

Divito v Goodfellas Brick Oven Pizza

2008 NY Slip Op 30005(U)

January 7, 2008

Supreme Court, Richmond County

Docket Number: 0102674/2006

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEPHEN DIVITO,

Plaintiff(s),

-against-

GOOD FELLAS BRICK OVEN PIZZA and
HSIUNG YE REALTY CORP.,

Defendant(s).

-----X

The following papers numbered 1 to 7 were used on this motion this 20th day of November, 2007

Notice of Motion [Defendant Hsiung Ye](Affirmation in Support)	1
Notice of Motion [Defendant Goodfellas] (Affirmation in Support).....	2
Affirmation in Opposition [Plaintiff]	3
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On June 12, 2006, the plaintiff allegedly sustained injuries when, acting in his capacity as a New York City Police Officer, he slipped and fell in the basement of defendant Goodfellas Brick Oven Pizza (hereinafter Goodfellas), located at 1718 Hylan Boulevard, Staten Island, New York. It is undisputed that at the time of the accident the plaintiff was responding to an activated burglar alarm at the defendant’s premises. Upon arrival, the plaintiff began to inspect the premises and while in the basement he slipped on an “oily or greasy” substance causing him to sustain injuries. At the time of the accident, defendant Hsiung Ye Realty Corporation (hereinafter Hsiung Ye) was the owner of the premises and defendants Goodfellas was the tenant and operated an Italian restaurant at the site. Plaintiff commenced this action on or about September 1, 2006, pursuant to General Municipal Law §205-e

alleging violations of New York City Administrative Code §§ 27-127¹, 27-128², 27-369³, 27-381⁴ and Section 153.19⁵ of the New York City Health Code and common law negligence. Issue was joined in or around September 22, 2006. At present, defendants Hsiung Ye and Goodfellas are separately moving for summary judgment dismissing the complaint and all cross claims.

I. Summary Judgment

a. Common Law Negligence Claims

It is well settled that “an owner of real property has a duty to maintain the property in a reasonably safe condition” (see Basso v Miller, 40 NY2d 233, 241 [1976]). In order to establish a prima facie case of negligence the plaintiff must prove that the defendant either created the condition, or had notice of the condition and had a reasonable time to remedy the situation (Gonzalez v. Jenel Management Corp., 11 AD3d 656, 656 [2d Dept. 2004; see

¹New York City Administrative Code § 27-127 provides that “[a]ll buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order”.

²New York City Administrative Code § 27-128 provides that “[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities”.

³New York City Administrative Code § 27-369 provides, in relevant part, that “[c]orridors shall be kept readily accessible and unobstructed at all times”.

⁴New York City Administrative Code §27-381 provides, in relevant part, that “[c]orridors and exits shall be provided with artificial lighting facilities”.

⁵New York City Health Code § 153.19(a) provides, in relevant part, “[t]he owner, agent, lessee, tenant, occupant or other person who manages or controls a building or lot shall be jointly and severally responsible for keeping the sidewalk, flagging and curbstone abutting the premises free from obstructions and nuisances and for keeping such sidewalk, flagging and curbstone, the air shafts, areaways, backyards, courts and alleys, or lot clean and free from garbage, refuse, rubbish, litter, or other offensive matter or accumulation of water”.

Finocchiaro v. AVR Realty Corp., 32 AD3d 819, 819 [2d Dept 2006]). In opposition to the defendant's prima facie showing of entitlement to summary judgment on plaintiff's common law negligence claims, the plaintiff has failed to present a triable issue of fact. The plaintiff has failed to establish that defendant caused or created the alleged condition or had notice of the condition for a sufficient period of time to remedy it (*see* Brown v. Outback Steakhouse, 39 AD2d 450 [2d Dept. 2007]).

b. General Municipal Law § 205-e Claims

General Municipal Law § 205-e provides a private right of action for police officers injured in the line of duty by the negligence of other parties (*see* Rabinowitz v City of New York, 286 AD2d 724, 724-25 [2d Dept., 2001]). This private right of action requires the plaintiff to demonstrate the violation of a relevant statute, ordinance, or regulation, and to “establish a *practical or reasonable connection* between the violation and the injury of the police officer” (Campbell v. City of New York, 31 AD3d 594, 595 [2d Dept., 2006][emphasis added]; Fahey v. Serota, 23 AD3d 335 [2d Dept., 2005]; Sconzo v. EMO Trans, Inc., 295 AD2d 493, 494 [2d Dept., 2002]).

