Sonera v 147-16 Hillside Ave. Corp.
2018 NY Slip Op 33400(U)
November 7, 2018
Supreme Court, Queens County
Docket Number: 711718/2015
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

YVONNE SONERA,

Plaintiff,

-against-

147-16 HILLSIDE AVENUE CORP., PUNTO ROJO BAKERY, COFFEE & RESTAURANT II, CORP., PUNTO ROJO BAKERY, COFFEE & RESTAURANT CORP., and PUNTO ROJO INC.,

Defendants.

147-16 HILLSIDE AVENUE CORP.,

Third-Party Plaintiff,

-against-

EDIEN HINCAPIE and EVERETH HINCAPIE,

Third-Party Defendants.

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Index No. 711718/2015

Motion
Date: September 26, 2018

Motion Cal. No.: 60

Motion Sequence No: 4

The following efile papers numbered 54-68, 95-96, 99 submitted and considered on this motion by defendant/third-party plaintiff 147-16 Hillside Avenue Corp. dismissing plaintiff's verified complaint and granting summary judgment on its contractual indemnification claim against third-party defendants Edien Hincapie and Evereth Hincapie.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 54-68
Affirmation in Partial Opposition-Affidavits -Exhibits.....	EF 95-96
Reply Affirmation-Affidavits-Exhibits.....:.....	EF 99

Plaintiff Yvonne Sonera (hereinafter "Sonera") commenced this litigation to recover damages which she alleged that she sustained when she tripped over a sidewalk sign on November 14, 2013 on a public sidewalk which abutted a premises located at 147-16 Hillside Avenue, County of Queens, State of New York. The premises are leased by a restaurant, defendants Punto Rojo Bakery, Coffee & Restaurant II, Corp., Punto Rojo Bakery, Coffee & Restaurant Corp., and Punto Rojo Inc. (hereinafter "Punto Rojo"). Defendant/third-party plaintiff, movant herein 147-16 Hillside Avenue Corp. (hereinafter "Hillside") is the owner of the building. Hillside has initiated a third-party action against third-party defendants Edien Hincapie and Evereth Hincapie, who are the owners of Punto Rojo, seeking contribution and indemnification.

On May 10, 2017, Sonera served an amended bill of particulars alleging, *inter alia*, that Hillside was negligent in failing to provide adequate lighting so as to assure reasonable visual acuity for those who were lawfully upon the sidewalk at, near, in front of and/or abutting the premises, and in negligently providing sufficient lighting.

Hillside moves for summary judgment, to dismiss plaintiff's verified complaint and granting summary judgment on its contractual indemnification claim against third-party defendants Edien Hincapie and Evereth Hincapie. Included in the documentary evidence submitted herein was a written lease agreement and its rider, and, the deposition transcripts of Sonera, Hillside and the Hincapies. Hillside maintained it entered into a written lease agreement with the Hincapies on August 1, 2012, leasing the entire building, the commercial space on the first floor, second floor residential apartments and the basement. The lease provided that Punto Rojo was responsible for the lighting at the building, the sidewalk in front of the buildings, as well as any signs. The lease provided for contractual indemnification of defendant/third-party plaintiff for any claims such as the one made by plaintiff herein.

Paragraph 4 of the lease states the following:

> "A. Tenant shall maintain and repair the public portions of the Demised Premises, both exterior and interior...Tenant...shall take good care of the demised Premises, the fixtures and appurtenances therein...and the store front and entrance doors thereto and, at the Tenant's sole cost and expense shall clean the sidewalks and curbs in front of the entire building and make all structural and non-structural repairs thereto and to the Demised Premises as and when needed to preserve same in good working order and condition...
> C. Notwithstanding anything contrary herein, the Tenant shall be responsible for promptly making all repairs, if any, to the electrical, heating and cooling, plumbing and sewer lines coming into and going out of the Demised Premises at its sole cost and expense."

Paragraph 43 of the Rider to the lease, entitled Repairs: Floor Load, provides in pertinent part the following:

> A. Tenant shall maintain and repair the public portions of the Demised Premises, both exterior and interior...Tenant... shall take good care of the demised premises, the fixtures and appurtenances therein... and the store front and entrance doors thereto and, at the Tenant's sole cost and expense, shall clean the sidewalks and curbs in front of the entire building and make all structural and non-structural repairs thereto and to the Demised Premises as and when needed to preserve same in good working Order and condition."
> ...
> "C. Notwithstanding anything to the contrary herein, the Tenant shall be responsible for promptly making all repairs, if any, to the electrical, heating and cooling, plumbing and sewer lines coming into and going out of the Demised Premises at its sole cost and expense."

