

Boxer v Metropolitan Transp. Auth.

2007 NY Slip Op 31276(U)

May 16, 2007

Supreme Court, Queens County

Docket Number: 0006060/2005

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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KIM BOXER and HAIMAN BOXER,

Plaintiffs,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY,
LONG ISLAND RAILROAD, LINDA'S NATURAL
KITCHEN, LLC, THE CITY OF NEW YORK,
BAKER'S DOZEN BAGEL CORP. and MLC
MANAGEMENT CORP.,

Defendants.

Index
Number: 6060/05

Motion
Date: 04/24/07

Motion
Cal. Number: 5
Motion Seq. No. 2

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The following papers numbered 1 to 22 read on this motion by defendant Metropolitan Transportation Authority (MTA), Long Island Railroad (LIRR) and MLC Management Corp. (MLC) for summary judgment dismissing the complaint and all cross-claims against them and for contractual indemnification from defendant Baker's Dozen Bagel Corp., cross-motion by Baker's Dozen for summary judgment dismissing the complaint as against it and dismissing the cross-claims of MTA, LIRR and MLC for contractual indemnification asserted against it, and cross-motion by the City of New York for summary judgment dismissing the complaint and all cross-claims against it.

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

Motion by MTA, LIRR and MLC ("movants") for summary judgment

dismissing the complaint and all cross-claims against them and for contractual indemnification from defendant Baker's Dozen Bagel Corp. is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised or depressed portion of a sidewalk flag abutting the premises 81-09 Lefferts Boulevard in Queens County on September 21, 2004. Said premises were owned by the LIRR and leased, along with other premises, to MLC pursuant to a lease agreement commencing October 1, 1993 and ending December 31, 2008. MLC, in turn, subleased the subject premises to Baker's Dozen pursuant to a sublease agreement dated May 23, 1994 for a term commencing August 1, 1994 and ending December 31, 2008.

Plaintiff testified in her deposition that the "toe of my sneaker got caught in a groove on the slab in the sidewalk" which she described as being "about an inch deep" but "I couldn't say exactly one inch" (Exhibit "C" to motion, deposition transcript p. 56). Brian Charney, president of Baker's Dozen, testified in his deposition that he personally measured with a ruler the defect and the height differential between the subject sidewalk flag and the surrounding area of the sidewalk, at its greatest extent, was less than one-half inch, about a quarter of an inch (Exhibit "D" to motion, deposition transcript pp. 42, 50-51). Plaintiff also testified that it was midday and sunny at the time she tripped (p. 58) and there was nothing obstructing her view of the sidewalk (p. 55).

Defendants contend that since there was only a one-quarter inch height differential between the defective sidewalk flag and the surrounding sidewalk, the defect was trivial and, therefore, not actionable as a matter of law.

The issue of whether a defective or dangerous condition exists depends upon the particular facts of each case and is generally a question for the jury (see Trincere v. Copunty of Suffolk, 90 NY 2d 976 [1997]).

Although a property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant (see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]), the determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the sidewalk defect in inches, but must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time,

place and circumstance' of the injury (Trincere v. County of Suffolk, supra).

The moving papers do not contain any photographs of the subject defect. Movants contend that they are entitled to summary judgment merely because the witness for Baker's Dozen alleged that the height of the defect was about one-quarter inch, an allegation which, even if true, would, in and of itself, not establish that the defect was trivial.

Indeed, an examination of the photographs annexed to plaintiffs' opposition papers, movants' reply papers and Baker's Dozen's cross-moving papers, demonstrates, in the opinion of this Court, that the defective condition of the subject section of sidewalk depicted therein is not trivial or so de minimis as to warrant summary judgment in favor of movants as a matter of law.

With respect to that branch of the motion for summary judgment on the issue of contractual indemnification, movants contend that they are entitled to contractual indemnification from Baker's Dozen on the basis of indemnity clauses contained in the lease and sublease.

Paragraph 4 of the sublease provides, in relevant part, under the heading of "Repairs," "Tenant shall . . . take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted."

Rider Paragraph 11 of the sublease provides, "The Overtenant shall not be liable for injury to persons or property, and subtenant shall indemnify and hold harmless the Overtenant for any loss incurred for injury to persons or property except those caused by Overtenant's negligence."

Rider Paragraph 14 of the sublease provides, "Subtenant agrees to exonerate, save harmless, protect, defend and indemnify the Overtenant or any owner of the demised premises from and against any and all losses, damages, claims, suits or actions, judgments and costs, which may arise or grow out of any injury to or death of persons or damage to property in any manner whatsoever arising out of the acts or omissions, or use by subtenant, subtenant's agents, servants, employees, guests or customers of the demised premises."

