Disilvestro v Natural Paradise, Inc
2018 NY Slip Op 30447(U)
March 5, 2018
Supreme Court, New York County
Docket Number: 158830/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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FRANK DISILVESTRO,

Plaintiff,

-against-

THE NATURAL PARADISE, INC D/B/A/ THE HEALTH NUTS and ESPLANADE 99 LLC,

Defendants.

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DECISION AND ORDER
Index No. 158830/2016
Mot. Seq. No. 003

KATHRYN FREED, J.S.C. :

In this personal injury action commenced by plaintiff Frank DiSilvestro, defendant The Natural Paradise, Inc. d/b/a The Health Nuts (Health Nuts) moves for summary judgment dismissing the complaint and all cross claims against it, and granting it summary judgment against defendant Esplanade 99 LLC (Esplanade) on its claims for common-law and contractual indemnification and breach of contract. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff alleges that, on July 20, 2016, he was walking on the sidewalk in front of the Health Nuts store located at 2611 Broadway, New York, New York, when he tripped over an uneven concrete sidewalk flag near a tree well. He claims that the condition was caused by the negligence of the defendants. Esplanade owned the premises and Health Nuts was its tenant.

During discovery, plaintiff served a bill of particulars alleging, inter alia, that Health Nuts was negligent in the ownership, operation, maintenance and control of the subject sidewalk, and violated section 7-210 of the New York City Administrative Code (Administrative Code), which

imposes a nondelegable duty for sidewalk maintenance and repair on an abutting landowner. Plaintiff's counsel has filed a note of issue and certificate of readiness regarding this action.

Plaintiff testified at his deposition that he tripped in an area with an uneven sidewalk, that there was no construction work being performed in the area at the time of the accident, and that he had previously walked on the subject portion of the sidewalk but did not observe that it was uneven. He further testified that the landlord of the building abutting the subject sidewalk (Esplanade) had patched the condition, but did not do it properly. He did not know when the subject patchwork was done or who had done it. After being shown photographs of the accident location, which were marked as exhibits, plaintiff identified the area where he tripped. Health Nuts asserts that plaintiff never advised any of its employees that he had fallen and that he did not complete an accident report.

At his deposition, Rafiul Shagor, Health Nuts' manager, testified regarding his duties, which included ordering merchandise and managing store employees. According to Shagor, the store occupied the first floor and a portion of the basement of the subject building. Inspecting the sidewalk in front of the store was not one of his duties, but he would examine the area on occasion. Upon viewing photographs of the accident site, Shagor admitted that the uneven portion of the sidewalk, which he referred to as broken patchwork, was present on the day of the accident. He denied that any person from Health Nuts performed the patchwork but recalled seeing Carlos Mena, Esplanade's superintendent, working on it sometime in 2015. Shagor believed that the roots of a tree caused the sidewalk to be raised in the area in question.

At his deposition, Mena identified himself as the superintendent of Hotel 99, which was located above Health Nuts and which, he said, was the same company as Esplanade. His duties included maintenance and the handling of emergencies. He regarded Health Nuts as a commercial

tenant of Esplanade. Mena admitted that he was in charge of maintaining the sidewalk abutting the building, although *he also stated that Health Nuts was responsible for maintaining the sidewalk on the Broadway side of the store* (the premises also abutted West 99th Street). After reviewing photographs of the accident site, Mena identified the patching work which he did in front of the store, with the assistance of two co-workers, after being ordered to do so by his manager. Although the photographs reflected that the patchwork was missing a piece, he did not know how the piece came to be missing. Mena recalled that, before the sidewalk was patched, it was raised about "an inch and a half," which he believed was caused by the roots of a nearby tree.

