Perkins v 85 Kenmare Realty Corp.
2014 NY Slip Op 31100(U)
April 11, 2014
Supreme Court, New York County
Docket Number: 102502/11
Judge: Joan A. Madden
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SCANNED ON 4/30/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 102502/2011
PERKINS, KATHRYN ANN
VS.
85 KENMARE REALTY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** Summary Judgmt

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 30 2014
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
APR 29 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: April 11, 2014

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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KATHRYN ANN PERKINS

Index No. 102502/11

Plaintiff,

- against -

85 KENMARE REALTY CORP., SHERYL LEE, INC., d/b/a BAG, MALIA MILLS, INC. and MALIA MILLS SWIMWEAR, INC.,

Defendants.

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JOAN A. MADDEN, J:

In this personal injury action, defendant 85 Kenmare Realty Corp. ("Kenmare") moves for summary judgment dismissing the complaint and all cross claims against it (motion seq. no. 002). Defendants Malia Mills, Inc. and Malia Mills Swimwear, Inc. (together "Mills") move, and defendant Sheryl Lee, Inc., d/b/a Bag ("Lee") cross moves, for summary judgment dismissing the complaint at all cross claims asserted against them (motion seq. no. 003).[1] Plaintiff Kathryn Ann W. Perkins ("Perkins") opposes the motions and cross motion.

Background

Perkins alleges that she sustained personal injuries on April 23, 2010, when she tripped and fell on the sidewalk between two stores, one located at 197 Mulberry Street and the other at 199 Mulberry Street. Kenmare owns the building known as 197-199 Mulberry Street (the Building) and leased the commercial space at 197 Mulberry Street to Lee and the commercial space at 199 Mulberry Street to Mills.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

[1]Motion seq. nos 002 and 003 are consolidated for disposition.

The sidewalk in front of the building has two levels (see exhibit N to Kenmare's motion for photos) with a painted red line stripe de-marking the two levels. The raised level of the sidewalk is in front of both 197 and 199 Mulberry Street.

Perkins testified on the date of the accident, she was leaving Mills' store which is known as "Bag," and turned left to continue shopping down the street. Perkins EBT at 16. Perkins testified that at the time she exited the store there were a lot of people walking on the sidewalk and she tried to get around them. Id. at 14-15. Perkins walked about 6 steps until she reached a step, about 6 inches tall, leading to the sidewalk, when her right foot rolled over the ledge of the step. After she tried to correct herself with her left foot, her left foot and knee went under her and she fell forward hitting her face on the ground. Id. at 17-20.

Irving Eng, ("I. Eng), Vice President of Kenmare, testified that the two-tier sidewalk was there when Kenmare purchased the building. I. Eng EBT, at 22. He did not know the purpose of the two levels. Id. at 19. He testified that the Building is not land marked. Id. at 18. The basic structure of the sidewalk has been the same since Kenmare assumed ownership of the Building in 1973. Id. at 35. According to I. Eng, there is a vault underneath the sidewalk which creates a basement area used by certain stores, including the store leased by Mills. He was aware of the red coloring along the upper sidewalk but did not know who painted it red. Id. at 22 He denied that he was aware of a prior lawsuit arising out of a fall on the same sidewalk, although he acknowledged during his deposition that he notarized an affidavit submitted by his brother in connection with such an action. Id. at 30-31.

Lailin Eng. ("L. Eng"), testified that she has been a managing agent employed by Kenmare since 1985. L. Eng EBT, at 12. She also testified that since she has been the managing agent of the Building, Kenmare has not hired an architect nor engineer to inspect the building or sidewalk, and never investigated the feasibility of changing the sidewalk from two levels to one. Id. at 25, 26. Additionally, she testified that Kenmare was never involved in making arrangements for the sidewalk to be painted. Id. at 38.

