

**Kandyllis v Ditmars 31st St. Assoc., LLC**

2010 NY Slip Op 30216(U)

January 22, 2010

Supreme Court, Queens County

Docket Number: 22584/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

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CALLY KANDYLIS and ZAHARIS KANDYLIS,  
  
Plaintiffs,  
  
-against-  
  
DITMARS 31<sup>st</sup> STREET ASSOCIATES, LLC  
and COMMERCE BANK, N.A.,  
  
Defendants.  
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Index No. 22584/07  
  
Motion  
Date October 6, 2009  
  
Motion  
Cal. Nos. 18 and 19  
  
Motion  
Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that the branch of the motion by defendant Commerce Bank, N.A. ("Commerce") for summary judgment seeking dismissal of the action of plaintiffs Cally Kandylis and Zaharias Kandylis in its entirety against Commerce Bank pursuant to CPLR 3212(b); that branch of the motion by defendant Commerce Bank for summary judgment against Ditmars 31<sup>st</sup> Street Associates, LLC ("Ditmars") seeking dismissal of all cross claims and the motion by defendant Ditmars 31<sup>st</sup> Street Associates, LLC for summary judgment in favor of defendant 31<sup>st</sup> Street Associates, LLC, dismissing plaintiffs' Complaint and all cross claims on the grounds that the defect alleged to have caused plaintiff's accident was trivial and non-actionable as a matter of law; and/or further granting Ditmars summary judgment on its claim for contractual indemnification against Commerce Bank, N.A. and directing Commerce to reimburse Ditmars for all reasonable costs incurred since February 14, 2008 based upon the written lease in effect on the date of plaintiff's accident requiring Commerce Bank to maintain the sidewalk adjacent to the property and to indemnify, defend, and save landlord harmless from any and all claims are hereby consolidated for purposes of disposition of the instant motions only.

That branch of Commerce Bank's motion for summary judgment seeking dismissal of plaintiffs Cally Kandylis and Zaharias Kandylis' action in its entirety against Commerce Bank pursuant to CPLR 3212(b) is hereby decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff, Cally Kandylis on July 6, 2007, when she tripped and fell on a sidewalk adjacent to the premises located at 22-01 31<sup>st</sup> Street, Queens, New York. Plaintiff's spouse, Zaharis Kandylis, sues derivatively.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (*see id.*).

Defendant Commerce Bank established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice

thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). Defendant Commerce established that the defective condition as described by plaintiff (a dent in the sidewalk, a loose brick that was not elevated properly) is trivial in nature and not the type of defect that is actionable as a matter of law. Commerce also established that it did not owe plaintiff a duty because it did not own the building adjacent to the alleged condition, and therefore, Commerce Bank did not owe a legal duty to a pedestrian walking on the sidewalk such as plaintiff. Defendant Commerce established that there is a Lease Agreement whereby Ditmars owned the property located at 22-01 31<sup>st</sup> Street on the date of the accident and Commerce Bank was the tenant of the premises. There is no provision in the Lease Agreement making Commerce responsible for maintaining the sidewalk. Commerce was not obligated by the Lease Agreement to make structural repairs to the sidewalk. In support of the motion, defendant Commerce Bank submits, inter alia, the examination before trial transcript testimony of plaintiff herself, Cally Kandylis, who testified that there was a gap between the area where the bricks met the sidewalk, the examination before trial transcript testimony of plaintiff, Zaharis Kandylis, the examination before trial of co-defendant Ditmars by Joseph Hollander, and the examination before trial transcript testimony of defendant Commerce by Andres Matos. Defendant Commerce Bank established its prima facie entitlement to summary judgment.

In opposition, plaintiffs raise a triable issue of fact. Plaintiff submits, inter alia, photographs of the defect and the examination before trial transcript testimony of plaintiffs themselves. Such photographs and testimony show that the hole was caused by a sunken brick and that it was not a transient defect, but rather one that developed over time, and had been in existence long enough that the hole was filled with weeds. Triable issues of fact exist, inter alia, as to whether the defect was trivial in nature.

That branch of Commerce Bank's motion for summary judgment seeking dismissal of plaintiffs Cally Kandylis and Zaharias Kandylis' action in its entirety against Commerce Bank pursuant to CPLR 3212(b) is hereby denied.

