Swede v 46 W. 21st St., LLC
2019 NY Slip Op 33521(U)
November 27, 2019
Supreme Court, New York County
Docket Number: 451758/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

X

RIKI SWEDE,

Plaintiff,

-against-

46 W. 21ST ST., LLC, SUPERIOR MANAGEMENT INCORPORATED and ALYSHIA ALEEM COFFEE SHOP,

Defendants.

X

DECISION & ORDER

MOT. SEQ. NOS.: 002 & 003

INDEX NO.: 451758/2017

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

The following documents filed with NYSCEF were considered in deciding these motions:

Motion Sequence 002: Doc. Nos. 56-59, 86, 88, 90, and 97.

Motion Sequence 003: Doc. Nos. 70-85, 87, 89, 91-95, 98.

Motion sequence numbers 002 and 003 are hereby consolidated for disposition and decided as set forth below.

Plaintiff Riki Swede commenced this negligence action seeking to recover monetary damages for personal injuries she allegedly sustained in a slip and fall accident.

In motion sequence 002, defendant Alyshia Aleem Coffee Shop ("Alyshia") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as well as any cross claims for contribution, contractual indemnification, common law indemnification and breach of contract asserted against it. Plaintiff opposes the motion and defendants 46 W. 21st Street, LLC ("46 W. 21") and Superior Management Inc. ("Superior"), oppose that portion of Alyshia's motion which seeks dismissal of their cross claims.

In motion sequence 003, defendants 46 W. 21 and Superior move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint and all cross claims against them. Plaintiff opposes the motion.

BACKGROUND

Plaintiff claims that, at about dinnertime on February 10, 2017, she slipped and fell on ice while walking on the public sidewalk in front of a building located at 46 W. 21st St., New York, New York ("the building" or "the premises").[1] The building, which was owned by 46 W. 21 and managed by Superior, consisted of a 5-story building on a 25-foot by 90-foot lot. The first story consisted of two retail spaces, one which was vacant and the other which was occupied by Alyshia pursuant to a month-to-month tenancy.

In the complaint, plaintiff alleged that 46 W. 21 and Superior negligently operated and managed the premises. Plaintiff further claims Alyshia had a duty to maintain the sidewalk at issue in a reasonably safe condition.

ANALYSIS

I. Alyshia's Motion for Summary Judgment Dismissing the Complaint and Cross Claims (Motion Sequence 002)

Alyshia argues that it is entitled to summary judgment dismissing the complaint and all cross claims against it because it: 1) had no duty, as a tenant, to maintain the sidewalk in question; 2) did

[1]Plaintiff testified that she could not recall the exact time of the accident (tr at 21-22, lines 25, 2).

not cause, create or exacerbate the alleged condition, nor make special use of the sidewalk; 3) had no contractual duty to maintain the sidewalk; and 4) had no notice of the alleged condition.

In support of its motion, Alyshia submits the deposition testimony of Aminmohamed Remtula (Remtula), Adam Nagin (Nagin) and plaintiff.

Remtula, the owner of Alyshia, testified that Superior's superintendent was responsible for removing snow from the sidewalk abutting the premises (tr at 35, lines 18, 35). He admitted that, during the period from 2010-2017, he personally removed snow during business hours from the portion of the sidewalk directly in front of Alyshia's coffee house (tr at 42, lines 2-24). Remtula further testified that, at approximately 4:00 p.m. on the day before the accident, he used a gardening spade tool to remove the snow and that he did not use salt or sand to melt snow and ice (tr at 70, 94, lines 22-25; 2-3; 2-18).

Nagin, Assistant Vice President of Superior, testified that he and his staff were responsible for performing maintenance and repairs at the premises. He was advised that his superintendent had cleared the snow from the sidewalk at the premises on the date of the accident (tr at 74, lines 8-25).

In opposition, plaintiff argues that there is a triable issue of fact as to whether Alyshia, by Remtula gratuitously undertaking to clear the snow, created or exacerbated a dangerous condition.

Summary judgment is drastic relief since it denies the losing party the opportunity to go to trial. Thus, summary judgment should only be granted where there are no triable issues of fact (*see Andre v Pomeroy*, 35 NY2d 361 [1974]). The focus for the Court is on issue finding, not issue determination. (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidence to demonstrate the absence of any material issues

of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]); *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The fact that an accident occurred does not, in and of itself, establish liability on the part of a defendant (*see Deblinger v The New York Racing Assn.*, 203 AD2d 169 [1st Dept 1994]). Without a duty, there is no breach, and without a breach, there can be no liability (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]). As a general rule, liability for a dangerous or defective condition on real property must be "predicated upon ownership, occupancy, control, or special use of the property" (*Welwood v Association for Children With Down Syndrome*, 248 AD2d 707, 708 [2d Dept 1998][internal quotation marks and citation omitted]; *Lahens v Town of Hempstead*, 132 AD3d 954, 955 [2d Dept 2015]; *Kubicsko v Westchester County Elec., Inc.*, 116 AD3d 737, 738-739 [2d Dept 2014]). "The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so" (*Bruzzo v County of Nassau*, 50 AD3d 720, 721 [2d Dept 2008]).