Since it was the responsibility of Baker's Dozen to repair the

sidewalk, movants argue, it is required to indemnify them against plaintiff's claim of injury sustained as a result of the defective sidewalk condition. Baker's Dozen, in its cross-motion, contends that it is not responsible for the repair of the sidewalk, since it is only obligated to make non-structural repairs.

Pursuant to paragraph 4 of the sublease, Baker's Dozen is only responsible to make non-structural repairs to the sidewalk. This begs the question: What would distinguish a "structural" repair of a broken cement sidewalk from a "non-structural" repair? In the absence of any elaboration in the sublease specifically defining what type of repair would constitute a non-structural, as opposed to a structural, repair, this Court must first examine whether there is any clear conduct of the parties that would unambiguously reveal their mutual intent and understanding with respect to the sidewalk repair clause in the sublease. The deposition testimony of Brian Charney, president of Baker's Dozen (Exhibit "D" to motion) and Joe Kuppillas, president of MLC (Exhibit "G" to motion) fail to establish the mutual intent of the parties.

Charney testified that in February or March 2004, he contacted Kuppillas' office to inform him that the sidewalk was broken and to request that he repair it (p.13). He also called the office of the LIRR and also spoke to a representative from Greystone Management, which Kuppillas in his deposition (p. 67, line 9) stated is "the intermediary between the Railroad and MLC." Charney stated that he was instructed by the Greystone representative not to repair the sidewalk, as such repair was Kuppillas' responsibility (pp. 14-15).

He testified that Kuppillas initially informed him that he would repair the sidewalk, but that after two or three weeks, Kuppillas told him that after reviewing his lease, it was his belief that the repair was the responsibility of Baker's Dozen. Charney testified that he adamantly insisted that it was not his responsibility because sidewalk repairs are structural and tenants do not usually make such repairs (p. 14).

He also testified that his insurance company told him to repair the sidewalk and that he sent a letter to his insurer apprising them that he would take care of the repair (pp. 26-27). Approximately one month after the accident, Charney repaired the sidewalk at his own expense (p. 47). He testified that he wanted to deduct the cost from his rent, but that Kuppillas directed him not to do so (p. 48).

Kuppillas, in his deposition, testified that he believed it was the responsibility of Baker's Dozen to make repairs to the sidewalk (p.23). His understanding, however, was not based upon his reading

of Paragraph 4 of the sublease, but rather was based upon the language of article 10, section 1 of the main lease between LIRR and MLC (p. 25). The referenced provision of that lease provides that the lessee (MLC) is responsible to maintain the sidewalk and that it was responsible for all repairs, structural and non-structural, to the interior and exterior of the buildings covered by the lease. Kuppillas testified that it was his understanding that Baker's Dozen is, in turn, responsible for the repairs set forth in the main lease by virtue of rider paragraph 34 of the sublease (p. 27). That paragraph merely provides that the sublease is subject and subordinate to the main lease.

It is apparent from the deposition testimony of Charney and Kuppillas that each had the opposite understanding of who was responsible for the sidewalk repair. It is clear that neither of them had any knowledge of paragraph 4 of the sublease. Therefore, the record on this motion fails to establish that MLC and Baker's Dozen had a mutual understanding of what the term "non-structural" as used in paragraph 4 of the sublease meant with respect to the sidewalk.

There is no evidence to be gleaned from the record herein that Charney's subsequent repair of the sidewalk was an admission on his part that he interpreted paragraph 4 of the sublease as placing the responsibility upon Baker's Dozen to make all repairs to the sidewalk.

Absent any clause in the sublease setting forth a definition of what constitutes a structural repair of the sidewalk, and in the absence of any clear evidence of the parties' intent, the language of paragraph 4 must be interpreted in harmony with its ordinary meaning. In this regard, sidewalk defects such as a depression or a raised slab are structural, and the repair thereof is not the responsibility of the tenant where the lease only requires the tenant to make non-structural repairs to the sidewalk (see Margolin v. New York Life Insurance Co., 32 NY 2d 149 [1973]; Berkowitz v. Dayton Construction, Inc., 2 AD 3d 764 [2nd Dept 2003]).

