Wolchock v Glorious Sun Blue Hill Plaza, LLC.
2020 NY Slip Op 34781(U)
August 21, 2020
Supreme Court, Rockland County
Docket Number: Index No. 033361/2018
Judge: Robert M. Berliner
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

---x
AMY WOLCHOCK

Plaintiff,

-against-

GLORIOUS SUN BLUE HILL PLAZA, LLC., CBRE, INC., and GRASSKEEPERS LANDSCAPING, INC.,

Defendants.
---x
GLORIOUS SUN BLUE HILL PLAZA, LLC. And CBRE, INC.,

Third-Party Plaintiffs,

-against-

GRASSKEEPERS LANDSCAPING, INC.,

Third-Party Defendant.
---x

DECISION AND ORDER

Index No.: 033361/2018

Motion Sequence # 1

The following papers, numbered 1 to 5, were read on the motion for summary judgment by Defendant/Third-Party Plaintiffs Glorious Sun Blue Hill Plaza, LLC and CBRE, Inc:

Notice of Motion/Affirmation in Support/Exhibits(A-O).. 1-2
Affirmation in Opposition(Lapp)..3
Affirmation in Partial Opposition(Sherwin) 4
Reply Affirmation 5

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

This action arises out of a slip and fall accident, where Plaintiff Amy Wolchock ("Wolchock") allegedly sustained damages after slipping and falling in a parking lot located at 1 Blue Hill Plaza in Pearl River, New York ("the Premises"), on May 21, 2018. While walking from her car in Parking Lot A to the building of the Premises, part of her shoe and foot went into a depression or pothole causing her foot to twist and fall. Wolchock traversed the Premises for 16 years prior to the accident as her office is located there. At the time of the accident, the Premises was owned by Glorious Sun Blue Hill Plaza, LLC ("Glorious") and managed by CBRE, Inc. ("CBRE"). On June 13, 2018, Wolchock filed a complaint against Glorious and CBRE for a cause of action sounding in negligence. On April 22, 2019, Glorious and CBRE filed a third-party complaint for indemnification against Grasskeepers Landscaping, Inc. ("Grasskeepers"). They had contracted with Grasskeepers to provide various services of snow removal, landscaping, and patching up driveways and parking lots on the Premises ("Service Agreement"). On August 2, 2019, Wolchock filed an amended complaint including Grasskeepers as a co-defendant.

Now, before the Court is Glorious's and CBRE's motion for summary judgment pursuant to CPLR § 3212. They seek (1) an order for summary judgment dismissing Wolchock's complaint and all crossclaims and counterclaims therein against them; (1) or in the alternative, an order for summary judgment on their third-party claim against Grasskeepers, with an issuance of order of conditional indemnification. The Court will now address whether to grant Glorious and CBRE summary judgment on Wolchock's complaint.

I. Summary Judgment as to Wolchock's Complaint

Glorious and CBRE allege that they are entitled to judgment as a matter of law as to Wolchock's complaint because: (1) alleged defect is trivial, and (2) they had no notice of the alleged defect. First, the Court addresses whether the alleged defect was trivial.

A. Whether the Alleged Defective Condition Was Trivial

In support of their motion, Glorious and CBRE provide, *inter alia*, photographs of the site at issue, the EBT of Wolchock, and the EBT of CBRE's real estate manager Elliot Kui. After Wolchock fell, she told Kui about the fall and where she fell. Based on what Wolchock told him,

Kui found a divot where he believed she fell and measured it with a quarter. Kui testified that he measured the defect "as deep as the width of a quarter", whereas Wolchock testified that the defect was about 2 inches deep. Attorney Affirmation in Support at 14. Glorious and CBRE rely on a photograph that was taken by Wolchock's husband after the repair of the defect and a photograph that was taken the day of the accident. During her EBT, Wolchock was shown the pre-repair photograph and circled where she fell. However, the post-repair photograph was not presented to Wolchock. During Kui's EBT, he was shown the pre-repair photograph, in which he circled and initialed where he measured the divot. Defendants allege that a comparison of the two photographs reveals that the alleged defect was trivial. In opposition of this motion, Wolchock alleges that the photographs provided are inconclusive as to the severity of the defect. Wolchock also highlights that she did neither testified nor was shown the pre-repair photograph.

"As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted].

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact." *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]. To determine whether a defect is trivial, courts must assess "all the facts presented, including width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997][internal citations omitted]; *see Melia v 50 Ct St. Assoc.*, 153 AD3d 703, 704 [2d Dept 2017]. While "[p]hotographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable," (*Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 984 [2011]) in some cases,

photographs "whether alone or combined with deposition testimony, cannot support a ruling of triviality as a matter of law." *Hutchinson*, 26 NY3d at 83. More specifically, the Second Department has held that poor quality photographs of the alleged condition were "insufficient to demonstrate as a matter of law that the alleged defect was trivial, and therefore not actionable." *Louima v Jims Realty, LLC*, 125 AD3d 943, 944 [2d Dept 2015]; *see e.g. Deviva v Bourbon St. Fine Foods & Spirit*, 116 AD3d 654, 655 [2d Dept 2014]; *Berry v Rocking Horse Ranch Corp.*, 56 AD3d 711, 711-12 [2d Dept 2008].

