Valdez v City of New York
2019 NY Slip Op 33817(U)
December 20, 2019
Supreme Court, New York County
Docket Number: 162203/2014
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** *Justice* **PART 5**

INDEX NO. 162203/2014

MOTION SEQ. NO. 006

ARIANE VALDEZ,
Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, APPLE BANCORP, INC., APPLE BANK FOR SAVINGS, MELVA CONSTRUCTION CORP., FLASH EXTERMINATING, INC., EVEREST SCAFFOLDING, INC., G&B FLORIST, INC. D/B/A FORT WASHINGTON FLORIST, BETTY ZAFIROS,
Defendants.

DECISION + ORDER ON MOTION

APPLE BANK FOR SAVINGS AND APPLE BANCORP, INC.,
Third- Party Plaintiff,

-against-

G & B FLORIST, INC. D/B/A FORT WASHINGTON FLORIST, BETTY ZAFIROS,
Third-Party Defendants.

Third-Party Index No. 595820/2016

The following e-filed documents, listed by NYSCEF document number (Motion 006) 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 249, 251, 252, 254, 259, 260, 261, 262, 267, 270, 271, 272, 273, 274, 275, 276, 277, 280, 281

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff commenced this action seeking to recover for injuries sustained on February 6, 2014, when she slipped and fell due to snow and ice covering the base of a fire hydrant on the sidewalk in front of 4257 Broadway, New York, New York.[1]

Defendant/Third-Party Plaintiffs, Apple Bank for Savings and Apple Bancorp, Inc. ("Apple Bank") moves the court pursuant to CPLR § 3212 seeking summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it, as well as, for summary judgment in its favor against defendants Flash Exterminating, Inc., G&B Florist, Inc. d/b/a Fort Washington and Betty D. Zafiros for indemnification and costs associated with its defense of this action.

[1] Defendant, G&B Florist, Inc. d/b/a Fort Washington Florist occupied this location on the date of the accident. At the time of the accident, the sidewalk was covered by a sidewalk bridge/shed (scaffolding) erected by defendant, Everest Scaffolding, Inc.

On February 6, 2014 at approximately 4:45 A.M., plaintiff slipped and fell on snow and ice in front of the flower shop (G&B Florist hereinafter "G&B") while attempting to cross in the middle of the street between 181st and 180th Street on Broadway.[2] (Apple Bank *Exhibit X*). Specifically, plaintiff testified that while walking towards a path into the street she slipped on snow and ice and while slipping her foot hit something (base of a fire hydrant) causing her to trip and fall. *Id.* Plaintiff asserts that the scaffolding blocked light emanating from the buildings but admits that the street lights were on. *Id.*

Apple Bank, as owner of the subject premises, hired Unity Building Services ("Unity"), a snow removal contractor, to remove snow and ice from in front of the area of the building occupied by Apple Bank only.[3] Unity hired Flash Exterminating, Inc. ("Flash") through an online service called "TaskEasy" to remove the snow and ice pursuant to its agreement with Apple Bank. Apple Bank argues that Flash was not responsible for shoveling snow in front of G&B and did not place snow in front of G&B. Per the testimony of Betty Zafiros, owner of G&B, G&B employees clear snow from the sidewalk and push it to the curb. Plaintiff testified that there was no snow in the middle of the sidewalk due to the scaffolding but that there was snow on the sidewalk from the outside of the scaffolding to the curb. (Apple Bank *Exhibit X*). To this point, Apple Bank argues that irrespective of whose duty it was to remove snow and ice, Apple Bank is entitled to dismissal as plaintiff elected to walk over a mound of snow to get to the roadway rather than traveling the safer route, where there was no snow, and crossing at the corner/crosswalk.

Apple Bank further argues that it had no notice of the alleged condition and did not cause or create the condition. Ms. Zafiros testified that at 8:00 P.M., when she closed the shop, there was no ice present and the store did not re-open until 6:00 A.M. the next day, after the alleged accident. As such, Apple Bank argues that a landowner cannot be responsible for twenty-four/seven surveillance to prevent ice formation and thus, it could not have had notice of the condition. Additionally, Apple Bank asserts that while plaintiff testified that it was dark out during the morning of her fall, lighting was not a significant factor in plaintiff's accident. Specifically, Ms. Zafiros testified that the lights in her store window are kept on overnight, as well as, the lights from the McDonald's restaurant next door. Furthermore, the portion of the sidewalk where plaintiff chose to travel was not covered by scaffolding, but nevertheless the scaffolding was lit by a 200-watt bulb every fifteen feet, per code.