Charney averred in his affidavit in support of the cross-motion of Baker's Dozen that the subsequent repair he did to the subject area of the sidewalk involved the removal of the entire sidewalk flag down to the dirt and the pouring of an new concrete flag. He states that the photographs annexed to the cross-motion as Exhibit "K" depict the repair. Scrutiny of these photographs shows an entirely new sidewalk flag, which harmonizes with his description of the repair. Therefore, it is clear that the repair was, in fact, a structural repair. No evidence has been proffered by movants to demonstrate that the sidewalk flag need not have been replaced with

new concrete, especially since the defect as depicted in the photographs annexed to the moving and cross-moving papers is not trivial.

Indeed, movants do not argue that the necessary repair to the sidewalk was non-structural in nature and for that reason Baker's Dozen was responsible for the repair pursuant to the sublease. Rather, as the aforementioned deposition testimony of Kuppillas demonstrates and movants' attorney argues in their affirmations in support of the motion and the opposition and reply papers, movants contend that Baker's Dozen is responsible for all repairs, structural as well as non-structural, pursuant to the terms of the main lease between LIRR and MLC.

Article 10, section 1 of the main lease provides that MLC is responsible to maintain the sidewalk and to make "all repairs, foreseen and unforeseen, interior and exterior, structural and nonstructural." Movants contend that the language of rider paragraph 34 of the sublease making it subject and subordinate to the main lease means that the main lease is incorporated by reference into the sublease and, thus, Baker's Dozen is subject to article 10 and, consequently, is obligated thereunder to make structural repairs to the sidewalk. Movants' argument is without merit.

A sublessee, not being a party to the main lease, is not in privity of contract with the lessor and thus is not liable for performance of covenants in the main lease (see Teft v. Apex Pawnbroking & Jewelry Co., 75 AD 2d 891 [2nd Dept 1980], Chock Full O'Nuts Corp. v. NRP LLC I, 11 AD 3d 385; La Vack v. National Shoes, Inc., 124 AD 2d 352 [3rd Dept 1986]), unless the sublease incorporates the covenants of the main lease (see La Vack v. National Shoes, Inc., supra).

Rider paragraph 34 of the sublease does not incorporate any covenants of the main lease. It merely serves, essentially, as an acknowledgment by Baker's Dozen that it is aware of the main lease and that its right to occupancy of the demised premises is dependent upon, and subordinate to, MLC's leasehold.

Baker's Dozen was entitled to rely upon the covenants in its sublease with MLC, including paragraph 4 thereof which obligated it to make only non-structural repairs. Since the defect in the subject sidewalk was a structural item, Baker's Dozen bore no responsibility for its repair and, consequently, is not liable either to indemnify MLC for any recovery by plaintiff against MLC for injuries resulting from the defect or to defend MLC.

The indemnification clause in rider paragraph 11 of the

sublease requires Baker's Dozen to indemnify MLC for any injuries except those caused by MLC's negligence. As to injuries not caused by MLC's negligence, rider paragraph 14 of the sublease further limits the obligation of Baker's Dozen to indemnify only for its own acts or omissions.

Since Baker's Dozen was not responsible to make the structural repair to the subject sidewalk, its not having done so did not constitute an omission on its part. Moreover, the record on this motion fails to establish that the defect which allegedly caused plaintiff's injuries was the result of any act on the part of Baker's Dozen. Movants fail to demonstrate, and they do not even allege, that Baker's Dozen created or caused the defect.

Movants' argument that the repair of the sidewalk by Baker's Dozen subsequent to the accident is proof that Baker's Dozen exercised dominion and control over the sidewalk and had assumed responsibility for its maintenance is without merit. There is no evidence that Baker's Dozen had assumed any dominion or control over the sidewalk (see generally Mendoza v. City of New York, 205 AD 2d 741 [2nd Dept 1994]). The act of undertaking the repair of the sidewalk subsequent to the accident is no indication that Baker's Dozen considered the sidewalk to be its responsibility and under its control. On the contrary, the deposition testimony of Charney and Kuppillas demonstrates that Charney did not consider the sidewalk to be the responsibility of Baker's Dozen and that he had, in fact, demanded that movants make the repair. Charney had the repair made subsequent to the accident only after Kuppillas represented to him that it was his responsibility to do so under the lease and after his insurance carrier recommended that he correct the defect.

Movants also appeal to rider paragraph 5 of the sublease which obligates Baker's Dozen to indemnify MLC against "any and all claims" and "all personal injury." This paragraph does not contain any limiting or qualifying terms.

