SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
NATHAN FREEMAN,

Plaintiff(s),

-against-

CMJ REALTY CO., LLC and FEDERAL EXPRESS CORPORATION,

Defendant(s)
X

Index No: 503572/18

DECISION AND ORDER

Recitation as required by CPLR 2219(a), of the papers considered in defendant Federal Express Corporation's motion for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	62-79
Cross-motion and supporting papers…….	
Answering Affidavits.....	90-98
Reply Papers.....	
Memorandum of law……...	

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to recover damages for personal injuries, the defendant Federal Express Corporation [FedEx] moves pursuant to CPLR 3212 for an order (1) for summary judgment dismissing plaintiff's complaint against it in its entirety;(2) granting summary judgment dismissing all of co-defendant CMJ Realty Co., LLC's [CMJ Realty] cross-claims for common-law and contractual indemnity,contribution, and for breach of contract for failure to procure insurance; or, in the alternative (3) granting it summary judgment against CMJ Realty on its cross-claims for contractual indemnification and/or contribution.

Plaintiff commenced this action against defendant-landlord CMJ Realty and defendant-tenant FedEx for damages arising from personal injuries he sustained when he tripped and fell in the parking lot adjacent to the FedEx store located at 58-95 Maurice Avenue, Queens, New York. Plaintiff's testimony indicates that as he was walking through the parking lot towards the entrance to the FedEx store he encountered "a sudden sharp decline in [his] walking space" and simultaneously got "the heel of [his] foot caught in … a crack," causing him to lose fall backwards. When further questioned as to what he meant by a "decline in [his] walking space," plaintiff testified that there was a unexpected slope in the area where he was walking.

FedEx argues that the parking lot was not part of the demised property and, in any event, any alleged defect on the surface of the asphalt parking lot was trivial and, thus, not actionable. "Liability for a dangerous condition on property is predicated upon occupancy,ownership, control or a special use of such premises" (*Balsam v. Delma Eng'g Corp*., 139AD2d 292, 296 [1st Dept 1988], *lv. dismissed*, *lv. denied* 73 NY2d 783 [1988]. Here, FedEx fails to demonstrate through the lease, or through the affidavit of Bobby Webb, its Properties and Facilities Maintenance Manager, that the parking lot was not part of the demised premises. The submitted lease documents do not include referenced documents relating to the description of the property. And, Mr. Webb's affidavit, which makes conclusory assertions, is of no probative value. As such, FedEx fails to demonstrate that it owed no duty of care to plaintiff with respect to an unsafe condition on the adjacent parking lot.

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v. County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]). However, a property owner (and its commercial tenant), may not be held liable for trivial defects (*see Portranova v Kantlis* (39 AD3d 731 [2d Dept 2007]). "For a court to determine whether a defect is trivial as a matter of law, it must examine all of the facts presented including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstances of the injury" (*GrossKopf v 8320 Parkway Towers Corp*., 88 AD3d 765, 766 [2d Dept 2011]).

In support of this portion of the motion, FedEx submits the affirmed report of its professional engineer who opined that an indentation near (but not on) the pathway plaintiff traversed, measuring approximately 2" x 3", which had been described as the "defect" by plaintiff's expert in a supplemental bill of particulars, had a beveled slope and measured between 1/2" to 0" deep, and did not have a depth of 1-inch as plaintiff's expert claimed. The expert further opined that this indentation met "accepted standards for a safe walking surface … and [had] no edge that would create a trap or snare to a person's shoe heel." The expert did, however opine that the slopes and grades of the parking lot, and particularly where the fall occurred, [were] far in excess of any applicable code requirement or recommended standard" and that in combination with plaintiff's "failure to observe and sense the apparent condition was the most probable cause of the fall, within a high degree of professional engineering certainty."

Even finding that FedEx, through its expert, met its burden here, the plaintiff's expert raises an issue of fact with his opinion within a reasonable degree of certainty as a certified safety professional that the defect where plaintiff's foot got caught, which he measured to be approximately "two-and-one fourth inches (2¼") long and three-and-one fourth inches (3¼") wide .. with a depth of approximately one inch (1")," was "not to

code," with the area "large enough for a heel to be caught in," and was a cause of the fall due to the "sudden change in level" which "departs from… accepted safe practices" and created a "tripping hazard" (in addition to the steep and dangerous slope) (*see Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130 [1st Dept 2018]). Therefore, summary judgment dismissal of plaintiff's complaint premised on the argument of a non-actionable trivial defect is not warranted.

FedEx also moves for summary judgment to dismiss CMJ Realty's cross-claims for contribution or indemnification arguing that because there is a structural/design defect in the parking lot which was within CMJ Realty's sole responsibility, and because FedEx bears no liability for this accident, CMJ is not entitled to recover on its cross-claims. Here, FedEx correctly contends that the lease did not require it to perform structural repairs to the parking lot. Paragraph 8(e) of the parties' lease provides "[t]enant shall maintain the exterior, the sidewalk, and driveways on or abutting the Demised Premises in good order and repair, including snow removal and sweeping of Tenant's portion of sidewalk…" The lease provision requiring FedEx to "maintain" the driveway/parking lot, without more, does not impose an obligation on FedEx to make structural repairs (*see*
Cast Iron Co., LLC v Cast Iron Corp., 177 AD3d 492 [1st Dept 2019]).

Unless a lease specifically obligates a commercial tenant to be responsible for structural repairs, and identifies the structural repairs covered, such a lease obligation generally will not be implied or imposed by the courts (Tracy Bateman J.D., et al., N.Y. Jur. 2d Landlord and Tenant § 223 [August 2023 update]; *Langston v Gonzalez*, 39 Misc.3d 371 [Sup. Ct. Kings County 2013]). Therefore, if it is determined that plaintiff's injuries arise solely from the structural defect in the parking lot (i.e. the sloping), CMJ Realty would not be entitled to contribution or indemnity in this matter. However, because triable issues of fact exist as to whether plaintiff's injuries resulted, in part, due to a non-trivial defect in the asphalt in the parking lot maintained by FedEx, and because no determination has yet been made as to CMJ Realty's liability, summary judgment dismissing the cross-claims for contribution and/or indemnity is not warranted.

Dismissal of CMJ Realty's cross-claims premised on FedEx's failure to procure insurance naming CMJ Realty as an additional insured pursuant to the provisions of the lease is also not warranted. FedEx fails to demonstrate that CMJ Realty was named as an additional insured under its general liability policy. Although FedEx submits the affidavit of Teresa Langston, its liability and claims litigation advisor, stating that FedEx procured the requisite insurance, she does not specifically state that CMJ Realty was named as an additional insured under the policy and no documents are provided to establish same.

Finally, FedEx moves, in the alternative, for summary judgment on its cross-claims against CMJ Realty for indemnity and contribution. However, because there remain triable issues of fact as to FedEx's liability summary judgment in the

cross-claims against CMJ Realty for indemnity and contribution is also not warranted (*see Pantaleo v Bellerose Senior Housing Development Fund Co., Inc*., 147 AD3d 777 [2d Dept 2017]).

In conclusion, FedEx's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

Dated: September 6, 2023

Enter,

Karen B. Rothenberg, J.S.C.