Elizabeth Kraemer ("Kraemer"), has been Mills' store manager since 2007. Kramer EBT at 7, 8. Kraemer testified that she was at the Mills' store on the day of Perkins accident and was made aware of the accident when she heard Perkins moaning on the ground, and called 911. Id. at 35, 36. According to Kraemer, she had a clear view of Perkins on the ground and that Perkins was on the ground to the left of the doorway when facing the street. Id. at 55. She also testified that she was unaware of prior complaints or accidents that occurred in front of the Mills store or the Bag store next door. Id. at 42-45. However, she testified that she observed people trip over the "second curb" once a day. Id. at 15-19. Kraemer also testified that Mills has never put warning signs or barricades to warn about the raised sidewalk. Id. at 41. The owner of the store, Malia Mills, was not there on the accident date. Kraemer described the accident in an April 26, 2010 email to Ms. Mills on which she states that "the woman who fell ...was walking with friends and family up the sidewalk when she fell. She fell between our store and the Bag store, but was closest to our store front."

Sheryl Lee Lukomski, the President of Lee and owner of "Bag," was not in the store on the day of the accident. Sheryl Lee Lukomski EBT, at 9, 11. She stated the landlord told her that the sidewalk was elevated because it has to do something with a

vaulted sidewalk, which has to do with the basement. Id. at 12. Further, Ms. Lee testified that Irving Eng told her that the landlord, (i.e. Kenmare), put the red coloring on the elevated tier of the sidewalk so the sidewalk was uniform all the way around the building. Id. at 16, 17. She also testified that the lower part of the sidewalk was re-cemented and resurfaced in 2002 or 2003, by someone hired by the landlord. Id. at 18, 19 Ms. Lee also stated that she complained to the landlord about the sidewalk, but Irving Eng said that the sidewalk could not be leveled because the neighborhood is a landmark and it would be impossible to get permits to level the sidewalk, and that it was a vaulted sidewalk. Id. at 31-33. Ms. Lee testified that she has observed people trip over the two-tiered sidewalk about once a day. Id. at 13. She did not post any warnings about the sidewalk or install any barricades or cones. Id. at 22, 23. However, when she first moved into the store, she painted the sidewalk orange and yellow to warn customers about the step but that the landlord painted it over to make it uniform with the other stores. Id. at 22-24.

Kenmare's Motion

Kenmare moves for summary judgment asserting that under its identical lease agreements with Lee and Mills, these defendants are responsible for keeping the sidewalk in good repair. Specifically, Kenmare relies on paragraph 7 of the rider to the leases which states that:

> Except as otherwise herein specifically provided, the Tenant shall, at its own cost and expense, keep and maintain in good repair and order and in safe condition, and make replacements as required, the building and improvements comprising the demised premises and their full equipment and appurtenances and each part thereof and shall use all precautions to prevent waste, damage, or injury to the demised premises and each and every part thereof, including sidewalks.

Kenmare also relies on the report of Scott Derector, Engineering Consultant for Affiliated Engineering Laboratories, Inc. Mr. Derector, who visited the accident scene in August 2012, opines in his letter dated November 22, 2012, that "the single riser that was allegedly involved in...[Perkins'] accident did not create any inordinate danger or injury risk for persons attentive to their surroundings [and that] the red stripe along the single riser served as a sharp visual cue of a change of elevation."

In any event, Kenmare argues that even if were subject to liability, it is entitled to summary judgment on its cross claims for contractual indemnification against Lee and Mills based on the identical indemnification clauses in their respective leases. Specifically, it relies on paragraph 2 of the Rider, and paragraph 8 of the Lease. Paragraph 2 of the Rider, entitled Indemnity and Liability, provides that:

> Landlord shall not be responsible or liable for any damage or injury to property of any kind or description, or to any person or persons, at any time on the said demised premises, including damages or injury to... invitees or visitors, and the Tenant hereby covenants and agrees that Tenant will forever indemnify and hold Landlord harmless from and against any such damage or injury, and Tenant covenants and agrees during the demised term to purchase and maintain at the Tenant's own cost and expense public liability and property damage insurance protecting and indemnifying Landlord, as an additional insured, from any and all claims for damages resulting from injury to person or property or from loss of life or property sustained by anyone whomsoever in and about the said demised premises of any part thereof, or adjoining sidewalks, whether arising out of the Landlord's negligence or not.

Paragraph 8 of the Lease provides, in part that:

> Tenant shall indemnify and save harmless [Kenmare] against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which [Kenmare] shall not be reimbursed by insurance, including reasonable attorneys' fees paid suffered or incurred as a result of any breach by the Tenant... of any covenant

> or condition of this lease or by the carelessness, negligence or improper conduct of the Tenant....In case any action ...is brought against [Kenmare] by reason of any such claim, Tenant upon written notice from [Kenmare] will at Tenant's expense, resist or defend such action....

