

Sostre v Jaeger

2006 NY Slip Op 30255(U)

September 26, 2006

Supreme Court, New York County

Docket Number: 0111949/2004

Judge: Sherry Klein Heitler

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

PRESENT: Sherry Klein Heitler

PART 3

Index Number : 111949/2004

SOSTRE, GIOVANNI

vs

JAEGER, LUELLEN

Sequence Number : 001

SUMMARY JUDGMENT

NO. 111949/04

ON DATE

ON SEQ. NO. (001)

ON CAL. NO.

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

is decided in accordance with the memorandum decision dated 9.26.06

FILED

SEP 29 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9.26.06

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30**

----- X
GIOVANNI SOSTRE and
GLORIA SOSTRE,

Plaintiffs,

- against -

LUELLEN JAEGER d/b/a ALT JAY REALTY CO.,
UNIVERSAL ENTERPRISES and SAMIR BENNANI,

Defendants.

----- X
LUELLEN JAEGER d/b/a
ALT JAY REALTY CO.,

Third-Party Plaintiff,

- against -

STARBUCKS CORPORATION,

Third-Party Defendant.

----- X
SHERRY KLEIN HEITLER, J.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition.

In Motion Sequence Number 001, defendant/third-party plaintiff Luellen Jaeger d/b/a Alt Jay Realty Co. (Alt Jay) moves, pursuant to CPLR 3212, for an order (1) dismissing plaintiffs' complaint on the ground that Alt Jay was not negligent, and (2) granting Alt Jay summary judgment on its third-party complaint, and dismissing any counterclaims, on the ground that third-party defendant Starbucks Corporation (Starbucks) owed a contractual duty to indemnify and defend Alt Jay.

Starbucks cross-moves, pursuant to CPLR 3212 (e), for summary judgment dismissing the third-party complaint.

Index No. 111949/04

DECISION AND ORDER

Index No. 590822/05

FILED
SEP 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

In Motion Sequence Number 002, defendants Universal Enterprises and Samir Bennani move, pursuant to CPLR 3212, for an order dismissing the complaint and all cross claims on the ground that there is no negligence attributable to these defendants.

For the reasons set forth below, all motions are denied.

Background

Plaintiff Giovanni Sostre (Sostre), and his wife, Gloria Sostre, allege that Sostre was injured on December 21, 2003, while working at his place of employment at a Starbucks store located at 1559 East Second Avenue, New York, New York (Premises). Defendant/third-party plaintiff Alt Jay is deemed the “owner” of the Premises, in a lease agreement dated May 5, 1994 (Lease), between it and Starbucks. The leased property includes the first floor (street level), second floor, and basement at the Premises. Defendant Samir Bennani is the sole proprietor of defendant Universal Enterprises, which “performed various items of electrical maintenance work” at the Premises pursuant to an oral agreement with Starbucks (Affidavit of Samir Bennani, sworn to June 14, 2006, ¶ 2).

Sostre alleges that his injuries were caused by a malfunctioning circuit breaker that was located in the basement of the Starbucks store located at the Premises. Sostre testified that, on the day of the incident, he went to the basement of the Premises, opened the circuit breaker box, and found the bar switch in an off position. He flipped the switch of the circuit breaker box, which then exploded, causing him injury (Sostre Dep. Tr., at 65-66). He testified further that, in the month prior to the incident, the store had experienced electrical problems relating to a water leak, and a fire occurred in the store due to the “box in the ceiling” (*id.* at 32). He testified about a subsequent fire in the store involving the circuit breakers in that “you turn on the bar and it breaks down, the wires

melted” (*id.* at 36). Sostre also testified that, three weeks prior to the incident, Starbucks had installed a new circuit breaker (*id.* at 42).

The complaint contains three causes of action. In the first cause of action, Sostre alleges that his injuries were due to the negligence of Alt Jay. In the second cause of action, Sostre alleges that Bennani, doing business as Universal, provided electrical repair services for the Premises, and that their negligence caused Sostre to be electrocuted, and suffer serious wounds and burns to his body. In the third cause of action, Gloria Sostre alleges that, as a result of the foregoing, she has been deprived of the society, services, consortium, and companionship of her husband.

Plaintiffs did not include Starbucks in the original action, because Sostre is collecting benefits in his capacity as a Starbucks employee pursuant to the Workers’ Compensation Law. In the third-party complaint, Alt Jay alleges that, if Sostre suffered the complained-of injuries, then they were caused solely by reason of the negligence of Starbucks. Alt Jay seeks common-law indemnity from Starbucks for any amounts paid to plaintiffs, and costs, disbursements, and attorney’s fees. It also seeks contractual indemnity and contribution based upon the applicable provisions of the Lease.

