SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

ANNE DEVLUGT,

DECISION/ORDER

Plaintiff,

-against- Index No.: 23282/2013E

SOBRO SHARP IV LLC., et als.

Defendants.

X

The following papers numbered 1 to 10 read on the below motions noticed on November 12, 2014 and duly submitted on the Part IA15 Motion calendar of **March 4, 2015**:

Papers Submitted	Numbered
Def. Affirmation in Support of Motion, Exhibits	1,2
Co-Def Cross-Motion, Exh., Partial Opp.	3,4,5
Pl. Aff. In Opp., Exhibits	6,7
Def. Affirmations in Reply	8,9
Co-Def.'s Aff. In Reply	10

Upon the foregoing papers, defendants Sobro Sharp IV LLC, Brook-Sharp Realty LLC, and Sharp Management Corp. (the "Sharp Defendants") move for summary judgment, dismissing the complaint of the plaintiff Anne Devlugt ("Plaintiff"), pursuant to CPLR 3212(b), or in the alternative, for summary judgment on their cross-claim against co-defendant Beauty Center Spa, Inc. ("BCS"), on the issue of contractual indemnification. BCS partially opposes the motion and cross-moves for an order dismissing Plaintiff's complaint. Plaintiff opposes the motion and cross-motion.

I. Background

This matter arises out of an alleged slip and fall incident that occurred on October 1, 2010, on the sidewalk in front of 3007 Third Avenue in the Bronx, New York. Defendant BCS is a street-level commercial tenant at this address, and the Sharp Defendants own the property. Plaintiff alleges that she slipped and fell on a sign board lying on the sidewalk while she was walking in front of BCS's nail salon.

Plaintiff testified that on the date of this accident, between 9:00 and 11:00 AM, she was walking on Third Avenue towards the subway station on 149th Street. Plaintiff explained that she was walking slower than usual because it was raining. She was wearing blue jeans, a trench coat, and leather shoes, and held an umbrella over her head with her right hand. As she walked along Third Avenue, Plaintiff saw a lot of debris that consisted of tree branches and leaves. She then stepped on a "white piece of hard board" and "went down very fast." The white board was described as a board that is seen in front of places where a business would write a menu or sign. Plaintiff testified that the board was located in the middle of the sidewalk, but she was not sure if she saw it before she fell. The board was a single, flat piece, that was shiny and measured two feet by two and a half feet. After she fell, Plaintiff noticed that the sign was directly next to a beauty shop. A woman inside the shop allegedly looked out at her. Later, Plaintiff returned to the location to identify where she fell. According to the defendants, she was only able to determine where she fell based on the location address identified in the police report that was drafted.

The Sharp Defendant submit the deposition transcript of Albert Benarroch, who is employed as the building's property manager. He testified that he visited the property approximately once per week. On each visit, he never saw a sign or sandwich board placed outside of the nail salon. The Sharp Defendants also submit the deposition transcript of Lam Nguyen, owner of BCS. Ms. Nguyen did not have a specific recollection of October 1, 2010, and was not aware of Plaintiff's alleged incident. In 2010, she never placed signs on the sidewalk in front of her business. She never had signs or posters attached to the outside of glass windows of the store. She did not see any of her neighbors using boards outside of their businesses. Ms. Nguyen also testified that she cleaned the sidewalk with a broom every morning, and had never seen signs on the sidewalk.

Defendants also provide a signed commercial lease agreement between BCS and the landlord. Ms. Nguyen knew that pursuant to the lease terms, she had the duty to keep sidewalks and curbs in front of her store free from snow, ice, dirt, and rubbish. She also knew if she did not keep the area clean, she would get a ticket from the "cops." Ms. Nguyen never made any prior

complaints about the sidewalk, and never had any issues with garbage or debris in front of the store. Moreover, her neighbors never complained about any issues on the sidewalk.

The Sharp Defendants now argue that they are entitled to dismissal of Plaintiff's complaint. There is no evidence that the defendants had actual or constructive notice of this allegedly hazardous condition. Further, the evidence demonstrates that Defendant never placed a sign board of any other type of sign in front of the business. In the alternative, the Sharp Defendants contend that they are entitled to summary judgment on their cross-claim for contractual indemnification against BCS. The lease provided that the tenant was to, among other things, keep the sidewalks and curbs free from snow, ice, dirt, and rubbish. The tenant also agreed to indemnify and hold the landlord harmless from all claims resulting from the tenant's breach of the lease.

BCS cross-moves for summary judgment. In support of the cross-motion, BCS notes that Plaintiff testified that the business currently operating at 3007 Third Avenue was not the same store she allegedly fell in front of. BCS also argues that they had no actual or constructive notice of this allegedly hazardous condition. Both witnesses testified that they had never seen a board of the type described, and the business operating at the accident location had never used such a board or sign. In partial opposition to the Sharp Defendants' motion, BCS argues that there is no evidence that they breached the applicable lease provision, and therefore summary judgment on this issue must be denied.

In opposition to the motions, Plaintiff contends that there are issues of fact as to whether the defendants created, or had actual or constructive notice of this sign board. Ms. Nguyen recalled that she used a hanging sign in front of her store, but did not remember if it was there when Plaintiff fell. The applicable lease provided that the any outside signs were not allowed unless they were to be required by law. Plaintiff argues that Ms. Nguyen contradicted herself in her testimony. Plaintiff contends that there are issues of fact as to whether the hanging sign on the awning may have been the sign on which Plaintiff slipped and fell. Moreover, contrary to the defendants' arguments, the Plaintiff has adequately identified the location of her fall. Plaintiff also notes that Ms. Nguyen opened the store every day and would have seen anything that was lying on the sidewalk in front of the business. Accordingly, there is an issue of fact as to whether

the defendants had constructive notice of this allegedly hazardous condition. Plaintiff further argues that, pursuant to the controlling lease, the Court may find that BCS had a duty to maintain and clean the sidewalk.