Paragraph 45 of the Rider to the lease, entitled Indemnity, provides in relevant part the following:

> "Tenant shall not do or permit any act of thing to be done upon the Demised Premises which may subject Landlord to any liability or responsibility for injury, damage to persons or property, or to any liability by reason of any violation of law or any legal requirement of any public authority or otherwise, but shall exercise such control over the Demised Premises as to fully protect Landlord against any such liability. Tenant agrees to indemnify and save harmless Landlord from and against any and all claims of whatever nature against Landlord arising from (a) any act, omission or negligence of Tenant... (b) any accident, injury or damage whatsoever caused to any person... and occurring during the term of this Lease in or around the demised premises; and (c) any breach violation of or non-performance of any term, covenant, condition or agreement in this Lease set forth on the part of the Tenant to be fulfilled, kept, observed, or performed. This indemnity and hold harmless agreement shall include indemnity from and against any and all liability, loss, cost, damage and expense of any kind or nature incurred in connection with any such claim or proceeding brought thereon and the defense thereof including, without limitation, reasonable attorneys' fees and disbursements. Landlord, from time to time may submit copies of Landlord's legal bills in connection with the foregoing, and Tenant, upon receipt of such bills, shall promptly pay to Landlord the amount shown thereon as Additional Rent.

> This indemnity and hold harmless agreement shall survive the expiration or earlier termination of this Lease."

Paragraph 48 of the Rider to the lease, entitled Services, provides in pertinent part:

> "B. Tenant, at tenant's sole cost and expense, shall: (i) keep the Demised Premises in good order, including but not limited to the heating system in the basement, the roof, the exterior and interior of the Demised Premises, it being the intention of the parties that this is a triple net Lease as provided for in Article 74 hereof; (ii) caused the Demised Premises and the store front, the entrance door or doors and all glass surfaces (interior and exterior) and any entrance areas (including service entrances) to be regular intervals (but not less frequently than weekly); (iii) keep the full width of the sidewalk and curb directly in front of the entire building clean... The tenant shall also be responsible for removal of snow and ice from the sidewalk in front of the Demised Premises to the street."

Paragraph 58 of the Rider to the lease, entitled Tenant's Signs , provides, in pertinent part:

> "Tenant agrees to maintain its signs, awnings, exterior decorations, projections, curtains, blinds, shades, screens, advertisements, notices and lettering in good condition and repair at all times."

Paragraph 74 of the Rider of the lease entitled Net Lease; Non-Terminability provide, in pertinent part:

> "Tenant acknowledges that this Lease shall be interpreted and construed to be deemed what is commonly known as a triple net lease which the Tenant pays for all operating expenses of the building, regardless of whether they are ordinary of extraordinary, including but not limited to the costs of structural repairs (i.e.,) roof and exterior walls) and the costs of removing any existing violations or new violations which may be placed upon the Demised Premises by any municipal agency or department having jurisdiction thereof, without set-off, abatement, suspension, deduction, defense or counterclaim..."

Deposition testimony of Plaintiff Yvonne Sonera

Sonera gave sworn testimony in this matter on May 1, 2017. Sonera stated that she was involved in the accident around 7:00 P.M. on November 14, 2013. At the time of the accident she was residing at Interline, a sober home, located across the street from the subject premises, and had been living there for about eight months. Her accident occurred outside of a restaurant, Punto Rojo, which was located across the street from where she was residing at the time. She had dined at the restaurant on other occasions prior to the evening of her accident. She would go to the restaurant every other week for breakfast. On the date of the occurrence, she was having dinner with her friend having arrived at the restaurant at about 6:00 P.M. She did not have alcoholic drinks that evening. She testified that at the time of the accident, the sun had set. On the way into the restaurant she saw an A-frame sign on the sidewalk which displayed the restaurant's menu. It was located toward the right of the door of the entrance. It was close to the door and displayed outward so it could be read by pedestrians walking along Hillside Avenue. Neither she nor her friend tripped on the sign when they entered the premises. Sonera was in the restaurant for about an hour and a half. Sonera did not have any difficulty walking in the area near the sidewalk sign upon entering the restaurant, however, when she left the restaurant she tripped and fell. Her left foot came into contact with the bottom of the sign. When she attempted to stand back up, she could not because her ankle had snapped. She did not see anyone move the sign while she was in the restaurant. When she walked out the restaurant she saw the sign, but she still tripped over it. Her friend, on the other hand, did not trip over the sign upon exiting the restaurant. She related that anytime she walked along Hillside Avenue she always remembered the A-frame sign being in front of the restaurant, because "...it just grabs your attention." Sonera identified various photographs of the location at her deposition, which were annexed to the motion. She testified that she did not complain about the sign or the lighting condition outside the restaurant before the day of her accident and had never tripped on the sidewlk in front of the restaurant before the day of her accident. She had never tripped on the sidewalk in front of the location before the date of her accident, and was not aware of anyone else tripping on the sidewalk prior to her accident.

