

Nisimova v Sherno's Inc.

2007 NY Slip Op 30100(U)

March 13, 2007

Supreme Court, Queens County

Docket Number: 0022399

Judge: Kevin J. Kerrigan

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Kevin J. Kerrigan Part 10
Justice

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YAFA NISIMOVA, Index No. 22399/04

Plaintiff,

- against -

Motion
Date 02/06/07

SHERNO'S, INC., MOIP ASSOCIATES and
THE CITY OF NEW YORK,

Motion
Cal. Number 15
Motion Seq. No. 5

Defendants.

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The following papers numbered 1 to 19 read on this motion and cross-motion pursuant to CPLR 2221(d) and (e) to reargue and renew.

	<u>PAPERS NUMBERED</u>
Amended Notice of Motion-Exhibits.....	1-4
Affirmation on Opposition-Exhibits.....	5-7
Reply.....	8-9
Notice of Cross-Motion.....	10-13
Affirmation in Opposition-Exhibits.....	14-16
Reply-Exhibits.....	17-19

Upon the foregoing papers, it is ordered that the motion and cross-motion are decided as follows:

Motion by MOIP to reargue the order issued by Justice David Elliot on November 13, 2006 denying its motion for summary judgment against Sherno's is denied. This Court is deciding the instant motion because Justice Elliot has been reassigned to another part. Movant has failed to demonstrate that that Court misapprehended any question of law or fact. Rather, it is movant that misconstrued the Court's opinion.

Contrary to its assertion, MOIP failed to interpose a cross-claim for contractual indemnification. MOIP's answer contains two

cross-claims. The first cross-claim asserts a cause of action for common law

The second cross-claim does not seek indemnification at all, but only contribution, in that plaintiff's injuries, to the extent any are found, were caused "in whole or in part, by the culpable conduct and breach of contract of co-defendants. . . . defendant is entitled to contribution from . . . co-defendants . . . equal to the proportionate share of responsibility as if adjudged between the defendants."

There is a fundamental difference between contribution and indemnity. "In an action for contribution, 'ratable or proportional reimbursement is sought'. . . . Indemnity, on the other hand . . . springs from contract . . . and full, not partial, reimbursement is sought" (Rock v. Reed-Prentice, 39 NY 2d 34, 38-39 [1976] [citations omitted]; see Westchester County v. Welton Beckett Associates, 102 AD 2d 34 [2nd Dept 1984]). MOIP's second cross-claim, merely by virtue of the inclusion of the phrase "breach of contract," may not be construed as seeking indemnification. It specifically seeks only contribution from co-defendants. It asserts that any injuries sustained by plaintiff were caused in whole or in part by said co-defendants and that it is entitled to contribution from said defendants for their proportionate share of responsibility. Indemnity, on the other hand, "involve[s] a shifting rather than an apportionment 'of culpability among wrongdoers'" (Rock v. Reed-Prentice, 39 NY 2d 34, 39 [citations omitted]).

MOIP's argument that it is entitled to summary judgment dismissing the complaint, since there is nothing in the language of Administrative Code §7-210 prohibiting an out of possession landlord from delegating its duty to repair and maintain the public sidewalks to its tenant, is without merit. By stating that §7-210 does not permit an owner to delegate its obligations to a tenant, the Court was not referring to any prohibition against parties allocating by agreement their respective duties to each other. A property owner and a tenant are, of course, free to contract, as between themselves, who will be responsible for the maintenance and repair of the demised property, including the sidewalks, and to agree to an indemnification provision in their lease. Rather, the Court meant that the owner may not by private contract divest itself of liability to third parties. MOIP had contended in its original motion that since it was an out of possession owner, it bore no liability for the injuries that plaintiff sustained as a result of tripping and falling upon the defective sidewalk abutting its premises and, therefore, it was entitled to summary judgment dismissing the complaint. Therefore, the Court properly denied that branch of MOIP's motion seeking dismissal of the complaint. The Court did not find that a claim for indemnification as between co-defendants was precluded by §7-210.

With respect to that branch of the motion seeking renewal, MOIP's motion is likewise denied. An application to renew must be

based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]).

Movant fails to articulate any new material facts that would support renewal. MOIP contends that renewal is proper because of new case law that was decided after the instant motion was brought. MOIP cites the case of Lewis v. Sears, Roebuck & Co., AD 3d, 2006, NY Slip Op 09516 [1st Dept, December 19, 2006]) which held that an out of possession landlord who was not obligated to make repairs pursuant to the lease agreement was not liable for plaintiff's injuries. This case, however, involved an accident that occurred in 2001, prior to the enactment of §7-210. Moreover, §7-210 would have been inapplicable, even had the accident occurred after the effective date of the statute, since it did not occur in the City of New York and since the alleged injuries were sustained on defendant's property, not on the public sidewalk (see Exhibit "I" to Sherno's affirmation in opposition). Therefore, this case does not set forth a change in the law but merely articulates the common law rule that an out of possession landlord who does not retain control over the premises is not liable for injuries sustained on the premises. MOIP clearly misrepresents to this Court that there has been a change in the law by virtue of the Lewis case.

Cross-motion by plaintiff to reargue and renew is also denied. The motion to reargue is untimely. The underlying order with notice of entry was served upon plaintiff's attorney on November 17, 2006. The instant cross-motion was served on January 19, 2007, which is more than 30 days after service of the underlying order with notice of entry (see CPLR 2221[d][3]).

In terms of renewal, plaintiff fails to set forth any new material facts.

Accordingly, the motion and cross-motion to renew and reargue are denied in their entirety.

Dated: March 13, 2007

KEVIN J. KERRIGAN, J.S.C.