inches of Con Ed's sidewalk cover.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's argument that there is an issue of fact as to whether 72nd Associates caused the alleged defect through their special use of the sidewalk, namely through scaffolding erected on the sidewalk, is without merit as Mulvey testified during his deposition that the scaffolding in question was erected in 2014, after the accident.

Plaintiff's argument that 72nd Associates must show that it did not have actual or constructive notice of the alleged defect is also without merit. The issue of whether a property owner has actual or constructive notice of a defect is only relevant where the owner has a duty with regard to the area where the defect is located. As set forth above, 72nd Associates has established that it did not have a duty to maintain and repair the portion of the sidewalk where the alleged defect was located as it did not create the alleged defect, make special use of the sidewalk or have a nondelegable duty pursuant to Administrative Code § 7-210 as the alleged defect was located on or within twelve inches of a sidewalk cover owned by Con Ed.

Moreover, the cases cited by plaintiff in support of her argument that 72nd Associates must show that it did not have actual or constructive notice of the alleged defect are inapposite. In the cases cited by plaintiff, the property owners had a duty to maintain and repair the areas of the sidewalks where the defects were located as said defects were not entirely located on or within twelve inches of a sidewalk cover or grating. *See, e.g., Shehata v. City of New York*, 128 A.D.3d 944 (2d Dept 2015) (holding that the owners' "duty to maintain the sidewalk abutting their property...was not displaced" by a utility's duty to repair any defect in the vault cover "since the condition which allegedly caused the injured plaintiff to trip and fall was located more than 12 inches from the perimeter of the vault cover"); *Doley v. Steiner*, 107 A.D.3d 517 (1st Dept 2013) (holding that the owner had a duty to maintain the sidewalk as the case did not involve sidewalk covers or gratings); *Cruz v. New York City Tr. Auth.*, 19 A.D.3d 130 (1st Dept 2005) (holding that at least part of the defect was not located within twelve inches of a sidewalk grate).

Further, plaintiff's argument that because she did not actually trip and fall on a cover or grating, 34 RCNY § 2-07 is inapplicable and 72nd Associates was thus required to maintain and repair the portion of the sidewalk where the alleged defect was located is without merit. The owner of a cover or grating has "exclusive maintenance responsibility over the [cover or] grate and the area extending 12 inches outward from the perimeter" of the cover or grating, not merely over the cover or grating itself. *Lewis v. City of New York*, 89 A.D.3d 410, 411 (1st Dept 2011). *See also Storper v. Kobe Club*, 76 A.D.3d 426, 427 (1st Dept 2010) (granting the property owners' motion for summary judgment dismissing the plaintiff's complaint on the ground that the alleged defect, "a raised and broken portion of the public sidewalk surrounding a vault cover owned by the MTA," was within the "12-inch zone that the MTA was required to repair pursuant to 34 RCNY 2-07"). Therefore, as plaintiff has failed to raise a triable issue of fact, the portion of 72nd Associates' motion for summary judgment dismissing plaintiff's complaint is granted.

The portion of 72nd Associates' motion for summary judgment dismissing Con Ed's counterclaims for common law indemnification and contribution against it is also granted. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the

own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999). Further, under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, 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. In the present case, Con Ed's counterclaim for common law indemnification and contribution must be dismissed as 72nd Associates has established as a matter of law that it is not guilty of any negligence contributing to the causation of the accident and is not otherwise subject to any liability with regard to the accident.

Accordingly, 72nd Associates' motion for summary judgment dismissing plaintiff's complaint and any counterclaims against it is granted. Thus, the court need not consider 72nd Associates' request in the alternative for summary judgment on its claim for common law indemnification against Con Ed. This constitutes the decision and order of the court.

DATE : 5/2/17

CK
KERN, CYNTHIA S., JSC
HON. CYNTHIA S. KERN
J.S.C.