Deposition Testimony of Edien Hincapie

Punto Rojo gave sworn testimony by its President, Edien Hincapie on May 4, 2017. He stated that he is the President and his brother Evereth Hincapie is the Vice President of Punto Rojo Bakery, Coffee and Restaurant Corp. They are named as third-party defendants herein. Along with a friend Jose Garcia, they own two Punto Rojo restaurants: the one at issue herein, and another in Hicksville, New York. He worked at the Jamaica, New York location and was working on the date of plaintiff's accident; he was the nighttime manager of the premises. About 13 to 15 other employees were also present at the restaurant at the time of the accident. The premises is leased by Punto Rojo. He signed a written lease. He is Spanish-speaking and does not read much English. The lease agreement was not translated to him in Spanish. He identified photographs of the premises and the A-frame sign located outside of the premises. He stated that the sign is used to light up the specials at the restaurant everyday. They sign was used until plaintiff filed this lawsuit. No one had ever told him to stop using the sign. The sign was not secured to a chain or tied down in any way

when it was in use.

Mr. Hincapie related that there were lights in the area of the entrance of Punto Rojo and the lights have always been present, even before he leased the premises. He stated that someone was hired to change the lights when they needed to be changed. At the time of the accident, the lights were all functioning. He said that it was not required that he get permission from the landlord to use the A-frame sign. No one had complained to him or his partners about the sign prior to plaintiff's accident. It was Punto Rojo's responsibility to sweep the sidewalk everyday, and perform snow removal. The restaurant had never received a violation from the City of New York with respect to the sidewalk or lighting, and he had no knowledge of the landlord receiving any violations from the City of New York with respect to the same.

The restaurant has one entrance for its patrons. In 2013, the door opened outwards towards the street as a patron was leaving the restaurant. The A-frame sign was generally placed in the same location as depicted in a picture from plaintiff's deposition. He described it as approximately three to four feet high and about 18 inches to two feet wide. The sign was placed on the sidewalk everyday between 8 and 9 A.M. and was left out until closing time. He was unaware of any witnesses to plaintiff's accident. He never received any complaints about the sign and to his knowledge no one ever tripped over it, or complained about the lighting prior to November 14, 2013. He never saw an ambulance in front of the restaurant after plaintiff's accident and only learned of the accident when he was served with litigation papers.

Deposition Testimony of Evereth Hincapie

Evereth Hincapie gave sworn testimony in this matter on October 25, 2017. He works at the Punto Rojo located in Hicksville, New York. He also does not read English, however he also signed the lease. The A-frame sign at issue was placed outside of the restaurant every day during operating hours. Before November 14, 2013 neither he or his partners had received any complaints about the sign and no one had tripped over it. He described the lighting outside of the restaurant as being well illuminated and prior to November 14, 2013 he had not received any complaints regarding the sidewalk in front of the restaurant. Also, no one had fallen on the sidewalk, or a pipe which is located on a portion of the sidewalk or complained about it either. He learned of the accident from the litigation papers. No one translated the lease or the insurance policy for him or his partners prior to these documents being executed. To the best of his knowledge, none of the restaurant's managers had received any complaints prior to November 14, 2013 related to the sidewalk or lighting, and he was not aware of any violations from the City of New York for the Jamaica property prior to November 14, 2013. He had never observed that lights on the awning not functioning.

Deposition Testimony of Defendant/Third-party Plaintiff 147-16 Hillside Avenue Corp.

