SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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CAROL BAUER, Index No. 158384/2015

Plaintiff

- against - DECISION AND ORDER

196 OWNER'S CORP. and PAPER SOURCE INC.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained February 26, 2015, when she fell on the sidewalk in front of premises owned by defendant 196 Owner's Corp. and leased to defendant Paper Source Inc., at 1296 3rd Avenue in New York County. 196 Owner's Corp. and Paper Source interpose cross-claims against each other for contribution, implied indemnification, and breach of a contract to procure insurance, to which 196 Owner's Corp. adds cross-claims against Paper Source for contractual indemnification and breach of contractual maintenance obligations. Defendants separately move for summary judgment dismissing the complaint against each of them and dismissing the other defendant's cross-claims. C.P.L.R. § 3212(b). For the reasons explained below, the court denies both motions.

In New York City, the owner of real property abutting a sidewalk owes a duty "to maintain such sidewalk in a reasonably

safe condition." N.Y.C. Admin. Code § 7-210(a); Sangaray v. West Riv. Assoc., LLC, 26 N.Y.3d 793, 796 (2016); Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 520 (2008). See Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d 615, 616 (1st Dep't 2017). The liability of a nonowner party, like the tenant Paper Source, for an unsafe sidewalk condition depends on whether the party created the unsafe condition or made special use of the sidewalk. Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d at 617; O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d 428, 429 (1st Dep't 2013); Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 514 (1st Dep't 2010).

II. THE MOTION BY 196 OWNER'S CORP.

196 Owner's Corp. contends that plaintiff's claims against it must be dismissed because the sidewalk defect that plaintiff claims caused her to fall was trivial and 196 Owner's Corp. lacked notice of the defect. 196 Owner's Corp. contends further that, since on these grounds it was not negligent, Paper Source's cross-claims against 196 Owner's Corp. for contribution and implied indemnification must be dismissed.

A. Trivial Defect

No minimum size establishes that a sidewalk defect is actionable versus trivial and non-actionable. Dimensions, depth, elevation, irregularities, appearance, lighting, and the time and other circumstances of the injury also must be considered. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66, 77 (2015); Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997). A

depression or elevation in the sidewalk surface that creates an insignificant height difference may be actionable if its other characteristics or the surrounding circumstances increase the hazard. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d at 78; Saab v. CVS Caremark Corp., 144 A.D.3d 540, 540-41 (1st Dep't 2016).

While 196 Owner's Corp. describes its photographs as showing rulers measuring the sidewalk depression that plaintiff claims caused her to fall, no witness authenticates the photographs. Angel Luis Lucena, a resident manager employed by 196 Owner's Corp. for its premises, in his deposition identified one photograph depicting the depression with a tape measure next to it, but this photograph does not display the markings on the tape measure to show the length, width, or depth of the depression. Aff. of John B. Martin Ex. J, at 10. 196 Owner's Corp. concedes in any event that, since Lucena never observed the depression until over four months after plaintiff's injury, he lacked the personal knowledge to authenticate the photograph as depicting the depression February 26, 2015.

196 Owner's Corp. also presents plaintiff's estimation of the size of the depression in her deposition, which equally fails to demonstrate conclusively that the depression was a trivial defect. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d at 82-83. Plaintiff testified that the edge of the depression was jagged and that the depression was large enough to trap her shoe, which remained in the depression after she fell. None of the

evidence regarding the size of the depression depicts it as smaller than nine inches long, two inches wide, and three quarters of an inch deep.

196 Owner's Corp. thus fails to present measurements to meet its initial burden of demonstrating that the sidewalk depression was a trivial defect. Id. at 82. The further photographs of the sidewalk defect authenticated by plaintiff, moreover, depict a depression with a height difference that was not trivial. Abreu v. New York City Hous. Auth., 61 A.D.3d 420, 421 (1st Dep't 2009). See Lansen v. SL Green Realty Corp., 103 A.D.3d 521, 522 (1st Dep't 2013); Leon v. Alcor Assoc., L.P., 96 A.D.3d 635, 635 (1st Dep't 2012).

Other circumstances weigh against a conclusion that the depression was a trivial defect. The weather was overcast in the early evening in February. Plaintiff also testified that the depression was obscured because of the lack of color contrast and because, as she approached the depression, she encountered moderate pedestrian traffic alongside her and coming toward her that may have obstructed her view of the surface in front of her. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d at 82-83.