The plaintiff, in proving negligence in accordance with General Municipal Law § 205-e, is not required to display “proof of such notice as would be required under a common-law theory of negligence” (Anthony v. New York City Transit Auth., 38 AD3d 484, 486 [2d Dept. 2007]), however, the notion “that notice of a violation is not a requisite element of a cause of action under [the statute] is . . . an overstatement. Notice is clearly material to recovery under the statute” (Lusenskaskas v. Axelrod, 183 AD2d 244, 248 [1st Dept., 1992]). Therefore, the plaintiff still needs to submit proof of a “causal connection, direct or indirect, between the

defendant's alleged statutory violations and the plaintiff's injury" (Fahey v. Serota, 23 AD3d at 336; Rabinowitz v. City of New York, 286 AD2d at 724).

Initially, the Court notes that New York City Health Code § 153.19 regulates outdoor areas and is inapplicable in the instant matter (*see* D'Arpa v. New York City Transit Auth., 239 AD2d 126 [1st Dept., 1997]). Further, the alleged violations of New York City Administrative Code § 27-127 and 27-128 are inapplicable as well, as such code provisions deal with structural/design defects, which are not part of the instant allegations (*see* Marsillo v. City of New York, 17 Misc.2d 612 [Sup. Ct., 2007][Aliotta, J.]). Therefore, summary judgment is appropriate on the causes of action alleged referencing the aforementioned violations.

Further, the defendants have established a prima facie entitlement to summary judgment by demonstrating that there was no reasonable causal connection between the alleged statutory violations of §§ 27-369 and 27-281 of the NYC Administrative Code and plaintiff's injuries (*see* Fahey v. Serota, 23 AD3d at 336). In opposition, the plaintiff has successfully raised a triable issue of fact regarding, *inter alia*, whether the defendants failure to adequately light the basement (NYC Admin. Code § 27-281) and keep corridors free from debris (NYC Admin. Code § 27-369) had a *reasonable causal* connection to plaintiff's injuries (Campbell v. City of New York, 31 AD3d 594, 595 [2d Dept. 2006]). Therefore, considering "the plaintiff is entitled, at this stage of the proceedings, to every reasonable inference that can be drawn from the testimony" summary judgment is inappropriate (Brown v. Outback Steakhouse, 39 AD3d 450, 451 [2d Dept. 2007]).

II. Attorneys' Fees

It is undisputed that defendant Hsiung Ye, as owner of the aforementioned premises was named as an additional insured on codefendant Goodfellas insurance policy with limits of \$1,000,000 per person; \$2,000,000 per accident. Upon receipt of correspondence from counsel for defendant Hsiung Ye, Goodfellas insurance company Utica First Insurance Company (hereinafter "Utica First") acknowledged indemnification was appropriate and attempted to take over the defense. Utica First thereafter sent a confirmatory letter, dated June 18, 2007, which Hsiung Ye's attorneys rejected on the grounds that Utica First did not "state that the acceptance of our tender and defense of our client is without reservation [and] [f]urther, your correspondence is silent as to acceptance of our tender of all costs incurred by my client". Goodfellas/Utica First again contacted Hsiung Ye, by letter dated August 21, 2007, to reiterate it's willingness to indemnify but noted its objection to payment of any attorneys fees. In response, Hsiung Ye acknowledged the indemnification however, instructed co-defendant that it moved for summary judgment regarding payment of its attorney's fees. To date, Goodfellas/Utica First has not taken over defense of Hsiung Ye and objects to payment of the attorneys fees incurred in its defense of the action. At present, Goodfellas and Hsiung Ye each move for summary judgment on the issue of attorney's fees.