Defendant/Third-party plaintiff 147-16 Hillside Avenue Corp. gave sworn testimony on May 4, 2017 by its witness Mr. Hernan Ochoa. He testified that he has two partners, his sister and brother. The corporation does not have any paid employees. The corporation holds and manages

the property for the purposes of renting it out. He identified his signatures on the lease and stated that the lease contained a rider. As of August 2012, Mr. Ochoa rented out the commercial portion of the subject premises and two apartments above the building. The intended use of the property was for a bakery. The tenant was allowed to rent out the apartment upstairs too. He would stop by the building once every two or three months, and when he did visit the premises, he would look over whatever exterior portions of the building he could see. The lease contained a Rider with a Personal Guaranty signed by both Edien and Evereth Hincapie. The lease was a "ground lease", also referred to as a "triple net lease". Although the Hincapies never requested permission from him to use the commercial space as something other than a bakery, and although the restaurant had waitress service in his view, there was not violation of the lease by his tenants with respect to the rental and use of the property. He did not have any objection to the sign that the tenants installed. He identified the A-frame sign from photographs but did not recall having seen it before. He never requested that the sign be removed from the sidewalk. He stated that he had an attorney negotiate the lease. He could not recall if the lease had an indemnification clause, and did not know if the Hincapies signed the rider to the lease. He stated that he did not recall receiving any violations with respect to lighting or sidewalk conditions during the time that the Hincapies' rented the property.

Legal Analysis

It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center,* 64 NY2d 851 [1985].) It is well settled that summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy,* 35 NY2d 361 [1974]). As summary judgment is a drastic remedy, it should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

In a tort action, for a defendant to be held liable, it must be demonstrated that the defendant owed a duty of care to the plaintiff (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]; *Suero-Sosa v Cardona*, 112 AD3d 706 [2d Dept 2013]). Generally, liability for a dangerous or defective condition on real property is premised upon ownership, occupancy, control or special use (*see Puzhayeva v City of New York,* 151 AD3d 988 [2d Dept 2017; *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845 [2d Dept 2010]; *Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729 [2d Dept 2008]; *Balsam v Delma Eng'g Corp.,* 139 AD2d 292 [1st Dept 1988]; *Minott v City of New York*, 230 AD2d 791 [2d Dept 1996]). If none of these factors are present, a defendant cannot be held responsible for injuries caused by a dangerous or defective condition on the premises (*Id.*).

There is no duty to protect or warn against an open or obvious condition, which, as a matter of law is not inherently dangerous (*see Davidoff v First Dev. Corp.,* 148 AD3d 773 [2d Dept 2017]; *Zhuo Zheng Chen v City of New York*, 106 AD3d 1081 [2d Dept 2013]). The Court must address the facts of each case, and generally, whether a condition is open and obvious is a question of fact for the jury (*Id.*). "A condition that is ordinarily apparent to a person making reasonable use of [his

or her] senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted." (*See Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008 [2d Dept 2008]; *see also Dalton v North Ritz Club*, 147 AD3d 1017 [2d Dept 2017]; *Stopelli v Yacenda*, 78 AD3d 815 [2d Dept 2010]). "There is no bright line test for determining what is open and obvious. The test is whether '[a]ny observer reasonably using his or her senses would see' the condition." (*See Centeno v Regine's Originals, Inc.*, 5 AD3d 210 [1st Dept 2004], quoting *Tagle v Jakob*, 97 NY2d 165 [2001]). The test incorporates a reasonableness standard, is fact specific and the degree to which a dangerous condition is open and obvious is usually an issue of comparative fault. (*Id.*).

An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or by a course of conduct by the landlord giving rise to a duty" (*see Lugo v Austin-Forest Assocs.*, 99 AD3d 865 [2d Dept 2012]). "[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*see Elsayed v Al Farha Corp.*, 132 AD3d 942 [2d Dept 2015]; *Alnashmi v Certified Analytical Group, Inc.* 89 AD3d 10 [2d Dept 2011]).

Hillside alleged that it did not create any defective condition related to the sidewalk at the premises; that it did not place the A-frame sign at the premises; that the lease agreement is a triple net lease which provides among other things for Punto Rojo to maintain the sidewalk at the premises; that there were no prior complaints related to the sign; the lighting conditions at the premises was not the proximate cause of plaintiff's accident. Thus, Hillside was not under a duty to maintain the sidewalk, the A-frame sign or the lighting at the premises. It also maintained that it is entitled to summary judgment on its claim for contractual indemnification against the third-party defendants pursuant to the written lease.