B. Notice of the Sidewalk Condition

196 Owner's Corp. also fails to demonstrate that it lacked constructive notice of the sidewalk depression through Lucena's testimony that he did not inspect the sidewalks abutting the premises for unsafe conditions until after plaintiff was injured. Williamson v. Ogden Cap Props., LLC, 124 A.D.3d 537, 537 (1st

Dep't 2015); Williams v. Esor Realty Co., 117 A.D.3d 480, 481 (1st Dep't 2014); Gonzalez v. Port Auth. of N.Y. & N.J., 85 A.D.3d 550, 550-51 (1st Dep't 2011); Narvaez v. 2914 Third Ave. Bronx, LLC, 88 A.D.3d at 501. See Conklin v. 500-512 Seventh Ave., LP, LLC, 159 A.D.3d 451, 451 (1st Dep't 2018). While Lucena testified that his porters swept and removed snow and ice from the sidewalks, including where plaintiff fell, before the stores in the premises opened and after they closed each day, the porters were not instructed to report unsafe conditions to him or to the property manager. The authenticated photographs show a depression of a size and with a worn surface that suggest the depression developed over time, raising factual issues that the condition was visible and discoverable by 196 Owner's Corp. Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d at 83; Jacobsen v. Krumholz, 41 A.D.3d at 129. No evidence suggests that the depression developed suddenly, leaving limited time for 196 Owner's Corp. to discover and to repair or warn of the hazard. Hill v. Manhattan N. Mgt., 164 A.D.3d 1187, 1188 (1st Dep't 2018); Morabito v. 11 Park Pl. LLC, 107 A.D.3d 472, 472-73 (1st Dep't 2013); Munoz v. Uptown Paradise T.P. LLC, 69 A.D.3d 401, 401-402 (1st Dep't 2010). See Parietti v. Wal-Mart Stores, Inc., 29 N.Y.3d 1136, 1137 (2017).

Even if the depression was readily observable or known to plaintiff as 196 Owner's Corp. claims, as long as the condition was unreasonably dangerous and not trivial, the visibility or plaintiff's awareness of a dangerous condition does not eliminate

the duty of 196 Owner's Corp., as the owner, to remedy the condition and maintain the sidewalk in a safe condition. Farrugia v. 1440 Broadway Assocs., 163 A.D.3d 452, 454 (1st Dep't 2018); Polini v. Schindler El. Corp., 146 A.D.3d 536, 536 (1st Dep't 2017); Johnson-Glover v. Fu Jun Hao Inc., 138 A.D.3d 499, 500 (1st Dep't 2016); Sorrentini v. Netta Realty Group, 100 A.D.3d 484, 485 (1st Dep't 2012). Plaintiff's ability to observe or actual awareness of the depression bears only on her comparative fault. Farrugia v. 1440 Broadway Assocs., 163 A.D.3d at 454-55; Socorro v. New York Presbyt. Weill Cornell Med. Ctr., 160 A.D.3d 544, 545 (1st Dep't 2018); Johnson-Glover v. Fu Jun Hao Inc., 138 A.D.3d at 500; Saretsky v. 85 Kenmare Realty Corp., 85 A.D.3d 89, 90 (1st Dep't 2011).

Finally, even if Paper Source breached its duty to maintain the ingress and egress of its leased premises as 196 Owner's Corp. contends, as illustrated above, no evidence demonstrates that 196 Owner's Corp. in turn complied with its own duty to maintain the abutting sidewalk. Sangaray v. West Riv. Assoc., LLC, 26 N.Y.3d at 799-800. 196 Owner's Corp. further fails to show that its lease to Paper Source relieved the landlord of its statutory duty to maintain and repair the sidewalk or its duty to maintain and repair the public portions of the building exterior to the leased premises..

C. Cross-Claims

The sole ground on which 196 Owner's Corp. relies for dismissal of Paper Source's cross-claims is the absence of

negligence by 196 Owner's Corp. Having failed to demonstrate that it was not negligent, as discussed above, 196 Owner's Corp. thus presents no basis to dismiss Paper Source's contribution and implied indemnification cross-claims. The absence of negligence by 196 Owner's Corp. in any event does not bear on Paper Source's cross-claim that 196 Owner's Corp. breached a contract to procure insurance covering Paper Source. 196 Owner's Corp. nowhere shows that it did not contract to procure insurance covering its tenant.

III. THE MOTION BY THE TENANT PAPER SOURCE

Paper Source contends that it owed no duty to maintain the sidewalk on which plaintiff fell. Like the owner, Paper Source also contends that it lacked notice of the sidewalk depression that plaintiff claims caused her to fall.

A. Duty to Maintain the Sidewalk

Since Paper Source was not an owner of the premises abutting the sidewalk on which plaintiff fell, as a tenant occupying the premises Paper Source owed no statutory duty to maintain the abutting sidewalk. N.Y.C. Admin. Code § 7-210(b); O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d at 429; Abramson v. Eden Farm, Inc., 70 A.D.3d at 514. To demonstrate the absence of any contractual obligation to maintain the sidewalk, Paper Source presents its lease, but fails to authenticate the lease. Nevertheless, even if the lease required Paper Source to maintain the sidewalk, such an obligation without more would be owed only to the owner and not to plaintiff. Bi Fang Zhou v. 131 Chrystie

St. Realty Corp., 125 A.D.3d 429, 430 (1st Dep't 2015); Collado v. Cruz, 81 A.D.3d 542, 542 (1st Dep't 2011); Tucciarone v. Windsor Owners Corp., 306 A.D.2d 162, 163 (1st Dep't 2003).