Section 7–210 of the Administrative Code of the City of New York ("section 7-210") places such a duty on commercial property owners, and imposes tort liability for injuries arising from noncompliance (*see* Administrative Code § 7–210[a], [b]; *Gyokchyan v. City of New York*, 106 AD3d 780, 781 [2d Dept 2013]). The tort liability imposed by section 7–210 extends to "the owner

of real property abutting [the subject] sidewalk" (Administrative Code § 7–210 [b]). In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous (*Bruzzo v County of Nassau*, 50 AD3d at 721).

Here, the testimony submitted by Remtula established that he performed some limited snow removal at approximately 4:00 p.m. on the day prior to the accident. He also testified that Superior was the party responsible for removing the snow (tr at 43-46; lines 24-2); that he closed the coffee shop at approximately 5:00 p.m. the evening before the accident; and that when he arrived at the premises the next morning (the morning of the date of the accident), the sidewalk in front of the building was entirely clear of snow and ice (tr at 46, line 2).

Alyshia failed to establish its prima facie entitlement to judgment as a matter of law since, contrary to its contention, it failed to demonstrate that Remtula's snow removal activities, which were admittedly undertaken prior to the accident, did not create or exacerbate the icy condition which allegedly caused the plaintiff to slip and fall (*Arashkovitch v City of New York*, 123 AD3d 853 [2d Dept 2014]; *see Viera v Rymdzionek*, 112 AD3d 915, 916 [2d Dept 2013]).

Since Alyshia failed to satisfy its prima facie burden, this Court need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, the motion by Alyshia for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

II. 46 W. 21 and Superior's Motion for Summary Judgment (Motion sequence 003)

46 W. 21 and Superior move, pursuant to CPLR 3212, for summary judgment dismissing

plaintiff's complaint and Alyshia's cross claims against them.

As noted above, section 7–210 places such a duty on commercial property owners to maintain adjoining sidewalks, and imposes tort liability for injuries arising from noncompliance (*see* Administrative Code § 7–210[a], [b]; *Gyokchyan v. City of New York*, 106 AD3d 780, 781[2d Dept 2013]). The tort liability imposed by section 7–210 extends to "the owner of real property abutting [the subject] sidewalk" (Administrative Code § 7–210 [b]). It is well established that, in order to demonstrate entitlement to summary judgment in a slip and fall case, a defendant must make a *prima facie* showing that it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it (*Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Where none of these factors is present, a party cannot be held liable for injuries caused by a dangerous or defective condition on the property (*Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2d Dept 2009]).

In support of its motion, 46 W. 21 and Superior argue that they did not create, or acquire prior notice of, the alleged dangerous condition, i.e., ice on the sidewalk. However, testimony by Nagin, Superior's employee, revealed that he directed his staff to instruct the superintendent to remove snow and ice at the property (tr at 20, line 13). Moreover, Nagin claims that he was informed that the superintendent did in fact conduct snow removal efforts at the premises at some point after 5:00 p.m. on the day before the accident and at about dinnertime on the day of the accident (tr at 59, lines 15-25). Nagin also testified that he did not rely on any verbal agreement or prior practices of Alyshia regarding snow removal. Rather, he claimed that he still required the superintendent or the staff to clear the sidewalk of snow and ice (tr at 68, lines 17-20).

Since 46 W. 21 and Superior fail to demonstrate that the sidewalk at the premises was clear of snow and ice at the time of the accident and that they did not create the dangerous condition by failing to maintain the sidewalk in a safe condition. Thus, they have not established their prima facie entitlement to summary judgment dismissing the complaint and the cross claims asserted against them.

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

ORDERED that the motion by defendant Alyshia Aleem Coffee Shop for summary judgment dismissing the complaint and cross claims against it is denied; and it is further

ORDERED that the motion by defendants 46 W. 21st St., LLC and Superior Management, Inc. for summary judgment dismissing the complaint and cross claims against them is denied; and it is further

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

Dated: November 27, 2019

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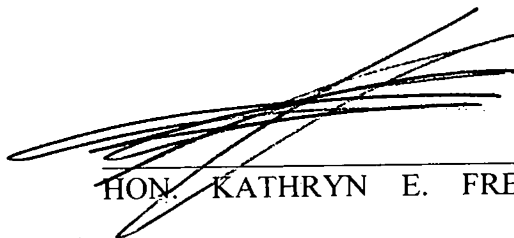

HON. KATHRYN E. FREED, J.S.C.