As to its indemnity claims, Apple Bank submits that if the court finds Apple Bank responsible for clearing snow in front of G&B, then Flash was negligent for not removing snow from that area and should indemnify Apple Bank. However, if the court finds that G&B's snow removal or lack thereof caused the condition, then Apple Bank seeks indemnification from G&B.

Flash opposes the motion, in part, solely arguing that Apple Bank's application for summary judgment on its cross-claim for common law indemnification and/or breach of contract should be denied as there is no evidence of a negligent act and/or omission by Flash. Specifically, Flash argues that plaintiff's accident occurred in an area outside of the scope of Flash's contract and that there is no evidence that Flash performed any work outside of its contractual obligations.

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[2] Plaintiff testified at her deposition that it was dark outside at the time of her accident. She saw larger mounds of snow near the corner, so she did not attempt to cross using the crosswalk. She was not under the scaffolding when she slipped and fell. (*See Apple Bank's Exhibit X.)*

[3] The contract did not include the storefronts owned Apple Bank.

G&B opposes Apple Bank's motion and cross-moves for summary judgment asserting that plaintiff failed to allege a cause of action against G&B as plaintiff's accident occurred close to the curb line and not under the scaffolding near the storefront. It avers that G&B owner Ms. Zafiros checked the area in front of the store prior to closing at 8:00 P.M. and the area was clear from snow. Moreover, G&B asserts that photographs annexed to Apple Bank's motion depict that the sidewalk was clear from snow and ice, and plaintiff chose to walk over a mound of snow on the curb line. G&B also argues that while it had no duty to guard or remove the fire hydrant base protruding from the sidewalk, it did provide the City with notice of the defect.[4] Finally, G&B argues that the indemnification in its lease with Apple Bank violates General Obligations Law § 5-322 as an indemnity agreement which purports to indemnify the promisee against its own negligence is against public policy. G&B further argues that pursuant to the Administrative Code § 7-210, as a lessee it does not have a duty to maintain the sidewalk. As such, G&B argues that the indemnification clause, as it stands, can only be triggered if G&B created the condition, caused it to occur, or made special use of the sidewalk. As there is no evidence in the record suggesting that G&B created the condition or made special use of the sidewalk, it is entitled to summary judgment and Apple Bank's application for indemnity should be denied.

Plaintiff also opposes Apple Bank's motion and cross-moves for summary judgment. Plaintiff asserts that due to the scaffolding, the middle of the sidewalk did not have snow, but the sidewalk was not completely clear of snow as the area in front of G&B, from the curb to the scaffolding edge, contained snow. Plaintiff further asserts that she walked towards a small path leading into the street located several feet from the corner of the intersection, which was covered by snow, and that she could not cross at the crosswalk since there was a large mound of snow on the corner of 181st Street and Broadway. Plaintiff maintains that a combination of snow and ice caused her to slip and fall and that while slipping she came in contact with the hydrant base. Plaintiff avers that Apple Bank is liable under Admin Code § 7-210 for failure to remove snow and ice from the sidewalk abutting its property – maintaining that she fell on the sidewalk, not the curb or street. Plaintiff contends that Apple Bank contracted with Unity to remove snow from its entire building and therefore, Apple Bank understood its duty to remove snow from its sidewalks. Plaintiff further contends that Apple Bank derived a special use from the sidewalk by installing the scaffolding/sidewalk shed to facilitate façade repairs. With respect to the scaffolding, plaintiff avows that pursuant to its contract with Everest Scaffolding, Inc., Apple Bank knew that it was responsible for snow and ice removal about the scaffolding and that inasmuch as it is undisputed that it snowed the day before the accident, Apple Bank cannot assert a lack of notice. (Admin code 19-101 (d)).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 [NY 1986] and *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989].