Defendant Hsiung Ye has established his prima facie entitlement to summary judgment on the issue of indemnification (Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The lease between the parties provides that the

"[t]enant shall indemnify and hold Landlord harmless from and against any and all liability, claim, loss, damage or expense, including reasonable attorney's fees, by reason of any

injury to or death of any person or persons, or injury to damage to property, or otherwise, arising from or in connection with the occupancy or use of the demised premises (or basement space)”.

Further, the parties do not contest, and Goodfellas has repeatedly expressed, the fact that Hsiung Ye was entitled to be indemnified pursuant to the lease agreement.

With respect to the attorneys fees, courts have long held that parties are generally responsible for their own attorneys fees, to the extent not provided elsewhere, and the pursuit of indemnification is no exception (Chapel v. Mitchell, 84 NY2d at 349; Perez v. Spring Creek Assoc., 283 AD 2d at 627]. However, where indemnification for attorney’s fees is provided for, the potential indemnitee is entitled only to recover attorneys fees incurred in the defense of the main action and shall not recover any fees that were incurred in the pursuit of indemnification (Chapel v. Mitchell, 84 NY2d 345, 349 [1994]; Roddy v. Nederlander Producing Company of Am., Inc., 44 AD3d 556, 557 [1st Dept., 2007]; Springstead v. Ciba-Geigy Corp., 27 AD3d 720, 722 [2d Dept. 2006]; Yacovacci v. Shoprite Supermarket Inc., 24 AD3d 539, 540 [2d Dept., 2005]; Perez v. Spring Creek Assoc., 283 AD2d 626, 627 [2d Dept., 2001]; Ehrlich, Julian D., *Outside Counsel, Recovering Attorney’s Fees in Construction-Site Cases*, NYLJ, May 25, 2007, at 4, col. 4).

As a result, Hsiung Ye’s attorneys are awarded attorneys fees incurred in their defense of the action against the plaintiff. No attorney fees incurred in pursuing the cross claim for indemnification against defendant Goodfellas will be recovered. For determination of the amount and reasonableness of attorneys fees incurred by Hsiung Ye’s attorneys in the defense of the main action, the Court will refer this issue alone to JHO

Ajello to hear and determine.

Accordingly, it is

ORDERED that the defendant Hsiung Ye's motion for summary judgment is hereby granted to the extent that the plaintiff's causes of action for common-law negligence, General Municipal Law § 205-e claims that allege violations of NYC Administrative Code §§ 27-127, 27-128 and Section 153.19 of NYC Health Code, are hereby dismissed, and it is further,

ORDERED that defendant Hsiung Ye's motion for summary judgment on attorneys fees is hereby granted to the extent that the defendant is entitled to be awarded attorneys fees that were incurred in his defense of the main action against plaintiff and no attorneys fees are to be awarded on the cross claim of indemnification, and it is further

ORDERED that the defendant Hsiung Ye's motion for summary judgment on all remaining claims is hereby denied, and it is further

ORDERED that the defendant Goodfellas' motion for summary judgment is granted to the extent that the plaintiff's causes of action for common-law negligence, General Municipal Law § 205-e claims that allege violations of NYC Administrative Code §§ 27-127, 27-128 and Section 153.19 of NYC Health Code are hereby dismissed, and it is further

ORDERED that the defendant Goodfellas' motion for summary judgment on all remaining claims is hereby denied, and it is further

ORDERED that the defendants report to JHO Ajello to determine the amount and reasonableness of attorneys fees that are appropriate in accordance with this decision, and

it is further

ORDERED that defendant Goodfellas take over the defense of Hsiung Ye Realty Corporation for the remainder of this action, and it is further

ORDERED that all parties are to appear before this Court on January 16, 2008, for a pre-trial conference.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: January 7, 2008

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court