Health Nuts submits an unsigned affidavit by Shagor, in which he attests that Health Nuts did not cause or contribute to the defective condition of the sidewalk where plaintiff allegedly fell. It also submits a copy of a Notice to Admit served on Esplanade's counsel on May 24, 2017. Health Nuts contends that Esplanade's counsel failed to respond to the notice within 20 days, thereby deeming the matters therein admitted pursuant to CPLR 3123. Health Nuts sought admissions from Esplanade that: Esplanade purchased the building located at 244 West 99th Street, New York, NY a/k/a 2611 Broadway, New York, NY in 2007; that the terms of lease attached to the Notice to Admit were in effect on July 20, 2014[1]; and that, pursuant to paragraph "h" of the Rider to said lease, the landlord was to maintain the sidewalks and keep the same in a good state of repair.

Although the lease names 244 West 99th Street, Inc. as owner and Consolidated Natural Food Enterprises of NY, Inc. as tenant, Health Nuts contends, without submitting any proof, that defendants in this action are the successors-in-interest to the parties named in the lease.

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[1]This appears to be an error in the Notice to Admit, since the alleged accident occurred on July 20, 2016.

Based on this evidence, Health Nuts claims that Esplanade had the duty to maintain the subject sidewalk in a safe condition. According to Health Nuts, Esplanade's duty is derived from the Rider to the lease, as well as from section 7-210 of the New York City Administrative Code, which imposes a nondelegable duty on a landlord to maintain sidewalks abutting its premises. Health Nuts also claims that there is no proof that it created and caused a defective or dangerous condition on the subject sidewalk. Further, Health Nuts argues that, given the absence of any duty or misconduct on its part, it is entitled to summary judgment dismissing the complaint and all cross claims against it.

Health Nuts maintains that Esplanade was required by the lease to maintain a policy of general insurance naming it (Health Nuts) as an additional insured with regard to claims arising out of Esplanade's acts, omissions, management and control of the subject premises, inclusive of sidewalks. Health Nuts also claims that Esplanade, as the landlord, was to defend, indemnify and hold harmless Health Nuts from any claim, liability, loss, cost or expense, including attorneys' fees, on account or arising out of Esplanade's failure to perform its obligations under the lease, *provided Health Nuts was free from any liability*. Health Nuts argues that Esplanade failed to include it as an additional insured on the policy, which constitutes a breach of contract. Health Nuts also argues that Esplanade failed to perform its contractual obligation to keep the sidewalk abutting the premises in good condition.

Health Nuts now moves for summary judgment dismissing the complaint and all cross claims brought against it on the ground that it had no duty to maintain the sidewalk area where the accident occurred, and that it did not cause or create the defective condition in the sidewalk area. It asserts, inter alia, that Esplanade conceded that it was responsible for maintaining the sidewalk in question.

Health Nuts also seeks summary judgment on its indemnification and breach of contract claims against Esplanade, including attorneys' fees. In support of its motion, Health Nuts submits, inter alia, an attorney affirmation; the lease pursuant to which it allegedly occupied the premises; the deposition testimony of plaintiff, Shagor, and Mena; the notice to admit it served on Esplanade, and an unsigned affidavit written by Shagor.

Plaintiff and Esplanade oppose the motion. Plaintiff asserts that Health Nuts failed to fulfill its burden of establishing as a matter of law that it owed him no duty of due care, and that an issue of fact exists regarding whether Health Nuts had a duty to maintain the sidewalk.

In opposing the motion, plaintiff relies, inter alia, on Mena's deposition testimony, specifically, his discussion of the photographs of the accident site. Mena recognized one photograph as depicting the Broadway sidewalk, adjacent to the Health Nuts store, as well as the concrete sidewalk repair patch that he installed towards the end of 2015. Plaintiff maintains that the photographs did not show what the sidewalk looked like after Mena made the repair, since a portion of the patch he installed was missing. Mena also testified that *Health Nuts was responsible for maintaining the sidewalk on the Broadway side of the property*, where the alleged accident occurred. While Mena admitted that he performed inspections of the sidewalk adjacent to the building on West 99th Street, he maintained that he did not inspect the sidewalk on the Broadway side of the building.