A party may protect itself against liability for negligence by means of an indemnification agreement, except that such an agreement will not be construed as indemnifying a party for its own ordinary negligence (as opposed to gross negligence or intentional torts) unless the intention to do so is expressed unequivocally (see Margolin v. New York Life Ins. Co., 32 NY 2d 149 [1973]; Ebbecke v. Bay View Environmental Services, Inc., 145 AD 2d 524 [2nd Dept 1988]). Unless the indemnity clause contains an express reference to the negligence of the indemnitee, the intention to indemnify a party for its own negligence must be "clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (Margolin v. New York Life Ins. Co., 32 NY

2d 149, 153).

The clause in rider paragraph 5, which contains a general indemnification provision and no exception to the subtenant's obligation to indemnify the overtenant, is inconsistent with the indemnification clauses in rider paragraph 11, which expressly excepts the overtenant's own negligence, and rider paragraph 14, which only obligates the subtenant to indemnify for its own acts and omissions. Therefore, reading the entire sublease a whole and considering the totality of the facts and circumstances presented on this record, this Court cannot conclude that the sublease expressed an intention that Baker's Dozen indemnify MLC for its own negligence.

Moreover, pursuant to the principle of *ejusdem generis*, a specific contract clause takes precedence over a more general clause (see Isaacs v. Westchester Wood Works, Inc., 278 AD 2d 184 [1st Dept 2000]). Therefore, rider paragraphs 11 and 14 control over rider paragraph 5 to the extent that those paragraphs contain specific exceptions to the subtenant's obligation to indemnify. Additionally, in keeping with the principle of contract construction that the Court should adopt an interpretation that gives meaning to all the provisions of a contract so that none should be left without force and effect (see Muzak Corp. V. Hotel Taft Corp., 1 NY 2d 42 [1956]), this Court interprets the sublease as obligating Baker's Dozen to indemnify MLC, except that it is not responsible to indemnify MLC for its own negligence and further, that its indemnity obligation extends only to its own acts and omissions.

Therefore, these principles of contract construction, coupled also with the rule of interpretation that any ambiguity in a contract must be resolved against the one who drafted it, requires this Court to conclude that MLC is not entitled to contractual indemnification without regard to whether it was negligent or whether plaintiff's injury was the result of any act or omission on the part of Baker's Dozen (see Ebbecke v. Bay View Environmental Services, Inc., 145 AD 2d 524, supra).

In any event, inasmuch as the contract provisions at issue are part of a lease for real property, to the extent that rider paragraph 5 contains an unconditional indemnification clause not limited to the subtenant's acts or omissions and does not except the overtenant's own negligence, it is void and unenforceable as being against public policy, pursuant to General Obligations Law §5-321 (see Sanford v. Jonathan Woodner Co., 304 AD 2d 813 [2nd Dept 2003]). (The reference of Baker's Dozen to General Obligations Law §5-322 is inapposite, since that section only applies to caterers and catering establishments. Moreover, §5-322.1 applies only to

construction contractors. The Court assumes that counsel was referring to GOL §321.)

Finally, movants contend that they are entitled to contractual indemnification since Baker's Dozen breached the provision of the sublease requiring it to purchase liability insurance protecting both Baker's Dozen and MLC against personal injury claims. Movants, therefore, request that Baker's Dozen be "directed to reimburse the moving defendants for any and all costs associated with its failure to procure the appropriate insurance."

In this regard, movants contend that the breach of an agreement to purchase insurance renders the promisor liable for all resulting damages. Baker's Dozen contends that where, however, the promisee already had liability coverage under its own policy of insurance, it is limited in its recovery against the promisor to its out-of-pocket expenses not covered by its own policy.

Both statements of the law are generally correct. "A landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant . . . [Where], however [t]he landlord obtained its own insurance and therefore sustained no loss beyond its out-of-pocket costs . . . it may not now look to the tenant for the full amount of the settlement and defense costs in the underlying tort claim" (Inchaustequi v. 666 5th Avenue Limited Partnership, 96 NY 2d 111, 114-116 [2001] [citations omitted]).

However, notwithstanding that both parties are correct in their statement of the law, they both miss the point. Regardless of whether or not Baker's Dozen failed to acquire liability insurance for MLC's benefit or whether or not MLC had its own liability policy that already protected it at the time of the accident, there is no basis in law for the relief movants are requesting herein.

The nature of the relief that movants are seeking is contractual indemnification by virtue of the failure of Baker's Dozen to purchase insurance covering MLC. Their fourth cross-claim interposed in their answer against Baker's Dozen asserts, "Defendant Baker's Dozen Corporation is, therefore, contractually bound to provide insurance coverage for the answering defendants, defend, indemnify and hold the answering defendants harmless in this action."