Perkins opposes Kenmare's motion, asserting that Kenmare is potentially liable to her under New York City Administrative Code § 7-201 and 19-101(b), and that the sidewalk's condition constitutes a "substantial defect" and "a trip hazard" under Administrative Code §§7-210 and 19-152. Perkins also argues that Kenmare had prior notice of the defective condition and points to two previous lawsuits involving the subject sidewalk in which Kenmare was named as a defendant. See Brown v. 85 Kenmare Realty Corp., et al; Index No. 117931/09; Saretsky v. 85 Kenmare Realty Corp., 85 AD3d 89 (1st Dept 2011).

In support of her opposition, Perkins submits the affidavit of Herman Silverman, a professional engineer, who inspected the sidewalk in August 2012. Silverman states that the sidewalk is approximately 7-feet wide from the curb to the raised abutting sidewalk [and that] the vertical differences in height between the two levels of the sidewalk are not uniform." Silverman Aff., ¶ 5. He further states that "[i]n the area where plaintiff's trip and fall occurred the difference varies in height from 2 inches at 199 Mulberry Street to 4 inches abutting 197 Mulberry Street." Id.

Based on this configuration he opines that:

> [t]he abutting raised portion of the sidewalk in conjunction with the lower portion of the sidewalk presents a hazardous and dangerous condition to pedestrians such as plaintiff using this sidewalk after exiting the retail stores on Mulberry Street thereby caused plaintiff's accident as the result of: the sharp vertical grade change between the abutting elevated sidewalk and the abutting sidewalk below; the lack of appropriate warnings, such as warning signs, handrails and/or barricades to indicate the change in

> elevation; the camouflaged effect of the concrete and the upper and lower portion of the sidewalk/walkway, which blend with the appearance of the concrete of the lower level sidewalk, thereby creating optical confusion and/or deceptive visual pattern causing the height differential not to be apparent....
> Id., ¶ 6.

Silverman further opines that the red stripe warning "were inadequate and allowed to wear away without any reasonable effort... to restore them. "Id., ¶ 14. He also opines that 2 to 4 inch change in elevation violates Administrative Code § 19-152 which states that a tripping hazard exists "where the vertical grade differential between the adjacent sidewalk flags is greater than or equal to one half inch." He also states that Kenmare violated its duty to keep the sidewalk in a reasonably safe condition as required by Administrative Code § 7-201 and that the area constitutes a sidewalk under Administrative Code §19-101(d). Silverman also states that the hazardous conditions of the sidewalk "could easily have been mitigated by converting the transition from sidewalk to abutting walkway into a ramp [and that] the cost for this mitigation is estimated to be in the range of $6,000." Id., ¶ 11.

Mills and Lee each oppose Kenmare's motion to the extent Kenmare seeks summary judgment on its cross claims for indemnification. They argue, *inter alia*, that under their respective leases they were not responsible for making structural repairs to the sidewalk

In reply, Kenmare argues that the prior action in Saretsky v. 85 Kenmare Realty Corp., did not give it notice of the defect as it involved different factual circumstances than those present in the instant case.

On a motion for summary judgment, the proponent "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 from the case...." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d

851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Section 7-210 is entitled "[l]iability of real property owner for failure to maintain sidewalk in a reasonably safe condition," imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. Collado v. Cruz, 81 A.D.3d 542 (1st Dept 2011). Administrative Code § 19–101(d) defines sidewalk as 'that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians," and the First Department has held that "in the absence of a definition in section 7–210, the definition of sidewalk in section 19–101(d) should govern." James v. 1620 Westchester Ave, LLC, 105 AD3d 1, 2 (1st Dept 2013). Here, the two-level area is between the lateral lines of Mulberry street and the property and qualifies as a sidewalk.

Moreover, even assuming *arguendo* that the report of Kenmare's expert were sufficient to make a prima facie showing that the sidewalk was not defective, the record, including the affidavit of Perkins' expert controverts any such showing. In this connection, section 19-152, entitled "[d]uties and obligations of property owner with respect to sidewalks and lots," and read in conjunction with § 7-210, sets forth the responsibilities of an abutting landowner and lists nine categories of "substantial defects" that the Commissioner of Transportation may order a property owner to repair, has been viewed as "a guidepost for determining the scope of a landlord's duty of maintenance [of the sidewalk]." King v. Alltom Props., Inc., 16 Misc.3d 1125(A)(Sup Ct Kings Co. 2007); see also, Calise v. Millennium, 26 Misc.3d 1222(A)(Sup Ct.