That branch of Commerce Bank's motion for summary judgment against Ditmars seeking dismissal of all cross claims is hereby decided as follows:

Defendant Commerce Bank established a prima facie case against Ditmars that there that there are no triable issues of fact regarding contribution and indemnification. Defendant Commerce established that since it is not liable to plaintiffs the claims against Commerce Bank for contribution must fail (CPLR

1401). Defendant Commerce also established a prima facie case that Ditmars' contractual indemnification cross claims against Commerce must be dismissed. Commerce demonstrated that there are no contracts which obligate Commerce to maintain the sidewalk where the plaintiff's accident took place. Additionally, Ditmars cannot demonstrate that Commerce Bank was responsible for making structural repairs to the sidewalk. Ditmars, as the landlord of the premises, is responsible for the repair and maintenance of the sidewalk, and is therefore liable for plaintiff's injury.

In opposition, defendant Ditmars raises a triable issue of fact. Defendant Ditmars contends that Commerce incorrectly argues that it owed no duty to plaintiff because it did not own the building abutting the public sidewalk involved in plaintiff's accident. Defendant Ditmars establishes that there is a triable issue of fact as to whether the terms of the lease place responsibility for the maintenance and repair of the public sidewalk on Commerce. Accordingly, that branch Commerce Bank's cross motion for summary judgment against Ditmars seeking dismissal of all cross claims is hereby denied.

Defendant Ditmars 31<sup>st</sup> Street Associates, LLC's motion for summary judgment in favor of defendant 31<sup>st</sup> Street Associates, LLC, dismissing plaintiffs' Complaint and all cross claims on the grounds that the defect alleged to have caused plaintiff's accident was trivial and non-actionable as a matter of law; and/or further granting Ditmars summary judgment on its claim for contractual indemnification against Commerce Bank, N.A. and directing Commerce to reimburse Ditmars for all reasonable costs incurred since February 14, 2008 based upon the written lease in effect on the date of plaintiff's accident requiring Commerce Bank to maintain the sidewalk adjacent to the property and to indemnify, defend, and save landlord harmless from any and all claims is hereby decided as follows:

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see *id.*).

Defendant Commerce Bank established its prima facie entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2d Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2d Dept 1997]). Defendant Ditmars established a prima facie case that the alleged defect in the sidewalk was trivial and non-

actionable. Defendant Ditmars also established a prima facie case that Ditmars is entitled to contractual indemnification from Commerce pursuant to the clear and unambiguous language in the lease between landlord and tenant.

In opposition to the motion, plaintiff raised a triable issue of fact as to whether the defect was trivial in nature or whether it was actionable. In opposition, plaintiff submits, inter alia, photographs of the defect showing that the hole was caused by a sunken brick and showing that it was not a transient defect, but rather one that had developed over time, and had been in existence long enough that the hole was filled with weeds; the examination before trial transcript testimony of plaintiff, Cally Kandylis, who testified that she was caused to fall by a loose, uneven brick that caused a "hole" or "opening" on the sidewalk and that she felt her foot go in that hole, causing her to fall, that the hole she fell in was as deep as half the thickness of the bricks themselves, and that the hole was deep enough to catch her foot and cause her to trip; and the examination before trial transcript testimony of plaintiff Cally Kandlyis' husband, Zaharis Kandylis, who testified that he was walking with her when she tripped and he saw the ground and "the bricks were broken there are there was like a hole." There are also triable issues of fact as to whether or not there was a lease provision that obligated Commerce to maintain the premises or whether the defect was a structural condition not encompassed by the Lease. Plaintiff established that Section 7-210 of the New York City Administrative Code imposes a non-delegable duty on property owners to maintain the sidewalks adjacent to their buildings.

The issue of contractual indemnification is not yet ripe as the issue as to whether or not the owner was negligent has not been decided (*Northland Associates v. Joseph Baldwin Construction Co., Inc.*, 6 AD3d 1214 [4th Dept 2004]). This is a triable issue of fact. Therefore, Ditmars' request for summary judgment on its contractual indemnification claim is denied.

This constitutes the decision and order of the Court.

Dated: January 22, 2010

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**Howard G. Lane, J.S.C.**