Bullock v 1585 Realty Co. U.C.
2020 NY Slip Op 32104(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 150073/2017
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM
Justice

INDEX NO. 150073/2017
MOTION DATE 12/03/2019
MOTION SEQ. NO. 001

JACQUELINE BULLOCK,

Plaintiff,

- v -

1585 REALTY COMPANY LLC., 1582 FIRST AVENUE WINE & LIQUOR INC.

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41
were read on this motion to/for DISMISSAL

Defendant 1582 First Avenue Wine & Liquor Inc.'s ("Wine & Liquor") motion for summary judgment is granted in part.

On November 30, 2016, at approximately 1:00 p.m., plaintiff Jacqueline Bullock was injured when she tripped and fell on the sidewalk in the vicinity of the sidewalk vault/cellar doors in front of Wine & Liquor located at 1585 First Avenue between 82nd and 83rd Street. Defendant 1585 Realty Company LLC ("1585 Realty") owns the commercial space leased to Wine & Liquor.

Plaintiff testified at her deposition that she fell on the steel grate plate of the cellar doors in front of Wine & Liquor, landing on her left elbow. She saw the cellar doors before the incident and indicated there were pedestrians around her at the time, including one walking towards her. There was a light rain at the time, but the sidewalk was not wet or slippery. Plaintiff was wearing flat, rain/snow boots, and holding an umbrella over her head, in her right hand. The pedestrian traffic was heavy, and plaintiff was walking by herself. Although she had previously frequented

the area, plaintiff stated that at the time of the incident there were delivery men, in addition to a truck, dolly, and boxes, in front of the liquor store making deliveries to Wine & Liquor. The sidewalk was narrow and the delivery men unloading the boxes from the truck were closer to the curb. Some of the boxes were on the sidewalk, while others were on the dolly. Plaintiff wanted to avoid the delivery men, so she moved right towards the buildings and walked closer to the cellar doors in front of Wine & Liquor's store. There was a tree well near the curb where the delivery truck was parked. In describing the moment that she fell, plaintiff stated: "The toe part of my footwear got caught in a gap, if you will or depression . . . The cellar door had a sharp raised corner edge and it was not flushed, because there was broken concrete under it, and it was high enough that it caught the toe portion in the footwear, of course."

Lewis Trencher, the property manager of 1585 First Avenue, was deposed on behalf of 1585 Realty. He testified that they hired Milbrook Properties to assist with management of 1585 First Avenue. Trencher further disclosed that sidewalk repairs in front of Wine & Liquor's store were the responsibility of the super and managing agent (on behalf of the landlord), and Wine & Liquor would contact Milbrook if any property issues arose. Trencher also named two individuals from Milbrook who were responsible for physically being at the property and dealing with issues such as repairs, operation of property, etc.

Paragraph 4 of the lease between 1585 Realty and Wine & Liquor states: "Owner shall maintain and repair the public portions of the building, both exterior and interior . . . Tenant shall, throughout the term of the lease, take good care of the demised premises including . . . the sidewalks adjacent thereto, and its sole cost and expense make all non-structural repairs thereto. . . ." The lease also states in Paragraph 14 that no vaults (i.e. the cellar doors) were part of the lease.

The lease rider at Paragraph 55 provides that the "tenant covenants and agrees to clean and maintain the store front portion of the demised premises." Paragraph 66 states that, "Tenant shall be responsible for the maintenance and cleanliness of all . . . doors, frames, door frames and street entrance and stairways and passageways leading to or from the demised premises." Finally, Paragraph 87 requires the tenant "to maintain in good order and condition and repair the exterior of the demised premises . . ."

In the instant motion, Wine & Liquor moved for summary judgment seeking dismissal of plaintiff's complaint and 1585 Realty's cross-claim seeking indemnification against 1585 Realty. Wine & Liquor claims that it is entitled to judgment as a matter of law as it owed no duty to the plaintiff and did not have an exclusive and comprehensive agreement to maintain and/or repair the portion of the sidewalk on which the plaintiff tripped. Wine & Liquor also argues that it never made special use of the sidewalk. In their Affirmation in Reply, Wine & Liquor presented where plaintiff fell as undisputed. Wine & Liquor interpreted plaintiff to mean she stepped on the cellar doors (excluded from the lease), thus 1585 Realty retaining their original responsibilities for plaintiff's injuries.

1585 Realty and plaintiff argue, that summary judgment is inappropriate because the lease and rider demonstrate that Wine & Liquor did have an exclusive duty to maintain and/or repair the sidewalk. Plaintiff also claims that even if the lease does not establish a clear duty on the part of Wine & Liquor, the lease still raises material issues of fact. Both parties also contend that Wine & Liquor made special use of the sidewalk.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]; *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]). This burden is a heavy one, and all

facts must be viewed in a light most favorable to the non-moving party (*Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; *Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must establish a *prima facie* case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The proponent of a summary judgment motion makes a *prima facie* showing, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the moving party has demonstrated its *prima facie* showing, the burden then shifts to the non-moving party to demonstrate by admissible evidence the existence of a triable issue of fact necessitating a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Administrative Code § 7–210 (enacted in 2003) imposes a non-delegable duty on property owners to maintain and repair the sidewalk abutting their property in a reasonably safe condition. This is true regardless of whether the property owner has transferred possession of the premises to a lessee or maintenance agreement to a third party (see *Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167 [2019]). Administrative Code § 7–210, in pertinent part, states: "It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury" (N.Y., Code § 7-210, New York City, N.Y.). Accordingly, Administrative Code § 7–210 does not impose any duty on a tenant, the property owner is liable for injuries resulting from violation of § 7–210.

