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

PRESENT: EDWARD H. LEHNER PART 19
Justice

0106722/2001

JANA L
vs
WEST 129TH ST. REALTY

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

SEQ 11

SUMMARY JUDGMENT

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

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
FEB 24 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: FEB 22 2005

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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JANA L.,

Plaintiff,

INDEX NO.
106722/01

- against -

WEST 129TH STREET REALTY CO., LLC, WEST 129TH STREET REALTY CORP. d/b/a WEST 129TH STREET CORP., 408-412 WEST 129TH STREET ASSOCIATES, LLC, GREEN MANAGEMENT CO. LLC d/b/a GREEN REALTY MANAGEMENT CORP., J & M REALTY SERVICES CORP., STEVEN GREEN, JERRY EDELMAN and JOSEPH TAHL,

Defendants.

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EDWARD H. LEHNER, J.:

Before the court is a motion by 408-412 West 129th Street Associates, LLC ("Associates"), J & M Realty Services Corp., Jerry Edelman and Joseph Tahl (collectively "Purchasers") for summary judgment dismissing plaintiff's complaint; a cross-motion by plaintiff for summary judgment dismissing the first and second affirmative defenses of the Purchasers and of West 129th Street Realty Co., LLC, West 129th Street Realty Corp., Green Realty Management Co., LLC and Stephen Green (collectively "Sellers"); and a cross-motion by West 129th Street Realty Co., LLC ("Seller") for summary judgment against Associates on the cross-claim for contractual indemnification.

Plaintiff's complaint sets forth causes of action based on negligence and violations of the New York City Administrative Code. She alleges that she was a resident of 408 West 129th Street (the "Building"); that she was assaulted in her apartment at the Building at 12:30 p.m. on January 25, 2001 when returning thereto after doing grocery shopping; and that the rooftop door lock was broken and the outside Building door lock worked intermittently. All defendants have interposed affirmative defenses asserting culpable conduct and the applicability of CPLR Article 16 for apportionment.

Purchasers allege that, since the closing for the purchase of the Building by Associates commenced at 2 p.m. on January 25, 2001 and did not conclude until 4 p.m., at the time of the alleged assault at 12:30 p.m. of that day they owed no duty of reasonable care to plaintiff since they then had no ownership, possession, operation or control of the Building. Sellers assert that based upon the September 2000 contract between Associates and Seller for the purchase of the Building (the "Contract"), Associates assumed a duty to indemnify Seller for any liability resulting from the assault. The Contract set the closing date as January 31, 2001, and included the following provision:

> "11.5 Indemnification. Purchaser shall indemnify and hold harmless Seller from any and all claims, losses, liabilities, costs, damages and expenses, including, but not limited to, court costs

> and reasonable attorneys' fees asserted against or incurred by Seller resulting from or arising out of the ownership, use or operation of the Property on or subsequent to the Closing Date. The provisions of this Section 11.4 (sic.) shall survive the Closing."

The closing was advanced to January 25 pursuant to an amendment dated October 30, 2000 that permitted a reduction in the purchase price in the event Associates closed title "on or before January 30, 2001." Pursuant to a separate agreement, which states therein that it was "executed ... as of January 10, 1999," but which is dated "as of January 25, 2001," Associates assumed all liability of the landlord under the leases assigned to it "from and after the date hereof." The liability policy obtained by Associates provided coverage "from 1/25/01," and adjustments at the closing appear to have been made pursuant to §8.1(a) of the Contract "as of 11:59 p.m. of the date next preceding the closing date." Thus, the Seller received credit for real estate taxes prepaid for all but 24 days in January and a corresponding adjustment was made for rental payments.

Although upon closing the Building was conveyed to Associates, plaintiff has also sued the other parties designated herein as Purchasers. However, plaintiff has failed to refute the contention that defendant Joseph Tahl was president of a corporation that was the managing member of a limited liability company that was the managing member of Associates, and thus not personally

liable for any obligations of Associates (see, Limited Liability Company Law, §609). Also there is no refutation of the contention that J & M Realty Services Corp. was hired by Associates only after the closing to manage the Building and that Edelman was president of that corporation. As such, plaintiff has failed to raise a triable issue as to any liability as against said defendants. Thus, the branch of the motion of the Purchasers to dismiss the action as against Edelman, Tahl and J & M Realty Services Corp. is granted and the Clerk shall enter judgment accordingly, severing the remaining action.

None of the Sellers has moved to dismiss the action and Associates' motion is based solely on the contention that it owed no duty to plaintiff at the time of the assault. Importantly, Sellers do not contend that Associates had ownership, possession, operation or control of the Building prior to the completion of the closing. While plaintiff seeks to assert that Associates, by reason of the aforesaid indemnity and assumption provisions, is liable to her, she also sets forth no facts showing that Associates had possession, ownership, operation or control of the Building prior to the closing. That Associates may have previously inspected the Building and that §6.2 of the Contract required the Seller to install a new boiler and new treads on the stairs does not make Associates responsible to the tenants for any defects until it procured the ability

and subsequent obligation to remedy any defective conditions.

The threshold and dispositive question on the motion to dismiss by Associates is whether it, as a contract vendee, owed a duty of care to the tenants of the Building. "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" [Church v. Callahan Industries, Inc., 99 NY2d 104, 110 (2002)]. "In the absence of duty, there is no breach and without a breach there is no liability" [Sheila C. v. Povich, 11 AD3d 120, 125 (1st Dept. 2004)]. "Landlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct" [Burgos v. Aqueduct Realty Corp., 92 NY2d 544, 548 (1998)]. This is "because the special relationship puts them in the best position to protect them against the risk" [532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc., 96 NY2d 280, 289 (2001)]. In Balsam v. Delma Engineering Corporation, 139 AD2d 292 (1st Dept. 1988), it was stated (p. 296):

> "Absent a duty of care to the person injured, a party cannot be held liable in negligence .... Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises .... The existence of one of more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective condition of the property."

