

Giuffrida v Metro-North Commuter Railroad Co.

2002 NY Slip Op 30120(U)

January 3, 2002

Supreme Court, New York County

Docket Number: 600892101

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
Justice

PART 2

Jay G. Goffida
- v -
Metro-North Commuter
railroad corp.

INDEX NO. 111350/97
MOTION DATE 7/9/01
MOTION SEQ. NO. 003
MOTION CAL. NO. 47

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

SCANNED
JAN 11 2002

Upon the foregoing papers, it is ordered that this motion

*motion is decided in accordance
with accompanying memorandum decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE _____

Dated: 1/3/02

Ley
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

LOUIS B. YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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JAY GIUFFRIDA,

Deeision/Order
Index No. **600892101**

Plaintiff,

- against -

METRO-NORTH COMMUTER RAILROD
COMPANY and **AZOR** BAKE SHOP d/b/a
ZARO'S BREAD BASKET,

Defendants.

----- X
----- X
METRO-NORTH COMMUTER RAILROAD
COMPANY,

Third-party
Index No. **590128/99**

Third-party Plaintiff,

- against -

AZOR BAKE SHOP d/b/a ZARO'S BREAD
BASKET,

Third-party Defendant.

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LOUIS B. YORK, J.:

In this action, plaintiff alleges that he sustained personal injuries when he
siipped and fell in the Grand Central Terminal the afternoon of May 30, 1996. Plaintiff
commenced her lawsuit against defendant Metro-North Commuter Railroad Company
["Metro-North"]. In the course of discovery, the parties determined that plaintiff's
accident occurred in the vicinity of Track 17. Metro-North commenced a third-party

action against Azor Bake Shop d/b/a Zaro's Bread Basket ("Zaro's") – which, according to Metro-North, rented a space in Grand Central from Metro North in the vicinity of Track 17 by permit agreement and assumed contractual responsibility for maintaining the area in question. Plaintiff also added Zaro's as a direct defendant.

Discovery is complete and plaintiff filed the Note of Issue in April of 1999. Since then, the parties have been engaged in dispositive motion practice. In September 1999 Justice Harold Tompkins, who then presided over this case, considered Metro-North's motion for summary judgment. As a result of the decision the court dismissed the case, including the third-party complaint. The court denied, as moot, Metro-North's motion for summary judgment on the third-party complaint.

Plaintiff appealed the trial court's decision and in late January of this year the First Department reversed, reinstating the complaint as against both defendants. Giuffrida v. Metro North Commuter Railroad Company, 279 A.D.2d 403, 720 N.Y.S.2d 41 (1st Dept. 2001). As a result, the third-party complaint was also reinstated. Therefore, Metro-North, as third-party plaintiff, once again brings its motion for summary judgment on the third-party complaint.

First, according to Metro-North, the area plaintiff describes in her deposition as the accident site is adjacent to the premises that Zaro's possesses by permit. Thus, pursuant to the permit agreement, Metro-North claims that Zaro's is responsible for maintaining the area and is fully responsible for any injuries that occur there. Second, Metro-North alleges that under the contract Zaro's must indemnify it for any alleged injuries on the premises. By failing to purchase indemnification insurance, Metro-North

argues, Zaro's breached its contractual obligations and is now responsible for the costs of litigation. Third, Metro-North states that Zaro's counterclaims must be stricken because under the permit Zaro's waived its right to assert counterclaims.

Zaro's, as third-party defendant, opposes Metro-North's motion. In response to the first argument, Zaro's states that the alleged accident occurred in the passageway or "Graybar" area near the premises, and that Metro-North rather than Zaro's was responsible for maintaining this area. Under the contract between Zaro's and Metro-North, Zaro's agreed to "keep the Premises and the area adjacent to the Premises in good order and condition so that at all times the Premises are clean . . . and present no hazardous condition. . . ." Contract, ¶ 12(c). The Premises is described as

the approximately 593 square foot area located within the Main Waiting Room at [Grand Central Terminal] and known as MWR #1 . . . in which area a kiosk tent structure to be supplied by Metro-North will be located and . . . the approximately 467 square foot area located at the west end of the Graybar Passageway at [the Terminal] and known as MC #31

Contract, ¶ 1(a).

Metro-North is correct that if plaintiff fell in an area maintained by Zaro's pursuant to the agreement in the permit, then Zaro's is liable for any damages. See D'Orlando v. Port Authority of New York & New Jersey, 250 A.D.2d 805, 805-06, 674 N.Y.S.2d 382, 382-83 (2nd Dept. 1998). However, it is not clear who controlled the accident site. In her deposition, plaintiff estimated that she was between five and ^{ten} feet of Zaro's prior to her accident, and that she did not get closer than five feet before she fell. In her various statements, she indicated that to one side of her stood Zaro's and to

the other stood a rectangular garbage can. Salvatore Lupi, Jr., a Metro-North employee who served as the General Foreman for building services at Grand Central, stated in his deposition that Metro-North was responsible for picking up the garbage in the cans and sweeping and mopping the area around the cans. If plaintiff fell in this area, then, Metro-North was responsible. The evidence before the court does not indicate whether the spot where the accident occurred is part of the common area, maintained by Metro-North; or, whether it is part of the area adjacent to the premises, arguably maintained by Zaro's. Thus, an issue of fact remains. See Melendez v. Bruckner Plaza Assoc., 273 A.D.2d 136, 136-37, 709 N.Y.S.2d 557, 558 (1st Dept. 2000) (discussing same issue in context of failure to procure insurance).