As a tenant, Paper Source did owe a duty to maintain the leased premises in a reasonably safe condition independent of any statutory or contractual obligation. Williams v. Esor Realty Co., 117 A.D.3d at 480; Araujo v. Mercer Sq. Owners Corp., 95 A.D.3d 624, 624 (1st Dep't 2012). Paper Source's failure to present the lease in admissible form to demonstrate that the sidewalk was not part of the leased premises, however, precludes summary judgment to Paper Source on the ground it owed no duty to maintain the sidewalk. Williams v. Esor Realty Co., 117 A.D.3d at 480-41. See Littlejohn v. Dominos Pizza LLC, 130 A.D.3d 500, 501 (1st Dep't 2015); Vivas v. VNO Bruckner Plaza LLC, 113 A.D.3d 401, 402 (1st Dep't 2014); Corrado v. 80 Broad, LLC, 101 A.D.3d 631, 631 (1st Dep't 2012). The lease also might demonstrate that it imposed a duty on Paper Source to maintain the sidewalk so "comprehensive and exclusive" that the duty displaced the owner's statutory duty and would be owed to plaintiff as well as to 196 Owner's Corp. Abramson v. Eden Farm, Inc., 70 A.D.3d at 514.

Even were the court to consider the lease, it imposes on the tenant a duty to take care of the demised premises and adjacent sidewalks. While the lease limits that duty to non-structural repairs, the duty to take care of the sidewalk is for the safety of pedestrians and includes, at minimum, a duty to warn them of a hazardous structural condition, with a marking, sign, or barrier,

for example. See Sorrentini v. Netta Realty Group, 100 A.D.3d at 485; Cook v. Consolidated Edison Co. of NY, Inc., 51 A.D.3d 447, 448 (1st Dep't 2008).

B. Notice of the Sidewalk Condition

Like the owner's employee Lucena, Paper Source's employee John Milioti testified at his deposition that Paper Source occasionally removed snow from the sidewalk, but both he and Paper Source's employee Colton Ackerman at his deposition testified that Paper Source did not inspect or otherwise clean the sidewalk. Therefore Paper Source likewise fails to demonstrate that it lacked constructive notice of the sidewalk depression in which plaintiff fell. Williamson v. Ogden Cap Props., LLC, 124 A.D.3d at 537; Williams v. Esor Realty Co., 117 A.D.3d at 481; Gonzalez v. Port Auth. of N.Y. & N.J., 85 A.D.3d at 550-51; Narvaez v. 2914 Third Ave. Bronx, LLC, 88 A.D.3d at 501. See Conklin v. 500-512 Seventh Ave., LP, LLC, 159 A.D.3d at 451.

Paper Source also fails to establish that it did not create the depression in the sidewalk through special use of the sidewalk or otherwise. Williams v. Esor Realty Co., 117 A.D.3d at 481; Frees v. Frank & Walter Eberhart L.P. No. 1, 71 A.D.3d 491, 492 (1st Dep't 2010); Cuevas v. City of New York, 32 A.D.3d 372, 373 (1st Dep't 2006). See O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d at 429; Abramson v. Eden Farm, Inc., 70 A.D.3d at 514. Lucena's unawareness whether any of the stores abutting the sidewalk performed work on the sidewalk does not

establish that Paper Source never did so. Socorro v. New York Presbyt. Weill Cornell Med. Ctr., 160 A.D.3d at 544; Frees v. Frank & Walter Eberhart L.P. No. 1, 71 A.D.3d at 492; Cuevas v. City of New York, 32 A.D.3d at 373. See Sager v. Waldo Gardens, Inc., 166 A.D.3d 408, 408 (1st Dep't 2018); Gonzalez v. Port Auth. of N.Y. & N.J., 85 A.D.3d at 551. Lucena did testify that Paper Source, when renovating its premises, erected a shed that extended two feet from its store, installed a dumpster on the street in front of the store, and hauled debris over the sidewalk to the dumpster, although no evidence indicates whether the shed extended near the depression or the transportation of heavy debris damaged the sidewalk.

C. Cross-Claims

Finally, Paper Source presents no support for dismissal of the cross-claims by 196 Owner's Corp. to meet Paper Source's initial burden to obtain summary judgment dismissing those cross-claims. Linhart v. Rojas, 154 A.D.3d 440, 440 (1st Dep't 2017); Chapman v. City of New York, 139 A.D.3d 507, 507-508 (1st Dep't 2016); Lee v. New York City Tr. Auth., 138 A.D.3d 579, 579 (1st Dep't 2016); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609, 609 (1st Dep't 2011). Since Paper Source also fails to demonstrate that it was not negligent, it presents no basis to dismiss the contribution and implied indemnification cross-claims by 196 Owner's Corp. Nor does Paper Source show that it did not contract to indemnify or procure insurance covering its landlord.

IV. CONCLUSION

For all the reasons set forth above, both defendants fail to meet their burden to establish entitlement to summary judgment dismissing the complaint against each of them and dismissing the other defendant's cross-claims. Therefore the court denies the separate motions by 196 Owner's Corp. and Paper Source Inc. for summary judgment in their entirety. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: February 1, 2019

LUCY BILLINGS, J.S.C.

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J.S.C.