Davila v Masaryk Towers Corp
2018 NY Slip Op 31775(U)
July 24, 2018
Supreme Court, New York County
Docket Number: 156246/2014
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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JAMIE DAVILA,

Plaintiff,

- v -

MASARYK TOWERS CORP, *et al.*,

Defendants.

INDEX NO. 156246/2014

MOTION DATE

MOTION SEQ. NO. 3, 4, 5, 6

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 194, 195

were read on this application for summary judgment.

By notice of motion, defendant Central Construction Management LLC moves pursuant to CPLR 3212 for an order granting dismissal of all claims, cross claims, and counterclaims asserted against it, and granting judgment on its third-party claim against Tri-State Paving, LLC and on its cross claims against Tri-State Paving & Masonry Corp. (Mot. seq. three). Plaintiff opposes.

By notice of motion, third-party defendant Tri-State Paving LLC moves for an order dismissing all claims asserted against it in the third-party complaint. (Mot. seq. four). Plaintiff and Central oppose.

By notice of motion, defendant New York City Housing Authority (NYCHA) moves for an order dismissing plaintiff's claims and all cross claims against it (Mot. seq. five). Plaintiff opposes.

By notice of motion, defendants Masaryk Towers Corp. and Metro Management and Development (collectively, Masaryk) move for an order dismissing plaintiff's claims and all cross and counter claims against it (mot. seq. six). Plaintiff opposes, and Central partially opposes.

The motions are consolidated for disposition..

I. PERTINENT FACTS AND BACKGROUND

A. Plaintiff's accident

Plaintiff alleges that on June 27, 2013, at approximately 2 a.m., she was injured while walking upon the premises, parking lot, and/or walkway of a public housing complex owned by NYCHA, adjacent to a construction site and dumpster apparatus located on Delancey Street near its intersection of Willett Street in Manhattan. (NYSCEF 1). As the abutting walkway owned by Masaryk Towers was closed by the installation of temporary fencing around the construction site, she walked down NYCHA's walkway leading through the parking lot behind NYCHA's property. After walking approximately 20 steps on the path, she tripped over a cinder block, which she had not seen as she was not looking at the ground, and had not seen when she crossed the walkway a week before her accident. (NYSCEF 82).

B. Procedural background

In plaintiff's original complaint, filed on or around June 26, 2014, she asserted claims against Masaryk Towers and NYCHA. (NYSCEF 1). On or about February 4, 2015, plaintiff amended the complaint to add Central as a defendant. (NYSCEF 7).

NYCHA answered and asserted a cross claim against Masaryk for common law indemnification, and against Central for contractual defense and indemnity. (NYSCEF 18). In its answer, Masaryk Towers asserted cross claims against NYCHA and Central for common law indemnification and contribution, and for contractual indemnification and failure to procure insurance against Central. (NYSCEF 74).

On or about April 7, 2016, Central commenced a third-party action against Tri-State Paving, advancing claims for common law and contractual indemnity, contribution, and failure to procure insurance. (NYSCEF 76).

In June 2016, plaintiff commenced a second action for the same accident against Tri-State Paving & Masonry and Metro. (NYSCEF 77). By decision and order dated December 21, 2016, I granted Masaryk's motion to consolidate the two actions under the instant index number. (NYSCEF 78).

In February 2017, Central interposed cross claims for contribution, indemnity, and failure to procure insurance against Tri-State Paving & Masonry and Metro. (NYSCEF 79).

II. CENTRAL'S MOTION

Central submits evidence that the block on which plaintiff tripped neither belonged to it, nor was it in its possession or control, and that therefore it did not cause or create the dangerous condition. It also establishes that it had no notice of the block before plaintiff's fall. Central thus demonstrates, *prima facie*, that it cannot be held liable to plaintiff. Moreover, the block was located on NYCHA's walkway, not Masaryk's, and Central had no duty related to NYCHA's walkway. (*See Pantaleo v Bellerose Senior Hous. Dev. Fund. Co., Inc.*, 147 AD3d 777 [2d Dept 2017] [contractor established that it did not own, occupy, control or make special use of walkway where plaintiff fell and did not create condition that caused fall]). That Central may

have had notice of people walking through the fencing and its construction site does not impart it with notice of the block's presence.

Plaintiff fails to raise a triable issue through the testimony of NYCHA's employee that there was often debris on the walkway during Central's construction, absent any indication that the "debris" includes cinder blocks like the one at issue. In any event, the employee did not testify that the debris was produced by or resulted from Central's work, and he denied having seen cinder blocks on the walkway. It would thus be impermissibly speculative to find that the cinder block belonged to Central or was on the walkway due to any action or inaction by Central. (*See e.g., Nepumuceno v City of New York*, 137 AD3d 646 [1st Dept 2016] [no evidence defendant caused or created condition; while plaintiff fell on piece of fruit that allegedly fell from fruit stand operating near defendant's entrance, she did not know how fruit came to be on sidewalk]; *Kiskiel v Stone Edge Mgt., Inc.*, 129 AD3d 672 [2d Dept 2015] [no evidence other than speculation that defendant caused puddle of wet paint in parking lot as condition "could have been caused by anyone with access to" lot]; *Brilliant v Citibank, N.A.*, 275 AD2d 632 [1st Dept 2000] [no evidence that dangerous condition of rope on floor of bank on which plaintiff tripped was caused by defendant or that it had constructive or actual notice of it, and thus defendant not liable as "(r)esponsibility for a hazardous condition in this situation must flow from some act or failure to act by defendant, particularly in an area, such as a bank lobby, not under the exclusive control of defendant's employees but, rather, open to the public at large"]).