Shagor admitted that he did not know whether Health Nuts had a lease for its store. While Shagor stated that his duties did not include inspecting the sidewalk in front of the store, he admitted that Health Nuts employees swept the sidewalk and were responsible for snow and ice removal from the sidewalk in front of the store.

Plaintiff maintains that Shagor's affidavit cannot be considered in connection with this

motion because it is not signed. He further contends that Health Nuts has otherwise failed to prove that it did not cause or create the alleged sidewalk defect. Specifically, plaintiff maintains that Shagor did not testify that Health Nuts had not broken or removed a portion of the sidewalk patch Mena installed.

Alternatively, plaintiff argues that a question of fact exists as to whether Health Nuts had a duty to maintain that portion of the subject sidewalk. Plaintiff claims that the lease annexed to the Notice to Admit is incomplete, with the signature lines, as well as several paragraphs, omitted. Thus, plaintiff contends that there is no conclusive proof that Health Nuts has no duty of due care in this case, particularly, when considering Shagor's testimony that his employees were responsible for ice and snow removal from the sidewalk in front of the store.

Esplanade adopts and incorporates by reference the arguments set forth in plaintiff's opposition papers. Esplanade further argues that the lease annexed to the Notice to Admit is inadmissible and, on its face, is between two unrelated parties. Esplanade contends that Health Nuts made an improper use of the Notice to Admit by attempting to resolve the critical legal issue of Esplanade's duty of care. Esplanade further maintains that there is an issue of fact regarding whether Health Nuts' lease term expired prior to the alleged accident. Since the lease is inadmissible, argues Esplanade, Health Nuts failed to establish that Esplanade breached the agreement or owed defense or indemnity to Health Nuts pursuant to the same.

Further, asserts Esplanade, there is an issue of fact regarding the precise location of the alleged accident. Specifically, Esplanade argues that plaintiff's deposition testimony regarding the location of his alleged fall conflicts with statements which he made to medical providers who recorded this conflicting information in their records.

Esplanade also argues that there remains an issue of fact regarding Health Nuts' duty to maintain the sidewalk, since its manager, Shagor, admitted that Health Nuts employees were involved in ice and snow removal. Additionally, Esplanade asserts that, since it is unknown how the broken patch on the sidewalk was created, Health Nuts has not conclusively proven itself free of liability.

Health Nuts has not submitted any reply papers.

LEGAL CONCLUSIONS:

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o] nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]" (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law" (*Flores v City of New York,* 29 AD3d 356, 358 [1st Dept 2006]). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." (*Id.)*

"The elements of a cause of action in negligence are '(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof'" (*Rodriguez v Budget Rent-A-Car Sys., Inc.,* 44 AD3d 216, 221 [1st Dept 2007], quoting

Akins v Glen Falls City School Dist., 53 NY2d 325, 333[1981]). "The threshold question in any negligence action is whether the alleged tortfeasor owes a duty of care to the injured party, and the existence and scope of that duty is a legal question for the courts to determine [internal citations omitted]" (*Sheila C. v Povich*, 11 AD3d 120, 125 [1st Dept 2004]).

Plaintiff and Esplanade argue that there is an issue of fact regarding whether Health Nuts had a duty to maintain the sidewalk in front of its store. Esplanade relies on *Flores v Baroudos*, 27 AD3d 517 (2d Dept 2006), in which the Appellate Division stated that liability can be imposed on a defendant that either (1) created the defective condition; (2) voluntarily but negligently made repairs; (3) created the defect through special use; or (4) violated a statute or ordinance which expressly imposes liability on the abutting landowner for failure to repair.

Health Nuts argues that Esplanade, pursuant to a Rider to the lease, assumed a duty to maintain and repair the subject sidewalk. Esplanade disputes this, arguing that the Notice to Admit was improperly used, and that the annexed lease was factually incomplete and that there is no proof that the agreement was between Esplanade and Health Nuts. Esplanade contends that a Notice to Admit cannot be used to make ultimate conclusions on substantial issues, such as a duty of care.