Here, there is no triable issue of fact regarding whether Wine & Liquor had a duty to the plaintiff. Despite 1585 Realty and plaintiff's arguments to the contrary, the lease between Wine

& Liquor and 1585 Realty was not "so comprehensive and exclusive" in regard to sidewalk maintenance as to entirely displace 1585 Realty's duty to maintain the sidewalk.

Neither Paragraph 4 of the lease, nor other sections of the lease make repairs and maintenance the exclusive responsibility of Wine & Liquor. As the lease does not show that Wine & Liquor had an exclusive duty to maintain the sidewalk, Wine & Liquor had no duty to the plaintiff *(see Collado v. Cruz*, 81 AD3d 542 [1st Dept 2011][holding that provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party]; *see also Torres v. Visto Realty Corp.*, 106 AD3d 645, 646 [1st Dept 2013]["The provisions of the tenant's lease obligating it to repair the sidewalk could not be enforced through the main action"]).

Similarly, the provisions contained in the rider do not rise to the level of being "so comprehensive and exclusive" as to entirely displace 1585 Realty's duty. As the lease and rider do not impart Wine & Liquor with the exclusive duty to maintain the sidewalk, Wine & Liquor owes no duty to the plaintiff *(see also Hsu v. City of New York*, 145 AD3d 759, 760 [2d Dept 2016]["As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party"]).

Moreover, Trencher explicitly stated that if there was an issue with sidewalk, Wine & Liquor was to contact the managing agent who had the responsibility of physically being at the property and attending to coordinating repairs. Therefore, the lease and rider, and Trencher's testimony all demonstrate that Wine & Liquor's sidewalk responsibilities were not exclusive.

Summary judgment should also be granted in favor of Wine & Liquor because Wine & Liquor did not cause the condition or make special use of the sidewalk *(see Kellogg v. All Saints Hous. Dev. Fund Co.*, 146 AD3d 615 [1st Dept 2017][finding that a tenant cannot be held liable to a third party in tort absent a showing that it affirmatively caused or created the defect which

caused the plaintiff to trip or the tenant made a "special use" out of the sidewalk for its own benefit]). There is no dispute that the condition was not caused by Wine & Liquor. However, 1585 Realty and plaintiff argue that Wine & Liquor made special use of the sidewalk.

1585 Realty argues that Wine & Liquor attained an exclusive benefit through their sidewalk use (i.e. allowing delivery personnel to unload liquor boxes on the sidewalk). Specifically, plaintiff testified that she walked closer to the buildings and cellar doors in front of Wine & Liquor's store to avoid the delivery men. 1585 Realty and plaintiff both argue that since the vault doors led to the basement (which was part of the lease), Wine & Liquor made special use of the cellar door.

"The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others.... Special use cases usually involve the installation of some object in the sidewalk or street or some variance in the construction thereof" (*see Hernandez v. Ortiz*, 165 AD3d 559, 559-60 [1st Dept 2018]; *quoting Balsam v Delma Eng'g Corp.*, 139 AD2d 292 [1st Dept 1988]). Examples of special use include: a restaurant using the sidewalk for tables and chairs (*Taubenfeld v Starbucks Corp.*, 48 AD3d 310 [1st Dept 2008]), railroad tracks imbedded in the public street (*Reyes v CSX Transp., Inc.*, 19 AD3d 193, 195 [1st Dept 2005]), concrete barriers diverting foot traffic (*Petty v Dumont*, 77 AD3d 466 [1st Dept 2010]), and the parking of a temporary boiler on the street (*Bell v. City of N.Y.*, 104 Ad3d 484 [1st Dept 2013]). Here, the argument is that a delivery took up space on the sidewalk. The First Department has explicitly held that the occasional use of the side of the store for deliveries does not constitute a special use as that term has been construed (*Rodriguez v City of New York*, 48

AD3d 298 [1st Dept 2008]). Further, to the extent that plaintiff needed to walk around the boxes and diverted her path towards the vault, this is also not special use (*see Taubenfeld, supra*).

The argument that Wine & Liquor made special use of the vault doors through their use of the basement is without merit. It is undisputed that Wine & Liquor never made use of the vault doors (and that the vault doors are excluded from the lease). Wine & Liquor never accessed the basement through the vault doors and only accessed the basement through an indoor staircase. In fact, Wine & Liquor stated, and it was not disputed, that the vault doors were locked, and they did not have access. Accordingly, as Wine & Liquor had no duty to plaintiff, their obligation to repair the sidewalk was not exclusive, they did not create the condition on the sidewalk and did not make special use of the sidewalk or vault (which was excluded from the lease), Wine & Liquor's motion for summary judgment as to plaintiff is granted.

Lastly, Wine & Liquor's motion for summary judgment seeking common law and contractual indemnification against 1585 Realty is denied. A landowner may maintain an indemnification action against a tenant who agrees to maintain the property (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 NY3d 167 [2019]; *see also Wahl v. JCNYC, LLC*, 133 AD3d 552 [1st Dept 2015]. Here, the lease includes indemnification and hold harmless clauses. Moreover, there is still a triable issue of fact as to where the plaintiff stepped. Specifically, although Wine & Liquor's reads plaintiff's statement to mean that she stepped on the vault doors (which are excluded from the lease), the statement can also be read that she stepped on sidewalk. The deposition testimony was not clear as to the precise location and cause for her fall. Accordingly, summary judgment on the indemnification claim is denied. For the above reasons, it is hereby

ORDERED that Wine & Liquor's motion for summary judgment against plaintiff is granted and plaintiff's claims against Wine & Liquor are dismissed; and it is further

ORDERED that Wine & Liquor's motion for summary judgment dismissing 1585 Realty's cross-claim for indemnification is denied.

6/30/2020
DATE

HON. DAVID B. COHEN
J.S.C.

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