Starbucks’ answer to the third-party complaint by Alt Jay contains a counterclaim alleging that any injury that Sostre may have suffered would have been caused by the negligence of Alt Jay, and it seeks indemnification and contribution in the event that it is found liable.

Alt Jay argues that the provisions of the Lease between it and Starbucks establishes that it had no control or responsibility to maintain the electrical systems on the Premises. In addition, the Lease afforded Starbucks the right to build or alter the electrical systems, and Starbucks was able to exercise that right through the use of a licensed contractor. Alt Jay was an out-of-possession landlord, and received no prior complaints about the electrical system. Alt Jay also asserts that,

because Starbucks failed to accept the tender of the defense on its behalf, Starbucks breached the duty to indemnify and defend it.

Starbucks argues that, because Sostre admits that he did not sustain a “grave injury,” as defined in Section 11 of the Workers’ Compensation Law, the first cause of action of the third-party complaint for common-law indemnification should be dismissed.

As for the second cause of action for contractual indemnification, Starbucks argues that the Lease does not expressly require Starbucks to indemnify and defend Alt Jay in suits against it by a Starbucks employee for injuries sustained in the course of employment. Thus, under controlling case law, contractual indemnification is unavailable in a situation involving Workers’ Compensation.

In support of their cross motion for summary judgment, Universal and Bennani contend that, because they did not own the property where the accident occurred, and because there is nothing in the record to support a claim of negligence on their part, no duty to Sostre ever arose, and therefore, Sostre has not proven the elements of negligence, and has not set forth a prima facie case.

Discussion

Alt Jay’s motion for dismissal of the complaint as against it, on the ground that it was not negligent, is denied.

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in its favor (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Alt Jay has not done so. Alt Jay has not met its burden as movant to demonstrate a prima facie entitlement to summary judgment, because it has produced no affidavit or relevant testimony to substantiate its claim that it had no notice of the alleged electrical hazard (*Vaughan v 1720 Unico, Inc.*, 30 AD3d 315 [1st Dept 2006]). The conclusory assertions by

counsel for Alt Jay, that Alt Jay performed no electrical work nor received any complaints, are unpersuasive and without probative value (*see Lewis v Safety Disposal Sys. of Pa.*, 12 AD3d 324 [1st Dept 2004]).

Alt Jay argues that it was an out-of-possession landlord that owed no duty of care to plaintiffs. In support, it cites (1) Section 43.01 of the rider to the Lease (Rider), which provides, in relevant part: “Tenant covenants and agrees that it shall . . . (f) maintain the interior of the demised premises in a clean, orderly, safe and sanitary condition at all times”; (2) Section 44.01 (a) of the Rider, which provides, in relevant part, that all alterations shall be made “at Tenant’s sole cost and expense, in a good and first class workmanlike manner”; (3) Section 44.02 of the Rider, which provides: “Tenant shall use licensed contractors to perform any alteration which affects the Building electrical system”; (4) Section 45.02 (c) of the Rider, which provides: “Owner shall have no liability to Tenant for any loss, damage or expense which Tenant may sustain or incur by reason of any change, failure, inadequacy or defect in the supply or character of the electrical energy furnished to the demised premises”; and (5) the indemnification provisions in the Lease.

These provisions do not support Alt Jay’s assertion that it cannot be liable for plaintiffs’ injury as a matter of law, notwithstanding its claim that it had no contractual duty to maintain the Premises, it had no direction or control over the store’s operations, and it was not responsible for the maintenance and repair of the Premises.

Generally, an out-of-possession landlord may not be held liable for a third-party’s injury on the premises unless the landlord has notice of the defect, and had consented to be responsible for maintenance or repair (*Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230 [1st Dept 2002]). Here, Article 13 of the Lease provides that the:

* 7]

“Owner or Owner’s agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the Building or which Owner may elect to perform, following Tenant’s failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.”

Thus, contrary to Alt Jay’s assertion, the Lease did not totally divest it of control over or responsibility for repairs and maintenance to the Premises, and the retention of the right to enter and inspect could be a sufficient predicate for liability considering the duties imposed upon building owners under Sections 27-127 and 27-128 of the Administrative Code of the City of New York for the safe maintenance of buildings and facilities (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]).