CPLR 3123 (a) permits a party to serve upon another party a written request that it admit, among other things, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry."

The courts have emphasized that:

> "[t] he purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper."

DeSilva v Rosenberg, 236 AD2d 508, 508 (2d Dept 1997); *see also Tolchin v Glaser*, 47 AD3d 922, 922-923 (2d Dept 2008).

This Court agrees with Esplanade that Health Nuts improperly used its notice to admit to seek admissions of matters at the heart of plaintiff's claim. The crucial issue of whether Esplanade assumed a contractual duty to maintain the sidewalk goes to the very heart of this matter.

Health Nuts correctly asserts that an owner of real property in the City of New York is required by section 7-210 of the Administrative Code to maintain abutting sidewalks, a duty which is nondelegable and independent of any contractual duty. Here, Esplanade is the owner of a building in which Health Nuts is a commercial tenant. Although Mena admitted at his deposition that Esplanade owned the premises, *he further stated that Health Nuts was responsible for maintaining the sidewalk on the Broadway side of the store, where the accident occurred.* Thus, although section 7-210 does not impose a nondelegable duty on Health Nuts to maintain the sidewalk, Health Nuts could be liable if its negligence caused or contributed to the accident.

In support of its argument that it did not cause or create a defective condition on the sidewalk, Health Nuts relies primarily on the unsigned affidavit of Shagor, which is inadmissible, as well as Shagor's deposition testimony that neither he nor his employees maintained the sidewalk. Although this testimony establishes Health Nuts' prima facie entitlement to summary judgment, Mena's testimony that Health Nuts was responsible for maintaining the sidewalk on Broadway adjacent to the store raises an issue of fact precluding the granting of summary judgment to Health Nuts

dismissing the claims by plaintiff against it.[2]

That branch of Health Nuts' motion seeking summary judgment on its claims against Esplanade for breach of contract and contractual and common-law indemnification, and dismissing the claims asserted against it by Esplanade, is also denied. As noted previously, the lease submitted in support of the motion was entered into by 244 West 99th Street, Inc., as owner, and Consolidated Natural Food Enterprises of NY, Inc., as tenant. Health Nuts has submitted no proof that it and Esplanade were successors-in-interest to the lease. Nor is the lease authenticated.

Even assuming that the lease was in admissible form and was proven to be between Esplanade and Health Nuts, the agreement required the owner to defend, indemnify and hold harmless the tenant for any failure by owner to perform its obligations under the lease (which obligations included maintaining the sidewalks abutting the premises). However, since Mena testified that Health Nuts maintained the sidewalk on the Broadway side of the store, it is by no means clear whether the alleged incident arose in whole or in part from the acts of the tenant, Health Nuts.

Finally, Health Nuts has not submitted any proof that Esplanade breached the lease by failing to name Health Nuts as an additional insured on its (Esplanade's) general liability policy.

Therefore, in light of the foregoing, it is hereby:

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[2]This Court notes that there appear to be credibility issues regarding Mena's testimony given his testimony that Health Nuts was responsible for maintaining the sidewalk on the Broadway side of the store despite also testifying that he patched the sidewalk on that side of the store. However, it is not the function of this Court to determine matters of credibility on a motion for summary judgment. *See Ferrante v American Lung Assn.*, 90 NY2d 623, 631 (1997); *Ocean v Hossain*, 127 AD3d 402, 403 (1st Dept 2015).

ORDERED that the motion for summary judgment by defendant The Natural Paradise, Inc. d/b/a The Health Nuts' is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: March 5, 2018

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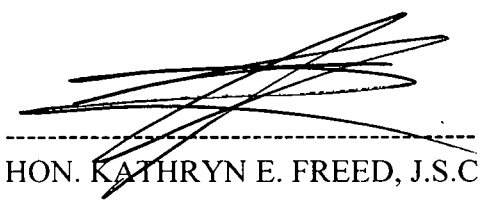

HON. KATHRYN E. FREED, J.S.C.