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[4] Ms. Zafiros reported the broken hydrant to 311. Luis Velez, City witness, Repair Supervisor for the Water Department of the City, whose duties include repairing and maintaining fire hydrants, testified at deposition that a service request dated January 31, 2014 notified the City of the broken hydrant near 181st Street near Broadway. Said request had a completion date of March 2, 2014, a month after plaintiff's accident.

In an action for negligence, a plaintiff must prove that the defendant owed her duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach. (*Akins v Glens Falls City School Dist.*, 53 NY2d 325 [1981]).

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]). A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms." (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507 [2008] [internal quotation marks and citations omitted]).

In applying these legal principles and considering the facts in the light most favorable to the non-movants, the court determines that Apple Bank, G&B and plaintiff have not established entitlement to summary judgment. There is no dispute that Apple contracted with Unity who contracted with Flash to remove snow from the Apple Bank entrances to the curb and further that the sidewalk abutting G&B was clear of snow or had small amounts of snow, particularly the portion of the sidewalk directly under the scaffolding. Thus, the crux of this action rests with whether the sidewalk was in a reasonably safe condition and whether plaintiff's decision to walk towards an alleged path from the portion of the sidewalk uncovered by the scaffolding over the curb line and into the street rather than walking towards the corner into the crosswalk is a bar to plaintiff's recovery from Apple Bank and/or G&B. These are issues of fact for a jury to decide.

As to the arguments advanced by Apple Bank with respect to its indemnification claims against Flash, said claims are unavailing. Apple Bank concedes in its motion that its contract with Unity did not include snow removal in front of G&B or any of its storefronts but only abutting the bank itself. (*Aff of Apple ¶ 40*). Hence, the contract between Unity and Flash only involved snow removal in front of the bank and excluded the storefronts. As such, Flash did not have a duty to remove snow from the sidewalk in front of G&B and in fact did not do so, as Ms. Zafiros from G&B testified that her employees removed snow from in front of G&B. As such, Apple Bank's indemnity claim against Flash has no merit and is denied.[5]

As to Apple Bank's indemnity claim against G&B, while Admin. Code § 7-210 imposes a nondelegable duty on landowners of abutting property to maintain and repair the sidewalk, a tenant may be liable to a landlord for damages resulting from a violation of the lease which imposes an obligation to repair or replace the sidewalk in front of the property. (See *Collado v Cruz*, 81 AD3d 542 [1st Dept 2011] and *Wahl v JCNYC, LLC*, 133 AD3d 552 [1st Dept 2015]). In this instance, paragraph 30 of the lease imposes a duty to remove snow, ice, dirt and rubbish from the sidewalk in addition to sidewalk repairs and replacements. Thus, Apple Bank's motion for contractual indemnification is granted only to the extent that if Apple Bank is found negligent, G&B must indemnify Apple Bank pursuant to the terms of its lease as G&B assumed the contractual duty to perform snow and ice removal. Accordingly, it is

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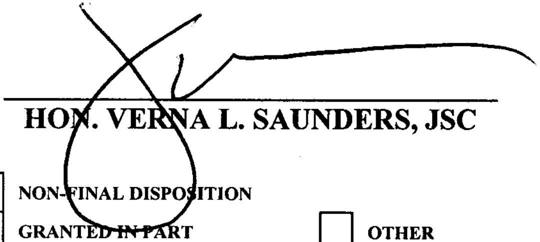
[5] Additionally, this court granted Flash's motion for summary judgment on the same grounds. See Decision and Order dated November 25, 2019.

ORDERED that defendant G&B Florist, Inc. d/b/a Fort Washington and plaintiff's respective cross-motions for summary judgment are denied; and it is further

ORDERED that defendant/third-party plaintiffs, Apple Bank for Savings' motion for summary judgment is denied and the issue of contractual indemnification shall be decided upon a determination of liability in accordance with this decision; and it is further

ORDERED that all parties are to appear for an early settlement conference on February 3, 2020 at 9:30 AM, Part DCM, Room 106, 80 Centre Street, New York, NY; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is denied and this constitutes the decision and order of the Court.



December 20, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	☐ **CASE DISPOSED**			☒ **NON-FINAL DISPOSITION**	
	☐ **GRANTED**	☒ **DENIED**		☐ **GRANTED IN PART**	☐ **OTHER**
APPLICATION:	☐ **SETTLE ORDER**			☐ **SUBMIT ORDER**	
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**			☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**