The Court finds that defendant 147-16 Hillside Avenue Corp., as an out-of possession landlord, established its entitlement to judgment as a matter of law (*see Gronski v County of Monroe*, 18 NY3d 374 [2011]; *Nieves v Pennsylvania, LLC*, –AD3d–, 2018 NY Slip Op 07134 [2d Dept 2018]; *O'Toole v City of Yonkers*, 107 AD3d 866 [2d Dept 2013]). The sidewalk sign was not inherently dangerous, the plaintiff was familiar with the restaurant and the sidewalk sign from eating at the restaurant and passing the location on several occasions. Sonera saw the sign on the date of the accident when she entered the restaurant, and saw the sign again while exiting the restaurant (*see Macey v Truman*, 70 NY2d 918 [1987]; *Dillon v Town of Smithtown*, –AD3d–, 2018 NY Slip Op 072889 [2d Dept 2018]; *Finocchiaro v Town of Islip*, 164 AD3d 871 [2d Dept 2018]; *Zhao v Brookfield Office Prop., Inc*, 128 AD3d 623 [1st Dept 2015]; *Calise v Costco Wholesale Corp.*, 124 AD3d 815 [2d Dept 2015]; *Lazar v Burger Heaven*, 88 AD3d 591 [2d Dept 2011]; *Marino v Bingler*, 60 AD3d 645 [2d Dept 2009]; *Schulman v Old Navy/The Gap, Inc.*, 45 AD3d 475 [2d Dept 2007]). She stated that the lighting conditions were normal and that it was not completely dark outside. There is no general duty of care requiring landowners to illuminate, but if there is knowledge of a condition that illumination could remedy, illumination may be required (*Peralta v Henriquez*, 100 NY2d 139 [2003]). The plaintiff testified that the lack of proper illumination did not proximately cause her accident. Moreover, plaintiff did not claim that there were any defective conditions with

respect to the structure of the public sidewalk alongside 147-16 Hillside Avenue and plaintiff failed to allege any violation of the New York City Administrative Code §7-210, but even if she had, defendants demonstrated that they were in compliance with the statute. There had been no prior complaints regarding the sign or trip and fall accidents.

In opposition, Punto Rojo argued that it opposes the portion of the motion seeking summary judgment on its claim for contractual indemnification only upon the basis that it is premature and without merit. The provisions of the lease, particularly Paragraph 45 which Hillside relies upon to require the Hincapies to indemnify Hillside are void and unenforceable under New York General Obligations Law §5-321, which provides as follows:

> "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damage for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property contained the demises premises shall be deemed to be void against public policy and wholly unenforceable."

Although plaintiff submitted a reply affirmation in opposition to plaintiff's cross-motion, a cross-motion was not filed under this sequence number. Plaintiff failed to submit opposition to Hillside's motion.

In response, Hillside maintained that its motion for summary judgment should be granted in its entirety. The indemnity provision in paragraph 45 does not purport to indemnify Hillside for its own negligence. Rather the first trigger is that the third-party defendants agreed to indemnify and save harmless the landlord/defendant/third-party plaintiff from any claim arising out of the "act, omission or negligence" of the tenants. The indemnity and save harmless provision is triggered because plaintiff's accident happened on the sidewalk in front of the door to the third-party defendant's restaurant as she was exiting the premises. The third-party defendants entered into a triple net lease and contracted to maintain and repair the premises, including any and all signs, the sidewalk in front of the building and the exterior and interior lighting. Hillside was an out-of-possession landlord, and, the sign which plaintiff tripped on belonged to the tenants. Any liability arising out the said sign can only be attributed to the tenants and the placement of the sign.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Mohan v Atlantic Court, LLC*, 134 AD3d 1075 [2d Dept 2015] citing *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2d Dept 2009]). In the case *Great Northern Ins. Co. v Interior Const. Co.*, 7 NY3d 412 [2006], the Court of Appeals held that where " a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, GOL §5-321 does not prohibit indemnity." Here, the broad language of the indemnification clause obligated the third-party defendants to indemnify the

landlord.

Therefore, the motion by defendant/third-party plaintiff 147-16 Hillside Avenue Corp. pursuant to CPLR 3212 dismissing plaintiff's verified complaint and granting summary judgment on its contractual indemnification claim against third-party defendants Edien Hincapie and Evereth Hincapie is granted.

This constitutes the decision and Order of the Court.

Dated: November 7, 2018

Hon. Chereé A. Buggs, JSC