Alt Jay claims that it had no notice of any hazardous condition. As discussed above, Alt Jay has not provided any probative evidence in support of this assertion. Moreover, plaintiffs’ expert witness, Richard J. Daken Jr., a New York State-licensed engineer, opined that, as of November 23, 2003, water or steam leaks had created a hazardous condition regarding the electrical panel at the Premises, thereby allowing an already existing and unnecessarily dangerous condition to deteriorate further (Affidavit of Daken, sworn to May 24, 2006 [Daken Aff.], ¶ 5). Where, as here, the landlord expressly reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance and repair, and there is a specific statutory violation, constructive notice of a defect or hazardous situation may be found (*See Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, *supra*; *De Sousa v Jocar Realty Co.*, 302 AD2d 336 [1st Dept 2003]; *Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, *supra*; *Hausmann v UMK, Inc.*, 296 AD2d 336 [1st Dept 2002]).

Daken alleges that the owner of the Premises violated Sections 27-127 and 27-128 of the Administrative Code “in failing to maintain the building and parts thereof in good working order from at least November 29, 2003” (Daken Aff., ¶ 15). To be sure, an allegation of a violation of these sections of the Administrative Code, which imposes upon a building’s owner the duty to maintain the building in a safe condition, does not constitute the allegation of a specific statutory violation (*see e.g. Boateng v Four Plus Corp.*, 22 AD3d 323 [1st Dept 2005]; *Nunez v Alfred Bleyer & Co.*, 304 AD2d 734 [2d Dept 2003]). Daken also asserts, however, that Alt Jay violated Sections 27-3064 (m), 27-3024 (a), 27-3027, and 27-301 (8) (a) of the Administrative Code.

For example, he states that he personally inspected the remains of the electrical panel and the replacement electrical panel at the Premises, and found that the electrical panel that emitted the electrical arc was installed in a condition that allowed contact with substances such as water, and was later permitted to remain in that condition. He concludes that this violates Section 27-3064 (m), which provides that the panel should have been installed to prevent such an occurrence:

“Unused openings in boxes, cabinets and fitting shall be effectively closed by metal plugs or plates affording protection substantially equivalent to that of the wall of the fitting, box or cabinet.”

(Daken Affidavit, ¶ 17). Additionally, he states that the circuit breakers found in the remains of the electrical panel were not listed for use in the Westinghouse cabinet that he examined, in violation of Section 27-3027 (Daken Affidavit, ¶ 19). He cites other examples of alleged statutory violations.

Moreover, although some decisions state that a specific statutory violation *and* a structural defect are required (*see e.g. Gomez v 192 E. 151st St. Assoc.*, 26 AD3d 276 [1st Dept 2006]), the alleged faulty electrical condition could constitute a structural defect (*De Sousa v Jocar Realty Co.*, 302 AD2d 336, *supra*). Contrary to Alt Jay’s assertion (Reply Affirmation at 6), a violation of the

“Electrical Code” (Administrative Code §§ 27-3001 *et seq.*) could be a basis to impose liability on an out-of-possession landlord, even if that landlord is not in the business of installing, altering, or repairing wiring and appliances for electrical light, heat, and power (*see De Sousa v Jocar Realty Co.*, 302 AD2d 336, *supra*).

Finally, the argument that it was improper for plaintiffs’ expert to opine as to statutory violations is unavailing (*see e.g. Torres v West St. Realty Co.*, 21 AD3d 718 [1st Dept 2005] [judgment in favor of out-of-possession landlord because plaintiff’s expert failed to cite any statutory violations], *lv denied* 7 NY3d 703 [2006]; *Veccia v Clearmeadow Pistol Club, Ltd.*, 300 AD2d 472 [1st Dept 2002] [same]).

As for Alt Jay’s motion for summary judgment against Starbucks, Section 11 of the Workers’ Compensation Law bars third-party actions against employers for indemnification or contribution, unless (1) the injured employee suffered a “grave injury” within the meaning of the statute, or (2) the third-party action is based upon a contract in which the employer expressly agreed to contribution or indemnification of the claimant (*Flores v Lower East Side Serv. Ctr.*, 4 NY3d 363, *rearg denied* 5 NY3d 746 [2005]). Sostre does not allege that he suffered a “grave injury” within the meaning of the statute.