Given this result, there is no need to consider Central's third-party claims against Tri-State Paving for contractual and common law indemnity. Central also appears to have abandoned its third-party claim for failure to procure insurance.

III. TRI-STATE PAVING'S MOTION

There is also no evidence linking the cinder block to Tri-State Paving's presence or work on the project, and thus no basis for finding it liable in indemnity to Central.

IV. NYCHA'S MOTION

While the construction site was on Masaryk's property, not NYCHA's, and it had no control over the construction, it is also undisputed that plaintiff fell on NYCHA's walkway. However, NYCHA submits proof that it had no connection to the cinder block as it had no contract with Central or with any other entity to perform the construction at issue, nor did it have any role or duty related to the construction, and thus did not create a dangerous condition by failing to ensure that the block was not in the walkway. There is also no merit to plaintiff's claim that NYCHA created the dangerous condition by failing to close the walkway while the construction was ongoing, as such a failure did not proximately cause plaintiff's accident but rather, and at most, furnished the occasion for it. (*See Escalet ex rel. Quinonez v New York City Hous. Auth.*, 56 AD3d 257 [1st Dept 2008] [presence of hole in fence through which plaintiff crawled and thereafter fell from different section of fence furnished occasion for accident, not its cause]; *Boltax v Joy Day Camp*, 113 AD2d 859 [2d Dept 1985], *affd on other grounds* 67 NY2d 617 [1986] [hole in fence which permitted plaintiff to enter premises and later injure himself by diving into pool was not cause of accident, even where defendant knew that people had been entering pool at night without permission and that they gained access through fence]; *see also Akinola v Palmer*, 98 AD3d 928 [2d Dept 2012] [presence of construction fence on sidewalk which blocked pedestrian traffic was not cause of plaintiff being struck by vehicle while crossing toward fence]; *Warchol v City of New York*, 58 Misc 3d 1211[A], 2018 NY Slip Op 50049[U] [Sup Ct, Queens County 2018] [presence of bent bars on fence which injured plaintiff was not

cause of accident, but rather his decision to attempt to exit grounds by squeezing through fence rather than using other exits]).

NYCHA also offers proof that it received no prior complaints regarding the block. Testimony that its employees were generally aware of a problem with construction debris emanating from the construction site onto the walkway is insufficient to establish that it had or should have had knowledge of this particular cinder block. (*See e.g. Farrell v State of New York*, 88 AD3d 638 [2d Dept 2011] [constructive notice of defective condition not established through general awareness of existence of debris]). For the same reason, there is no basis for plaintiff's claim that the presence of the cinder block on the walkway was recurring.

There is also no evidence as to how long the cinder block had been present on the walkway before plaintiff's accident. Plaintiff testified that she had not seen it there that night before her fall or a week beforehand, and all of the defendants' witnesses testified that they had never seen the block, before or immediately after the accident. (*See generally, Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986] [to constitute constructive notice, defect must be visible and apparent and must exist for sufficient length of time before accident to allow defendant to discovery and remedy it]; *see also Rivera v 2160 Realty Co., LLC*, 4 NY3d 837 [2005] [no triable issue raised as to constructive notice absent evidence that owner had notice of debris on steps before accident or that debris had been there long enough for owner to discover and fix problem]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [1st Dept 2008], *affd* 11 NY3d 889 [premises owner not liable for caused by piece of carpet outside outdoor garbage site as evidence did not show constructive notice, but rather that item could have been deposited in area only minutes or seconds before accident and any other conclusion would be fatally speculative]).

In light of this testimony, NYCHA was not required to submit evidence as to when it last inspected the walkway. (*Id.* at 837-8 [no proof as to constructive notice needed absent evidence that anyone, including plaintiff, saw debris before accident]). In any event, NYCHA submits a report from June 2013 detailing its inspection of premises, including the walkway and parking lot.

NYCHA thus demonstrates, *prima facie*, that it neither created the dangerous condition, nor had actual or constructive notice of it, and thus may not be held liable here, and plaintiff fails to raise a triable issue precluding summary dismissal.

V. MASARYK'S MOTION

As the walkway on which plaintiff fell was owned by NYCHA and Masaryk had no duty to maintain it, and absent evidence that it created a dangerous condition or had actual or constructive notice of it, Masaryk may not be held liable to plaintiff.

As there is no evidence connecting Central's work for Masaryk to plaintiff's accident (*see supra.*, II.), there is no basis for granting judgment in Masaryk's favor against Central for contractual indemnification.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant Central Construction Management LLC (sequence three) for an order granting dismissal of all claims and cross-claims and counterclaims asserted against it is granted, and the complaint is severed and dismissed as against said defendant; its motion for an order granting judgment on its third-party claim against Tri-State Paving, LLC and on its cross claims against Tri-State Paving & Masonry Corp. is denied; it is further

ORDERED, that the motion of third-party defendant Tri-State Paving (sequence four) for an order dismissing the third-party complaint is granted, and the third-party complaint is dismissed in its entirety; it is further

ORDERED, that the motion of defendant New York City Housing Authority (sequence five) for an order dismissing plaintiff's claims and all cross claims against it is granted, the complaint is severed and dismissed as against said defendant; it is further

ORDERED, that the motion of defendants Masaryk Towers Corp. and Metro Management and Development (sequence six) for an order dismissing plaintiff's claims and all cross and counter claims against them is granted, and the complaint is severed and dismissed as against said defendants; their motion for an order granting them judgment on their cross-claim for contractual indemnification against defendant Central is denied; and it is further

ORDERED, that there being no defendants remaining, the action is dismissed.

7/24/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[X]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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