NY Co. 2010). Of relevance here, section 19-152 defines a "trip hazard" as "a substantial defect" "where the vertical grade differential between the adjacent sidewalk flags is greater than or equal to one half inch." Here, based on affidavit of Perkins' expert the vertical grade differential between the two levels was between 2 and 4 inches.

Next, the record raises a triable issue of fact as to whether Kenmare breached its duty to provide a safe means of ingress and egress based on evidence that it had actual and/or constructive notice of the defect based on evidence of daily trip and fall incidents on the subject sidewalk and the two previous lawsuits in which Kenmare was named a defendant which involved the same subject sidewalk. See generally Peralta v. Henriquez, 100 NY2d 139 (2003).

Furthermore, it cannot be said as a matter of law that the sidewalk defect was open and obvious. The issue of "whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion." Westbrook v. WR Activities-Cabrera Mkts., 5 A.D.3d 69, 72 (1st Dep't 2004). As the First Department noted "the mere fact that a defect or hazard is capable of being discerned by a careful observer is not the end of the analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked." Id.

In any event, a finding that a condition is open and obvious does not eliminate a defendant's duty to maintain the property in a reasonably safe condition. Westbrook v. WR Activities-Cabrera Mkts., 5 A.D.3d at 73. See generally, O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996). In this case, the record raises issues of fact as to whether the defect in the sidewalk was an open and obvious condition. Saretsky v. 85 Kenmare Realty Corp., 85 AD3d 89 (finding that the trial court erred in granting summary

judgment in favor of Kenmare on the ground that the condition of the subject sidewalk was open and obvious).

Next, as there are triable issues of fact as to whether the injuries to Perkins were caused by any breach by Mills and/or Lee of any covenant or condition in their respective leases or by their carelessness, negligence or improper conduct, Kenmare is also not entitled to summary judgment on its cross claims for contractual indemnification. In this connection, the court notes that while Lee and Mills were responsible keep and maintain the sidewalk in good repair and in a safe condition, and to make replacements and improvements as required, it cannot be said as a matter of law that they breached this duty, particularly as Lee and Mills maintain that the repair was a structural alteration not covered by this provision. Likewise, the record raises issues of fact as to whether the "carelessness, negligence or improper conduct" of these defendants gave rise to plaintiff's claim.

Accordingly, Kenmare's motion for summary judgment is denied.

Mills' Motion and Lee's Cross motion

Mills moves for summary judgment dismissing the complaint and all cross claims against it, arguing that it cannot be held liable for Perkins' injuries as the record, including the photograph marked by Perkins during her deposition, shows that Perkins fell in front of the Lee's store, Bag, and not Mills' store. Mills also notes that Perkins was shopping at Bag just prior to her fall. In addition, Mills argues that it did not create any defect or have actual or constructive notice of it, and that it owes no duty of care to Perkins.

Mills also submits a written report from Douglas Peden, in architect retained by Mills. Mr. Peden, who inspected the site on August 31, 2012, concludes in his report that:

> 1) the step within the sidewalk was not created by the retail tenants at 197-199 Mulberry Street.
> 2) The sidewalk and the vault are not under the ownership or control of retail tenants at 197-199 Mulberry Street.
> 3) The painted stripe provided a reasonable warning for reasonably attentive pedestrians of the existence of the step in the sidewalk.
> 4) If any code violations exist at the subject sidewalk, they are not the responsibility of the retail tenants at 197-199 Mulberry Street.

Lee cross moves for summary judgment, arguing that it owes no duty to Perkins, who, according to the testimony of Mills' store manager, fell in front of Mills' store after leaving Bag. Moreover, Lee argues that even if Perkins did fall in front of its store, Lee would not be liable to Perkins who did not fall on any defect that Lee was obligated to repair. In this connection, Lee argues that the two-tiered sidewalk is not under its control, and that under the lease, it was prohibited from altering the sidewalk (paragraph 3), and that its responsibility for the sidewalk was limited to making non-structural repairs (paragraph 4).[2] In any event, Lee argues that the lease does not serve as a basis for any duty owed by Lee to Perkins, who is merely an incidental beneficiary to the agreement.