However, no cognizable cause of action exists for contractual indemnification for the breach of a covenant to purchase insurance. "An agreement to procure insurance is not an agreement to indemnify or hold harmless, and the distinction between the two is well recognized" (Kinney v. G.W. Lisk Company, Inc., 76 NY 2d 215, 218 [1990]). Therefore, if MLC is exposed to loss by its subtenant's breach of the covenant in the sublease to procure insurance, it may have sought damages for breach of contract, but not indemnification. Inasmuch as movants demand only that Baker's Dozen indemnify and hold MLC harmless, and do not seek damages for breach of contract, their motion must be denied. Therefore, this Court does not reach, and will not resolve, the issue of whether Baker's Dozen breached its agreement to procure insurance or whether MLC had its own coverage at the time of the accident.

Cross-Motion of Baker's Dozen for summary judgment dismissing the complaint as against it and dismissing the cross-claims of MTA, LIRR and MLC for contractual indemnification asserted against it is granted.

For the reasons heretofore stated, Baker's Dozen was not obligated under its sublease to repair the structural defect of the sidewalk that allegedly caused plaintiff's injuries. Moreover, there is no issue that it created the condition or caused it through any special use. In addition, there is no evidence that Baker's Dozen had assumed responsibility over the sidewalk. Its subsequent repair of the sidewalk does not, in and of itself, raise an issue of fact in this regard.

Finally, no statutory duty attaches to Baker's Dozen to repair and maintain the sidewalk. As to this issue, plaintiff, in its affirmation in opposition to the cross-motion, merely adopts and incorporates its arguments asserted in its affirmation in opposition to the motion. Among the arguments raised in those opposition papers is the contention that liability may be predicated against movants upon §§19-152 and 7-210 of the New York City Administrative Code. With respect to their relevance to Baker's Dozen, however, those sections expressly state that responsibility to repair and maintain the public sidewalk and liability for the breach of that duty, rest upon the owner of the abutting real property. "Nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession" (Castillo v. Bangladesh Society, Inc., 2006 NY Slip Op 51130(U), *2 [Supreme Court, Queens County]). Moreover, it is clear from the language of §§19-152 and 7-210, as well as the legislative history of these sections, that the term "owner" was

intended to have its ordinary meaning and not include lessees.

Pursuant to §19-152, the "owner" of the abutting property bears the responsibility of repairing defective sidewalk flags. In contrast, §16-123 requires the "owner, lessee, tenant, occupant, or other person having charge of any building or lot. . . abutting . . . the sidewalk" to remove snow, ice, dirt or other material from the sidewalk and gutter. However, §7-210 imposes tort liability only upon the "owner" for failure either to repair defects in the sidewalk or remove snow, ice and debris from the sidewalk. If the City Council had intended to include lessees or tenants within the scope of §§19-152 and 7-210, it would have specifically so provided.

Indeed, the intention of the City Council to impose liability only upon the actual owner and not tenants or lessees may be gleaned from the Report of the Committee on Transportation that adopted §7-210. Commenting upon the exemption from that section of one to three-family residential premises wholly or partially owner-occupied, the Report stated, "This exception for such properties is out of recognition of the fact that small property owners who reside at such property have limited resources and it would not be appropriate to expose such owners to exclusive liability with respect to sidewalk maintenance and repair" (emphasis added) (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193).

Therefore, no basis of liability lies against Baker's Dozen based upon §§19-152 and 7-210 of the Administrative Code.

Accordingly, the complaint is dismissed as against Baker's Dozen.

The cross-claims interposed by movants against Baker's Dozen for contractual indemnification are also dismissed, for the reasons heretofore stated.

Cross-motion by the City for summary judgment dismissing the complaint and any cross-claims as against the City is granted, there appearing no written opposition.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners

liable for injuries to pedestrians, liability remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to absolve the City of any tort liability for personal injury or property damage and to shift that liability from the City to the property owner who breaches the duty to repair imposed by §19-152 (see Report of Committee on Transportation, supra; Puello v. City of New York, 35 AD 3d 294 [1st Dept 2006]). Section 7-210 (c) provides, "Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks . . . in a reasonably safe condition." The only exceptions stated in that section are where the adjacent or abutting property is an owner-occupied one to three-family residential home and where the City is the property owner. Neither of these exceptions applies in the instant case.

Accordingly, the cross-motion must be granted and the complaint and any cross-claims insofar as asserted against the City are dismissed.

Dated: May 16, 2007

KEVIN J. KERRIGAN, J.S.C.