In reply, the Sharp Defendants argues that nothing in the record supports Plaintiff's claim that the defendants caused this alleged hazard, or had actual notice of it. None of the witnesses were aware of the existence of a sign at any point before, or even after, the accident. Further, Plaintiff could only state where she fell by reading the police report that listed the address. She did not recognize the location when she was shown a picture of the premises. Regarding their cross-motion, the Sharp Defendants contend that pursuant to the lease, there is no question that BCS was obligated to defend and indemnify the property owner for any claims dealing with their requirement to clean the sidewalk. BCS also submits a reply affirmation, and argues that Plaintiff could not identify the location of her accident without the aid of an inadmissible hearsay police report. Further, Plaintiff's description of the sign that allegedly caused her fall is very different from the hanging sign on the awning that Ms. Ngyuen identified at her deposition. The existence of that hanging sign at some point, therefore, does not establish the existence of a material fact and is completely irrelevant. The contractual indemnification issues between the co-defendants has no bearing on the defendants' collective entitlement to dismissal of Plaintiff's complaint.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then

produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

To impose liability upon a landowner in a premises liability-related action, there must be evidence that a dangerous or defective condition existed and that the defendant either created or had actual or constructive notice of the condition (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967 [1994]). To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time before the accident to permit defendant's employees to discover and remedy it. *(see Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986] *).* The notice required must be more than general notice of any defective condition. (*Id.*) The law requires notice of the specific condition alleged at the specific location alleged (*Id.*)

Importantly, it is not the plaintiff's burden in opposing a motion for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendant's burden to establish lack of notice as a matter of law (*Giuffrida v. Metro N., Commuter R.R. Co.*, 279 A.D.2d 403, 404 [1st Dept. 2001]). Such a moving defendant must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed (*Id.; see also Gautier v. 941 Intervale Realty LLC.*, 108 A.D.3d 481 [1st Dept. 2013]).

Here, the defendants have established that they did not create the allegedly hazardous condition that caused Plaintiff's fall. The witnesses produced by the defendants testified that they did not possess any white boards or signs and never placed any such signs on the subject sidewalk before this accident. The defendants also established that they lacked constructive

notice of the allegedly defective condition. Ms. Nguyen testified that she, herself, cleaned the front of the store and sidewalk every morning and had never noticed a sign or board on the sidewalk. Ms. Nguyen and Mr. Benarroch both testified that no one ever made any prior complaints about the condition of the subject sidewalk.

In opposition to the motion, Plaintiff has failed to raise a genuine issue of material fact. Contrary to Plaintiff's contentions, Ms. Nguyen's testimony that her business did have a blue hanging sign, at some point, is insufficient to raise an issue of fact as to whether defendants caused, created, or had actual notice of the condition at issue. The sign described at Ms. Nguyen's deposition, and apparently depicted in photographs, was a blue sign that hung from the awning of the property. Ms . Nguyen testified that she could not remember when this sign was installed, and she further stated that it never previously fell off of the awning. The sign allegedly encountered by Plaintiff, however, was a two-foot by two and a half-foot, white, shiny board. Plaintiff described the object as a type of sign a business would use to write a "sign or a menu of stuff like that , you know, and put up against in the business place" (Pl. Dep. at 20:2-6). In light of the foregoing, there are no issues of fact as to whether the defendants created this condition or had actual notice of the sign at issue. It would be pure speculation to conclude that the hanging sign discussed at Ms. Nguyen's deposition "may have been the sign on which Plaintiff slipped and fell..." (Pl. Aff. In Opp., at Par. 13). Speculation such as this is insufficient to defeat summary judgment (*see, e.g., Briggs v. Pick Quick Foods, Inc.*, 103 A.D.3d 526 [1st Dept. 2013]). Further, Plaintiff has not presented any evidence to raise a triable issue of fact as to whether the defendants had constructive notice of this condition. Ms. Nguyen testified that she personally opened the business every morning, cleaned the front of the store with a broom, and never saw the sign or board. There was, moreover, no record of any complaints about garbage, signs, or debris on the sidewalk location (*see Hutchinson v. Sheridan Hill House Corp.*, 110 A.D.3d 552 [1st Dept. 2013]; *see also Rodriguez v. New York City Housing Auth.*, 102 A.D.3d 407 [1st Dept. 2013]). Defendants are therefore entitled to dismissal of the complaint, even accepting Plaintiff's contentions that she adequately identified the location of the alleged accident. Any issues regarding contractual indemnification between the co-defendants,

moreover, do not raise a factual issue as to the co-defendants' lack of notice of this allegedly hazardous condition.

In light of the foregoing, that branch of the Sharp Defendant's motion seeking summary judgment on their cross-claims for common-law indemnification are denied as moot.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the defendants' motion and cross-motion for summary judgment, dismissing Plaintiff's complaint, are both granted, and it is further,

ORDERED, the Plaintiff's complaint is dismissed with prejudice, and it is further,

ORDERED, that the Sharp Defendants' motion for summary judgment on their cross-claims for contractual indemnification is denied as moot.

This constitutes the Decision and Order of this Court.

Dated: 6/15, 2015

Hon. Mary Ann Brigantti, J.S.C.