Perkins opposes the motion and the cross motion, arguing that as occupiers of stores open to the public, Mills and Lee owe a duty to provide a reasonably safe means of ingress and egress. Moreover, Perkins asserts that the record shows that both Mills and Lee were aware of

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[2]Paragraph 4 provides in relevant part that:

> Tenant shall throughout the term of the lease, take good care of the demised premises (including, without limitation, the storefront) and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

the tripping hazard outside their stores, and points out that the deponents for Mills and Lee admitted that they knew that people tripped over the two-tiered sidewalk about once a day. Perkins also points out the Mills was a defendant in Brown v. 85 Kenmare Realty Corp., et al, while Lee was a defendant in Saretsky v. 85 Kenmare Realty Corp., 85 AD3d 89.

Mills opposes Lee's cross motion to the extent Lee argues that Perkins fell solely in front of Mills' store and notes that before she fell, Perkins was shopping at Lee's store, Bag. Lee opposes Mills' motion insofar as Mills seeks to impose responsibility on it, noting that Mills' employee testified that Perkins fell in front of Mills' store, and that Mills, and not Lee, benefits from the vault under the sidewalk. Kenmare opposes the motion and cross motion to the extent they seek to dismiss its cross claims for contractual indemnification.

As a preliminary matter, the record creates an issue of fact as to whether Perkins fell as a result of the condition of the sidewalk in front of Mills' and/or Lee's store. In this connection, the photograph circled by Perkins during her deposition creates an issue of fact as to whether she fell in front in front of Mills' store and/or Lee's store, or in between the stores. There remains the issue, however, as to whether these defendants can be said to owe a duty to Perkins. Although "Administrative Code § 7–210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, [when]... the tenant did not create the condition or make special use of the sidewalk, ...[p]rovisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party...." Collado v. Cruz, 81 AD3d 542, 542 (1st Dept 2011); see also, Hughey v. RHM-88, LLC, 77 AD3d 520, 522 (1st Dept 2010). Here, there is no evidence, and Perkins does not argue, that Mills and Lee created the condition of the sidewalk or made special use of the sidewalk, and their respective leases do not give rise to a duty owed to a third-person, like Perkins.

That being said, however, as the stores were open to the public, these defendants owe a duty a duty to Perkins to provide her with a safe means of egress or ingress, *citing* Peralta v. Heriquez, 100 NY2d at 143; Reyes by Reyes v. Dunning, 216 AD2d 449 (2d Dept 1995); Hedges v. East River Plaza, LLC, ___ Misc3d _____, 981 NY2d 894 (Sup Ct NY Co. 2013).

Here, there are triable issues as to whether Mills and/or Lee breached this duty based on the record showing that Perkins was injured in an area necessary for egress or ingress, i.e. near the entrance of both stores. In this connection, even assuming *arguendo* that Mills and Lee were not permitted to alter the structure of the sidewalk, the triable issues of fact exist as to whether they owed members of the public a duty to warn them of the condition, particularly in light of evidence of that these defendants had notice that people tripped on the two-tiered sidewalk every day.

Finally, issues of fact exist as to whether Mills and Lee are liable to Kenmare under the indemnification clauses contained in their respective leases. In this regard, however, the court notes that, as asserted by Lee, the indemnification provision contained in paragraph 8 of the lease, requires that "the tenant [i.e. Mills and Lee] to reimburse the owner [i.e. Kenmare] only for damages not covered by any insurance policy, including insurance obtained by the owner." Collado v. Cruz, 81 AD3d at 543 (interpreting an identical or nearly identical paragraph 8 in the lease before it).

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant 85 Kenmare Realty Corp. (motion seq. no. 002) is denied; and it is further

ORDERED that the motion and cross motion by defendants Malia Mills, Inc. and Malia Mills Swimwear, Inc. and defendant Sheryl Lee, Inc., d/b/a Bag, respectively, are denied; and it is further

ORDERED that the parties shall proceed to mediation.

DATED: April 11, 2014

J.S.C.

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FILED

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