The second ground for permitting a third-party action for contractual indemnification is where the claim is “based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered” (Workers’ Compensation Law § 11; *Rodrigues v N & S Build. Contr.*, 5 NY3d 427 [2005]). Section 52.01 of the Lease between Starbucks and Alt Jay provides that:

“Neither Owner nor Owner’s agents, officers, directors, shareholders, partners, trustees or principals (disclosed or undisclosed) shall be liable to Tenant or Tenant’s agents, employees, contractors, invitees, customers, concessionaires or licensees or any other occupant of the demised Premises, and Tenant shall indemnify Owner in connection with or arising from any injury to Tenant or to any other person or for any damage to, or loss (by theft or otherwise) of, any of Tenant’s property or the property of any other person, irrespective of the cause of such injury, damage or loss, unless due to the negligence of Owner or Owner’s agents or its employees, agents, contractors, invites, customers, concessionaires, licensees or other occupants of the Building.”

Alt Jay argues that this provision (combined with § 57.03) unequivocally states that Alt Jay shall not be liable to Starbucks employees, and that Starbucks, as tenant, is obligated to indemnify it, as owner, in connection with, or arising from, any injury to Starbucks, or any other person, which includes Starbucks employees. One problem with this assertion is that the provision itself states that the indemnification is inapplicable in situations involving the owner’s negligence, which is alleged in the complaint, and, as discussed above, remains an issue of fact (*see also* Rider § 45.02 [c]).

Starbucks is also not presently entitled to summary judgment, because it expressly agreed to indemnify Alt Jay in situations where the injury results from Starbucks’ own negligence (Lease, § 52.03), and negligence of the various parties to these actions remains an issue of fact (*Zeigler-Bonds v Structure Tone, Inc.*, 245 AD2d 80 [1st Dept 1997]).

Despite the Workers’ Compensation Law shield of employers from liability as joint tortfeasors, a third party may recover against an employer pursuant to contract (*Rodrigues v N & S Build. Contr.*, 5 NY3d 427, *supra*; *Acosta v S.L. Green Mgt. Corp.*, 267 AD2d 67 [1st Dept 1999]). Contrary to Starbucks’ assertion, the indemnification provision is enforceable, because the agreement “directly, firmly and explicitly” evidences Starbucks’ promise to make all alterations in a good and first-class workmanlike manner, using licensed contractors to perform any alteration that affects the building’s electrical system, and to indemnify Alt Jay for its negligence in this regard (*Rodrigues v*

N & S Build. Contr., 5 NY3d 427, *supra*). Starbucks' reliance upon *Tonking v Port Authority of New York and New Jersey* (3 NY3d 486 [2004]) is unconvincing, because there the party seeking indemnification was not a party to the operative contract containing the indemnification clause, nor was it found to be an "agent" of the contracting (indemnified) party.

Universal and Bennani have also not demonstrated entitlement to summary judgment.

In support of their motion, Universal and Bennani submitted an affidavit of Glenn C. Frederick, P.E., a professional engineer, licensed by the State of Pennsylvania, as well as an affidavit from Bennani. Bennani states that he never performed any work at Starbucks that may have contributed to the accident. Although he performed electrical work at the Premises subsequent to the leaks and prior to December 21, 2003, Starbucks personnel had already hired a plumber and advised his company that they had repaired the leaks. According to Bennani, it was only when they were advised that all leaks had been stopped, and suitable repairs to the plumbing had been completed, that Universal performed any electrical work, insofar as he opened a junction box so that water could drain, and thereafter reset the power. Bennani states further that any actions or omissions by Universal were unrelated to the accident at issue, wherein Sostre is alleged to have flipped a tripped circuit breaker and suffered electrical burns.

Notwithstanding these assertions, evidence in the record raises a question of fact as to whether Universal performed electrical work at the Premises in the months prior to the accident that bears some causal relationship to the alleged accident. For example, Bennani testified that, on November 29, 2003, he sent one of his workers on a service call because of a loss of power in the basement of the Premises. Because there were "too many wires," they added an extension box, and checked all the wiring and connections. Additionally, Bennani's testimony indicates that his

company responded to a loss of power due to a short circuit resulting from a "flood" (Bennani Dep. Tr., at 39-41, 54).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant/third-party plaintiff Luellen Jaeger d/b/a Alt Jay Realty Co. (001) is denied; and it is further


ORDERED that the cross motion for summary judgment by Starbucks Corporation is denied; and it is further

ORDERED that the motion for summary judgment by defendants Universal Enterprises and Samir Bennani (002) is denied; and it is further

ORDERED that counsel for the parties shall appear for a conference at 10:00 a.m. on October 16, 2006, at Room 438, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of the court.

DATED: SEPTEMBER 26, 2006


SHERRY KLEIN HEITLER
J.S.C.

FILED
SEP 29 2006
COUNTY CLERK'S OFFICE
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