Here the Court finds that Defendant failed to meet its burden of to prove that the defect is trivial. There is conflicting evidence as to the measurement of the defect from Wolchock and Kui's testimonies. The photographs relied on are taken far from the alleged defect. Additionally, Wolchock and Kui were not presented with the same photograph when testifying to the alleged defect. Therefore, it is unclear whether the pre-repair photograph accurately depicts the condition of the defect at the time of Wolchock's fall, and thus, it is impossible for the Court to discern whether the alleged defective condition is trivial as a matter of law. *See Paradat v New York City Tr. Auth.*, 137 AD3d 1095, 1097 [2d Dept 2016]["it is impossible to ascertain from the photographs submitted in support of the motion whether the alleged defective condition was trivial as a matter of law"]; *Berry*, 56 AD3d at 711-12 ["the evidence submitted in support of [defendant's] motion for summary judgment, including the purported photographs of the accident site that were of poor quality, were insufficient to demonstrate, as a matter of law, that the alleged driveway condition was too trivial to be actionable"]. Therefore, the Court denies summary judgment on Wolchock's complaint based on a trivial defect. Next, the Court will address whether to grant Glorious and CBRE summary judgment based on lack of notice.

B. Whether Glorious and CBRE Had Notice

Glorious and CBRE allege that they had no notice of the alleged defective condition in Parking Lot A. They rely on, *inter alia*, the EBTs of Wolchock, Kui, and the owner of Grasskeepers Larry Turco. Glorious and CBRE point out that Wolchock never made a complaint of the alleged defective condition to anyone at her office though she may have noticed it once or twice prior to her fall. Also, they alleged that they relied on Grasskeepers and their security contractors to notify them of any dangerous or defective conditions in the parking lots.

Additionally, Grasskeepers completed a yearly inspection every April for any needed repairs, including pavement defects/potholes. Prior to the date of the accident, Glorious and CBRE did not receive any notice of a defective condition at the location of the accident from either its security contractors or Grasskeepers.

In opposition, Wolchock alleges that Glorious and CBRE fail to submit evidence sufficiently establishing when the subject area was last inspected prior to her accident. She notes that testimony about general inspection practices without specific, affirmative evidence regarding an actual inspection is insufficient as a matter of law.

"A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 598 [2d Dept 2010][internal citations omitted]. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-99 [2d Dept 2008][internal citations omitted]. "A movant cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case." *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 910 [2d Dept 2011][internal citations omitted].

Here, Glorious and CBRE fail to meet their burden to prove the last time Parking Lot A was inspected or prior to Wolchock's accident. Although Kui testified as to the general practices of the security contractors placing an orange cone on defective conditions, he could not recall as to when Parking Lot A was last cleaned or inspected relative prior to Wolchock's fall. Similarly, Turco failed to testify as to the same. Turco testified that he performed the annual walk-through of the Premises in April 2018 with CBRE's general manager, Joanne Morano, about a month prior to the accident. However, he did not recall whether they walked through the site of Plaintiff's fall. Therefore, the Court denies the motion for summary judgment based on lack of notice. Based upon the foregoing, the Court denies the branch of Glorious's and CBRE's motion for summary judgment dismissing Wolchock's complaint.

II. Summary Judgment as to the Third-Party Claim and Condition Order of Indemnification

Alternatively, Glorious and CBRE seek summary judgment as to their third-party claim of contractual indemnification against Grasskeepers as well as a conditional order of indemnification. They rely on the Service Agreement between Glorious, CBRE, and Grasskeepers. Therein, Grasskeepers agreed to indemnify them against any liabilities, suits, claims or actions arising out of Grasskeepers' work on the Premises. In opposition, Grasskeepers alleges that Glorious and CBRE failed to establish that they themselves are free from negligence with respect to Wolchock's fall so as to permit a conditional order of indemnification.

"A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed." *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2d Dept 2011][internal citations omitted]. "The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability." *Arriola v City of New York*, 128 AD3d 747, 749 [2d Dept 2015][internal citations omitted]; *Brown v Two Exchange Plaza Partners*, 76 NY2d 172 [1990].

Here, because Glorious and CBRE failed to prove that they are free from negligence, they are not entitled to judgment as a matter of law for their cause of action sounding in contractual indemnification against Grasskeepers. *See State v. Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757-758 [3d Dept 2001]["where issues of fact exist concerning the indemnitee's active negligence, even a conditional judgment has been found premature"]; *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253, 1260 [2d Dept 2019]. Therefore, the Court denies Glorious's and CBRE's motion for summary judgment as to its third-party complaint.

Based upon the foregoing, this motion for summary judgment is denied in its entirety.

The parties are hereby advised of a pre-trial conference on **September 9, 2020 at 10:30 am**.[1]

The foregoing constitutes the Decision and Order of the Court.

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[1] The conference will occur virtually via Skype for Business. Plaintiff's counsel is directed to file a court notice via NYSCEF confirming the availability and providing the contact information of all counsel of record.

Dated: New City, New York
August 21, 2020

ENTER

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF