Ryan v City of New York
2022 NY Slip Op 30099(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 159891/2016
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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DONNA RYAN,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, 572 EIGHTH AVE. CORP., 572 EIGHTH AVE. MARKET CORP. and 572 EIGHTH AVE. MARKET CORP. doing business under an assumed name as GRACE CAFE, GRACE 38 CAFE INC. and GRACE 38 CAFE INC. doing business under and assumed name as GRACE CAFE,

Defendants

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DECISION AND ORDER

Index No. 159891/2016

Motion Sequence Nos. 2, 3 & 4

HON. J. MACHELLE SWEETING, J.S.C.:

In the underlying action, plaintiff seeks to recover damages for personal injuries allegedly sustained on March 20, 2016, when she tripped and fell on a metal grate located on the sidewalk in front of Grace Café, located at 572 8th Avenue, between 39th and 38th Street (hereinafter, the premises). Plaintiff filed suit against (1) The City of New York (hereinafter, "the City"); (2) the New York City Transit Authority and Metropolitan Transportation Authority (together and hereinafter, "NYCTA"); (3) 572 Eighth Ave. Corp., which owns the premises; and (4) 572 Eighth Ave. Market Corp. and 572 Eighth Ave. Market Corp. doing business under an assumed name as Grace Café, Grace 38 Cafe Inc. and Grace 38 Cafe Inc. doing business under and assumed name as Grace Cafe (collectively and hereinafter, "Grace Café"), the commercial tenant at the premises.

Now pending before the court are separate motions by defendants, Grace Café, the City and 572 Eighth Ave. Corp., seeking orders, pursuant to CPLR 3212, granting them summary judgment. In the alternative, the City seeks an order, pursuant to the lease between the City and NYCTA, granting defense and indemnification to the City by NYCTA.

BACKGROUND

A. Testimony

On March 20, 2016, plaintiff and her husband were walking along 8th Avenue in Manhattan, from 39th to 38th Street, when she allegedly tripped and fell due to a hole in the sidewalk (plaintiff's deposition transcript, NYSCEF Doc No. 70 at 9-10, 16). The hole was adjacent to a metal grate located in front of the premises (the City's 50-H hearing transcript, NYSCEF Doc No. 69 at 10-11, 18). Plaintiff testified that she was walking but had stepped to the right as other pedestrians were coming towards her (NYSCEF Doc No. 69 at 19). Her left foot caught in the defect and she fell onto her knees (*id*. at 20, 22). Plaintiff described the hole as 3 inches deep, extending from the edge of the grate 8 to 12 inches, towards storefronts (NYSCEF Doc No. 70 at 128). Plaintiff was shown photographs of the sidewalk in question marked at her deposition as defendant's "A" through "G," as well as a photograph marked "Exhibit 1" (*id*. at 52). She stated that the photographs depicted the area as it looked at the time of her accident (*id*. at 55). She had previously identified the location of her accident by drawing a circle on the photograph marked "Exhibit 1" during a statutory 50-h hearing with NYCTA on June 21, 2016 (NYCTA 50-H hearing transcript, NYSCEF Doc No. 68 at 17-18). The point circled in the photograph shows a hole in the sidewalk immediately abutting a metal grate.

Daniel Park, the manager of Grace Café on the date of the accident, testified on behalf of his employer (Park deposition, NYSCEF Doc No. 78 at 7). Mr. Park stated that he would clear debris from the sidewalk in front of Grace Café and other employees would clear snow, but he did not know who was responsible for sidewalk repairs (*id*. at 12-15). Mr. Park had never been notified of, or witnessed, anyone fall in front of Grace Café (*id*. at 15, 31). He stated that to his knowledge he never received any documents from the City of New York about the alleged accident location and never received any complaints or documents from the landlord about the sidewalk (*id*. at 25-26). He also never received any complaints regarding the alleged accident location (*id*. at 15). As to the condition of the sidewalk, Mr. Park stated the following, after being shown photographs of the defect:

> Q. What did it look like back in March of 2016?
>
> A. Just a little crack, that's it, that's what I see, but not this whole thing, this up here, no, I never notice like this (indicating).

(*id*. at 19, lines 5-8).

Raymond Levy, a principal and shareholder of 572 Eighth Ave. Corp., testified on its behalf. He stated that 572 Eighth Ave. Corp owns the premises and described it as a one-story commercial building, with co-defendant Grace Café as one of two tenants in the building (Levy deposition, NYSCEF Doc No. 76 at 11-12). The lease between 572 Eighth Ave. Corp and Grace Café was in effect on the date of the accident and was previously assigned from another tenant, 572 Market Corp. (*id*. at 15-17).

Vincent Moschello, a station maintainer for NYCTA, testified on behalf of NYCTA. He was shown photographs of the alleged accident location and testified that the metal grates, as depicted, are owned by the City, but maintained and operated by NYCTA (Moschello deposition transcript, NYSCEF Doc No. 72 at 18). He further testified that the maintenance and repair of the

12 inch area surrounding the metal grates is also NYCTA's responsibility, namely, that of his department. (*id*. at 22- 23).

B. Record Search

The City conducted a sidewalk segment block search that included the area of the sidewalk in which the plaintiff allegedly tripped and fell, for two years prior to and including the date of accident (record search, NYSCEF Doc No. 132 at 1). The results of the search revealed: 17 permits, 16 of which were hardcopy permits, 1 corrective action request, 12 notices of violation, 46 inspections, 3 sidewalk inspections, 3 sidewalk re-inspections, and 2 Big Apple Maps labeled as volume 5, pages 32, and 34 (*id*. at 1-2).

Omar Codling, a Department of Transportation employee, testified on behalf of the City. A sidewalk violation for "broken; trip hazard; undermined patch work and flag" was issued on September 21, 2015, to co-defendant 572 Eight Ave. Corp. for the location 570 8th Avenue (Codling deposition, NYSCEF Doc No. 73. at 36-37). Of the 17 permits issued, one was issued to the New York City Department of Environmental Protection (hereinafter, "DEP") to "open a roadway and/or sidewalk at Eighth 9 Avenue and West 39th Street for a maximum length of ten feet for the purpose of repair water" (*id*. at 19). Three building operation permits were issued to 572 Eighth Avenue for the purpose of storing equipment such as "cranes, derricks, among others" at the location of 572 Eighth Avenue (*id*. at 26-27).

C. City and NYCTA Lease

The 1953 "Master Lease" agreement between the City and NYCTA "authorizes the Authority [NYCTA] to take jurisdiction, control, possession and supervision of such transit facilities, materials, supplies and property on the effective date" (Master Lease, NYSCEF Doc No. 135 at Section 2.1). "Leased Property" is defined as "the transit facilities and any other materials, supplies and property incidental to or necessary for the operation of such transit facilities referred to in Section 2.1" (*id*. at Section 1.3)

Moreover, Section 6.8 of the Lease provides as follows:

> "The Authority covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against and final disposition of, any and all claims, actions or judgments including compensation claims and awards and judgments on appeal, resulting from any accident or occurrence arising out of or in connection with the operation, management and control by the Authority of the Lease Property"

(*id*. at Section 6.8).

ARGUMENTS

A. Grace Café's Motion for Summary Judgment

Grace Café argues that it is entitled to summary judgment as a matter of law because it is neither responsible for the maintenance or repair of the area where plaintiff tripped and fell, nor did it create the defective condition. Since plaintiff testified that the hole that caused her to trip was between 8 and 12 inches wide and 3 inches deep, immediately abutting the metal grating, Grace Café argues that the responsibility for the maintenance and repair of the defect must fall on co-defendants, the City or NYCTA, pursuant to the Rules of the City of New York Department of Transportation (34 RCNY) § 2-07 (b) (1).

NYCTA, in opposition, argues that there are triable issues of fact. First, it argues that 34 RCNY 2-07 (b) (1) is only applicable to the owners of covers or gratings. Thus, the City, being the owner of both the sidewalk and subway gratings, would be responsible for the 12 inches extending outwards from the grate. However, it admits that there is a lease agreement between the City and NYCTA which arguably places the duty to repair and maintain the area on the lessee, NYCTA. Therefore, NYCTA argues that delineation of these duties is a question for a jury to decide. Second, NYCTA argues that Grace Cafe may have caused or created the defect, based upon building operation permits issued to 572 Eighth Ave. Corp. for the benefit of Grace Café for storage of cranes and derricks. NYCTA contends that Grace Cafe's possible special use of the sidewalk for storage of cranes or derricks would create a duty for Grace Café to maintain and repair the sidewalk. Lastly, NYCTA argues that the notice of violation sent to 572 Eighth Ave. Corp. for a sidewalk flag defect in front of 570 Eighth Ave also creates a question of fact as to whether Grace Café is liable for the defective conditions described by the notice.

B. 572 Eighth Ave. Corp.'s Motion for Summary Judgment

572 Eighth Ave. Corp. avers that it is entitled to summary judgment because, as admitted by NCYTA's own witness, Vincent Moschello, the grate and the area surrounding it are the responsibility of NYCTA. 572 Eighth Ave. Corp. cites to *Storper v Kobe Club* (76 AD3d 426, 426 [1st Dept. 2010]), wherein the plaintiff tripped and fell on a broken portion of sidewalk next to a metal vault cover, in front of a commercial property. In dismissing the claims against the property owners, the Court held that pursuant to 34 RCNY 2-07, the MTA was responsible for the maintenance and repair of the defective area of the sidewalk because it was within the 12-inch zone (*id*. at 427). 572 Eighth Ave. Corp. argues that per the holding in *Stoper*, as the abutting

property owner, it cannot be concurrently liable with NYCTA and thus, its summary judgment motion must be granted.

In opposition, NYCTA reiterates the same arguments it presented in response to Grace Café's summary judgment motion, but also contends that pursuant to New York City Administrative Code § 7-210 (section 7-210), the duty of maintaining the defective area should fall on 572 Eighth Ave. Corp., as it is the owner of the real property abutting the location where plaintiff fell.

C. The City's Motion for Summary Judgment

The City argues that the liability shifting provision of section 7-210 passes the burden of maintenance and repair of the accident location to the property owner, 572 Eighth Ave. Corp. and the City is therefore entitled to summary judgment. Moreover, it avers that it did not cause or create the defective condition as its record search revealed no evidence that the City performed work on the sidewalk in front of the premises.

In opposition, NYCTA argues that there are issues of fact as to whether a permit issued to DEP to open the roadway and/or sidewalk at 8th Avenue and West 39th Street for repair work caused or created the subject defective condition. NYCTA also reiterates its argument that the City, as the owner of the grate, should be responsible for the 12 inches surrounding the grate where plaintiff fell.

DISCUSSION

The standard for summary judgment is well settled. "[T]he 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 eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960], *rearg denied* 8 NY3d 934 [1960]). While "[t]he moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case" (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]), the movant must come forth with proof in admissible form to warrant granting it summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

The court's function in a summary judgment motion is issue-finding rather than issue-determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Sillman*, 3 NY2d at 404).

Section 7-210 of the Administrative Code of the City of New York provides, in relevant part,

> "a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition.
>
> b. 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 ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include ... the negligent failure to remove snow, ice, dirt or other material from the sidewalk"

(Administrative Code of City of N.Y. § 7-210[a]-[b]).

34 RCNY § 2-07 (b) states:

> "Maintenance (1) The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and concrete pads installed around such covers or gratings and the area extending twelve inches outward from the edge of the cover or grating or concrete pad, if such pad is installed. (2) The owners of covers or gratings shall replace or repair any cover or grating found to be defective and shall repair any defective street condition found within an area extending twelve inches outward from the perimeter of the cover or grating."

In addition, 34 RCNY § 2-01 includes a "sidewalk" within the definition of "street" (*Torres v Sander's Furniture, Inc.*, 134 AD3d 803, 804 [2d Dept 2015]).

While section 7-210 generally imposes liability for injuries resulting from negligent sidewalk repair on the abutting property owners, 34 RCNY § 2-07 places the responsibility for the upkeep and maintenance of a sidewalk grate, and the area extending 12 inches outward, on the owner of the grate (*Storper*, 76 AD3d at 427; *Hurley v Related Mgt. Co.*, 74 AD3d 648 [1st Dept 2010]; *Lewis v City of New York*, 89 AD3d 410, 411 [1st Dept 2011] [reversing lower court and dismissing case against property owner and City as neither defendant had the ability to exercise control over Con Edison's grate pursuant to RCNY § 2-07[b][1], [2]]).

Grace Café and 572 Eighth Ave. Corp. argue that they had neither control nor authority over the metal grate and owe no duty to plaintiff as the subject defect was within 12 inches of the grate. Both Grace Café and 572 Eighth Ave. Corp have demonstrated that the subject defect was within 12 inches of the metal grate by citing to plaintiff's 50-h hearing testimony and deposition, and photographs marked by plaintiff. The only party that opposes, NYCTA, argues that the hole may be larger than 12 inches, but tenders no evidence to raise an issue of fact. Grace Café and 572 Eighth Ave. Corp. have made a *prima facie* showing that they did not create the alleged dangerous condition, negligently maintain the area, or use the sidewalk in a special manner for their own benefit (*see Flynn v City of New York*, 84 AD3d 1018, 1019 [2d Dept 2011]; *Farrell v City of New York*, 67 AD3d 859, 860-861 [2d Dept 2009]). In opposition, NYCTA failed to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562).

Accordingly, both Grace Café and 572 Eighth Ave. Corp.'s motion for summary judgment is granted.

The City does not outright dispute its ownership of the metal grate at issue, but cites to First Department cases wherein the court noted that NYCTA "owned" similar metal grates and was therefore responsible for the 12 inches of sidewalk surrounding the grates (*see Storper*, 76 AD2d at 427; *Cruz v New York City Tr. Auth.*, 19 AD3d 130, 131 [1st Dept 2005]). However, recent cases have examined and held that 34 RCNY § 2-07(b)(1) is a nondelegable duty of the owner of covers or gratings to inspect and maintain the 12-inch area surrounding the metal grating (*see Fajardo v City of New York*, 197 AD3d 456,459 [2d Dept 2021]; *Roa v City of New York*, 188 AD3d 504, 504, [1st Dept 2020]). The issue was analyzed most recently by the Second Department in *Fajardo*, wherein the Court stated:

> "The terms of the lease executed by the City and the Transit Authority demonstrate, prima facie, that the City is the owner of the subway ventilation grating, which is located in the sidewalk in the area near where the plaintiff allegedly fell. Therefore, the Transit Authority demonstrated, prima facie, that **the City, and not the Transit Authority, owed a nondelegable duty under 34 RCNY 2–07 (b) to monitor the condition of the ventilation grating and the area of the sidewalk extending 12 inches outward from the perimeter of the grating**"

(*Fajardo*, 197 AD3d at 459 [internal citations omitted] [emphasis added]).

Therefore, even though the Master Lease assigns the duty to NYCTA, pursuant to 34 RCNY § 2-07 (b) (1), the duty to repair and maintain the 12 inches surrounding covers and grating is nondelegable and falls on the owner, the City (*see Xiang Fu He v Troon Mgt., Inc*., 34 NY3d 167, 174 [2019] [analyzing nondelegable obligations of owners]).

While the City argues that, pursuant to section 7-210, the abutting landowner is responsible for the maintenance of the premises "there is nothing in Section 7-210 of the Administrative Code of the City of New York indicating that the City Council intended to supplant the provisions of 34 RCNY 2–07 (b) [ ] to allow a [party] to shift the statutory obligation of the owner of the cover or grating to the abutting property owner" (*Flynn*, 84 AD3d at 1019). Accordingly, the responsibility for maintaining the condition of the area where plaintiff fell lies with the City, and not the other co-defendants. The City has failed to make its *prima facie* case and its motion for summary judgment is therefore denied.

Notwithstanding the above, pursuant to the terms of the Master Lease, the City is entitled to defense and indemnification under Section 6.8, which states as follows:

> The Authority covenants that, during the term of this Agreement, it shall be responsible for the payment of, discharge of, defense against and final disposition of, any and all claims, actions or judgments including compensation claims and awards and judgments on appeal, resulting from any accident or occurrence arising out of or in connection with the operation, management and control by the Authority of the Lease Property.

(NYSCEF Doc No. 135 at Section 6.8).

NYCTA offers no opposition to the above and the contractual terms here are clear. Thus, NYCTA is obligated to defend and indemnify the City in the underlying personal injury matter as per the terms of the Master Lease (*Vintage, LLC v Laws Constr.Corp.*, 13 NY3d 847, 849 [2009] ["Where an agreement is unambiguous on its face, it must be enforced in accordance with the plain meaning of its terms"]).

CONCLUSION

For all of the aforementioned reasons, it is hereby

ORDERED that defendant referred to in the above decision as Grace Café and within the caption as 572 Eighth Ave. Market Corp. and 572 Eighth Ave. Market Corp. doing business under an assumed name as Grace Café, Grace 38 Cafe Inc. and Grace 38 Cafe Inc. doing business under and assumed name as Grace Cafe's motion for summary judgment (Motion Sequence Number 2) is granted in its entirety and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that defendant 572 Eighth Ave. Corp.'s motion for summary judgment (Motion Sequence Number 3) is granted in its entirety and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the City of New York's motion for summary judgment (Motion Sequence Number 4) is granted to the extent that defendant New York City Transit Authority is obligated to defend and indemnify the City of New York in the underlying personal injury matter, and is otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendants 572 Eighth Ave. Market Corp. and 572 Eighth Ave. Market Corp. doing business under an assumed name as Grace Café, Grace 38 Cafe Inc. and Grace 38 Cafe Inc. doing business under and assumed name as Grace Cafe and 572 Eighth Ave. Corp. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that this matter, including any other motions is transferred to the Transit Part for any further proceedings; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: January 12, 2022

ENTER:

HON. J. MACHELLE SWEETING, J.S.C.