Whether a duty is owed is determined as of the time of the incident involved. That title passed later in the day does not create a duty that did not exist earlier in the day. The assumption created by the indemnity clause relating to claims arising "on or subsequent to the Closing Date" and the assumption of lease obligations as of such day did not create a duty by Associates to plaintiff in view of the absence of any control of the premises by Associates prior to the time of closing. Such assumption only related to the contractual relationship between Associates and the Seller. "Under our decisional law, a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" [Espinal v. Melville Snow Contractors, Inc. 98 NY2d 136, 138 (2002)]. Here it cannot be said that the tenants of the Building in any way relied on the assumption, nor that Associates replaced the Seller as the party obligated to maintain the Building prior to the closing, nor that Associates did anything prior to the closing that made the Building less safe. See in general, Church v. Callahan Industries, Inc., supra; Regatta Condominium Association v. Village of Mamaroneck, 303 AD2d 739 (2d Dept. 2003).

Since Associates was not in a position to enter the Building to make repairs prior to closing, it cannot be said the plaintiff was an intended third-party beneficiary of the assumption, and plaintiff does not argue that she is such a

beneficiary. It is noted that §16.3 of the Contract specifically states that no benefits are intended to be conferred upon any third party. Rather she principally maintains that the court should enforce clear and unambiguous indemnity and assumption provisions contained in the agreements between the Seller and Associates, and the unusual prayer for relief in her own notice of motion is to grant summary judgment to the Seller on its cross-claim for contractual indemnity against Associates.

Enforcing the indemnity provision would require Associates to indemnify the Seller for any judgment rendered against it as a result of plaintiff establishing negligence of the Seller in its maintenance of the Building. Contracts between sophisticated business persons where one party contracts for indemnity for the party's own negligence may be enforced unless statutorily prohibited in particular circumstances (i.e., General Obligations Law §5-322.1). "In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications" [Lago v. Krollage, 78 NY2d 95, 99 (1991)]. In Gross v. Sweet, 49 NY2d 102 (1979), it was noted that such exoneration clauses are often

"'negotiated at arm's length between ... sophisticated business entities' and ... can be viewed as merely 'allocating the risk of liability to third parties between themselves, essentially through the employment of insurance'" (p. 108). While the court in Margolin v. New York Life Insurance Company, 32 NY2d 149 (1973), stated that "indemnity provisions will not be construed to indemnify a party against his own negligence unless such intention is expressed in unequivocal terms," it held that this "is not to say that the indemnity clause must contain express language referring to the negligence of the indemnitee, but merely that the intention to indemnify can be clearly implied from the language of the entire agreement and the surrounding facts and circumstances" (p. 153). See also, McDonald v. MJ Peterson Development Corporation, 269 AD2d 734 (4th Dept. 2000); Strauss v. Stoneledge Farms, 256 AD2d 1186 (4th Dept. 1998); Ameri v. Young Skincare Center, Inc., 170 AD2d 280 (1st Dept. 1991).

Here, the financial adjustments made at closing pursuant to the Contract treated Associates as the owner of the Building on January 25, although as aforesaid, it did not have any control over the Building until after the closing was completed. The insurance policy obtained by it effective "from January 25, 2001" provided it coverage for that entire day. Thus, the provision of the Contract whereby Associates provided indemnity to the Seller for tort liability

on that day may be enforceable as it appears that the parties intended Associates to be protected by insurance.

Nevertheless, a triable issue of fact has been raised as to enforceability due to the fact that there is some question as to whether Seller, as a result of knowledge obtained by its superintendent, was aware of the assault prior to the completion of the closing and failed to disclose this material fact to Associates (see Tr. pp. 29-31). If Associates was informed of such incident it may well, notwithstanding its insurance coverage, have sought to adjourn the closing for a day, in which circumstance its indemnity would not have come into effect until the following day. In any event, it would have had the opportunity to attempt to make special arrangements with respect to the potential liability for such incident of which it otherwise had no notice prior to the completion of the closing. Accordingly, the motion of Seller for summary judgment on the claim for contractual indemnity is denied. Thus, while the application of Associates to dismiss the complaint as against it is granted, the cross-claim against it by the Seller shall continue as a third-party claim.

Plaintiff's cross-motion to strike the affirmative defense asserted regarding the applicability of CPLR article 16 is granted without opposition (Tr. pp. 37-38). Regarding the defense of comparative negligence, "a total absence

of comparative negligence as a matter of law" is sufficient to warrant dismissal of such an affirmative defense [Thoma v. Ronai, 189 AD2d 635, 636 (1st Dept. 1993), aff'd. 82 NY2d 736 (1993)]. See also, Dasher v. Wegmans Food Markets, Inc., 305 AD2d 1019 (4th Dept. 2003). In this action, plaintiff stated that she was in the process of closing her apartment door when the assailant pushed his way in and attacked her. There is a total absence of evidence that plaintiff opened the apartment door to the assailant or was otherwise negligent. Her cross-motion to strike the affirmative defense of culpable conduct is therefore granted.

This decision constitutes the order of this court.

Dated: February 22, 2005

J.S.C.