Moreover, although the lease provision is evidence that Metro North lacked the control over the area adjacent to Zaro's necessary to make them liable, "it is not dispositive over the issue of control, which may be established by proof of the landlord's promise, either written or otherwise," to maintain the area. Colon v. Mandelbaum, 244 A.D.2d 292, 292, 664 N.Y.S.2d 302, 303 (1st Dept. 1997). Here, Mr. Lupi indicated that Metro-North's staff cleaned the area in front of Zaro's. Bruce Boland, another Metro-North employee whom Zaro's deposed, agreed that Metro-North was responsible for removing the litter and cleaning the hallway around Track 17. Together, this evidence suggests that Metro North undertook the cleaning and maintenance of much of the area outside of Zaro's. This increases the possibility that Metro-North might be liable for negligence -- even if the area where plaintiff fell turns out to be "adjacent" under the language of the contract. See also Colicchio v. The Port

Authority of New York and New Jersey, 246 A.D.2d 464, 465, 668 N.Y.S.2d 385, 386 (1st Dept. 1998) (reversing dismissal of complaint, where evidence of prior conduct might have revealed that defendant had assumed responsibility to make repairs). Because when asked whether his staff cleaned immediately in front of the store Mr. Lupi said that did not know “how far out it was they had to clean,” Lupi Dep. at p. 34, there remains an issue as to who controlled and maintained the accident site.

Second, Metro-North argues that Zaro’s has not properly indemnified Metro-North pursuant to the contract. However, Zaro’s has purchased the requisite insurance policy. Zaro’s annexes copies of the insurance policies in question. Thus, it has shown compliance with its contractual duty to purchase indemnification insurance. Metro-North indicates that Zaro’s failed to provide it with this information previously. Zaro’s is required to provide Metro-North with all proper insurance information within 30 days of service of a copy of this order with notice of entry.

To the extent that in its argument Metro-North challenges Zaro’s willingness to indemnify, Zaro’s states that the issue cannot be determined at this time. As Zaro’s points out, an issue of fact remains as to whether Metro-North’s negligence contributed to or caused the accident. Provision 7 of the contract, which discusses liability, provides in pertinent part:

. . . Vendor [Zaro’s] shall indemnify, . . . and defend Metro-North . . . from and against any and all . . . suits, claims, costs and expense, including, without limitation, reasonable attorneys’ fees and disbursements . . . arising from or in connection with . . . injury to . . . any person, which. . . shall arise in any manner. . . in connection with this Permit or the use, occupancy or management of the Premises by Vendor. . . or arising out of work performed . . . in the . . .

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maintenance, cleaning, . . . or other work in respect to Vendor's use of the Premises . . . except to the extent of Liabilities attributable to . . . injury . . . caused by the negligence or intentionally tortious act of any of the Indemnitees.

Based on the contractual language, Zaro's does not have to indemnify and defend Metro North if there is a finding that the latter was negligent. Only if there is a finding of negligence and Zaro's does not proffer indemnification under its policy is it in violation of the contract. See Thomas v. Euclid Avenue Assoc., 269 A.D.2d 440, 441-42, 703 N.Y.S.2d 227, 299 (2nd Dept. 2000) (party could be vicariously liable if accident not caused by landlord's negligence). Therefore, summary judgment regarding this issue is premature. See Nrecai v. Fisher Liberty Co., 282 A.D.2d 213, 214, 723 N.Y.S.2d 26, 27-28 (1st Dept. 2001); Mavashev v. Shalosh Realty, 233 A.D.2d 301, 303, 649 N.Y.S.2d 718, 720 (2nd Dept. 1996).

Third, Zaro's concedes that it cannot assert counterclaims against Metro-North. However, it states that it can assert cross-claims against Metro-North, which is its co-defendant in **Ms.** Giuffrida's action.

Metro-North states that Zaro's waived its right to ~~assert~~ counterclaims or cross-claims against it. Metro-North refers to provision 6 of the permit agreement between the parties, which states, at subsection (a):

This Permit is not a lease, is not intended and shall not be construed to create the relationship of landlord and tenant between Metro-North and Vendor [Zaro's] and does not grant to Vendor rights of a tenant under the law of the State of New York in any action against Metro-North, in any claim brought by Vendor against Metro-North, or in defense against any action brought by Metro-North. Vendor hereby waives its rights (i) to assert any counterclaims in any action

or proceeding brought by Metro-North, (ii) to a trial by jury, (iii) to assert equitable defenses and (iv) to consolidate action(s) brought by Vendor with action(s) brought by Metro-North.

The court cannot find any law supporting Zaro's position that its waiver of counterclaims against Metro-North does not also apply to cross claims. Moreover, its argument *is* not logical, as, to a large extent, it would defeat the purpose of the waiver. However, the court does note that the waiver, which often exists in the context of landlord-tenant disputes, is unusually broad as interpreted. Accordingly, the court rejects this argument and strikes the cross- and counterclaims, with leave to renew/reargue within 30 days of the date of entry of this order if Zaro's is able to provide adequate legal support for its position.

Based on the above, therefore, it is


ORDERED that the portion of this motion seeking summary judgment on the third-party complaint is denied; and it is further

ORDERED that the portion of the motion seeking to strike Zaro's counterclaims and crossclaims is granted; and it is further

ORDERED that Zaro's must provide any outstanding insurance information to Metro-North within 30 days of service of a copy of this order with notice of entry along with a demand describing the outstanding information Metro-North still desires.

ENTER:

Dated: 1/3/02



LOUIS B. YORK, J.S.C.

LOUIS B. YORK