

Surillo v Building Maintenance Serv. Corp.

2008 NY Slip Op 30040(U)

January 7, 2008

Supreme Court, New York County

Docket Number: 0102686/2004

Judge: Walter Tolub

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

PRESENT: WALTER E. TOLUB
Justice

PART 15

Index Number : 102686/2004

SURILLO, KATRECIA

VS.

BUILDING MAINTENANCE SERVICE

SEQUENCE NUMBER : 003

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

its 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 RULE ...

MEMORANDUM DECISION

IN ACCORDANCE WITH ACC ...

IS DECIDE

MEMORANDUM DECISION

FILED

JAN 10 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/7/08

WALTER E. TOLUB

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: IAS PART 15

-----x
KATRECIA SURILLO and DAVID SURILLO

Plaintiffs,

Index No. 102686/04
Mtn Seq. 003

-against-

BUILDING MAINTENANCE SERVICE CORP., and
ONE PENN PLAZA, LLC,

Defendants.

-----x
ONE PENN PLAZA, LLC,

Third-Party Plaintiff,

-against-

PARSONS, BRINCKERHOFF, QUADE
& DOUGLAS, INC.,

Third-Party Defendant

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JAN 10 2008
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-----x
PARSONS, BRINCKERHOFF, QUADE
& DOUGLAS, INC.,

Second Third-Party Plaintiff,

-against-

BUILDING MAINTENANCE SERVICE CORP.

Second Third-Party Defendant.

-----x

WALTER B. TOLUB, J.:

This is an action for personal injuries claimed to have been sustained by plaintiff as a result of a slip and fall on water in a pantry located on the second floor of One Penn Plaza in Manhattan ("the building"). Defendant/Third Party Plaintiff One Penn Plaza, LLC is the owner of the building ("One Penn Plaza").

At the time of plaintiff's accident, One Penn Plaza had leased the entire second floor of the building to third-party defendant/second-third-party plaintiff Parsons, BRINCKERHOFF, Quade & Douglas ("Parsons BRINCKERHOFF" or "tenant").

Plaintiff, who was an employee of Parsons BRINCKERHOFF at the time of her accident, claims that on August 7, 2002 at around 4:00 in the afternoon, she entered the pantry on the second floor of the building which housed a coffee maker, a refrigerator, and a water machine. Plaintiff claims that she was injured when she slipped on water which was on the floor, fell, and struck her head. This action was commenced in 2004, naming One Penn Plaza and Defendant/second-third party defendant Building Maintenance Service Corp. ("BMS"), the independent cleaning company for the building, as defendants. In turn, One Penn Plaza commenced the third-party action against Parsons BRINCKERHOFF, who then commenced a second third-party action against Building Maintenance. By this motion, One Penn Plaza moves for summary judgment and dismissal of the complaint and cross-claims asserted against them. In addition, One Penn Plaza seeks partial summary judgment against third-party defendant Parsons Brinckerhoff on contractual indemnity grounds, as well as attorneys fees and expenses.

Discussion

Motions for summary judgment limit this Court's role to

finding issues, and not resolving them. To succeed, it is therefore incumbent upon the movant to provide the court with admissible evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92).

The opposing party bears the burden of producing evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact requiring trial. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 NY2d 557 [1980]), and, if there is any doubt that triable issues of fact exist, summary judgment will not be granted.

In this action, plaintiff's sole claim against One Penn Plaza sounds in negligence. As such, to succeed on its claim, plaintiff must demonstrate that One Penn Plaza (1) owed a duty to plaintiff; (2) breached that duty; and (3) that plaintiff's injury was proximately caused by the breach (Solomon v. City of New York, 66 NY2d 1026 [1985]).

As previously touched upon, One Penn Plaza leased the entire second floor of the building to Parsons Brinckerhoff in 1995

("the Lease"). Pursuant to the terms of the lease, One Penn Plaza was responsible for sweeping all hard-surfaced flooring with a "dust-check" type of mop every evening (Lease, Article 27.02; Cleaning Schedule Exhibit C). Any additional cleaning services, however, were the responsibility of the tenant (see, Notice of Motion, Exhibit E, (Deposition Transcript of Jeffrey Duarte), p. 14; Exhibit F (Deposition Transcript of Annie Berletec p. 17). To meet those additional cleaning needs, Parsons Brinckerhoff contractually engaged BMS (Notice of Motion Exhibit G, (Deposition Transcript of Juan Francisco) p. 44-50). Under the agreement between Parsons Brinckerhoff and BMS, BMS was responsible for mopping the vinyl floors in the pantry areas on the second floor, and were contacted directly by Parsons Brinckerhoff with respect to any cleaning issues which arose on a daily basis (Id.; see also Notice of Motion Exhibit H (Deposition Transcript of James Bowen), p. 9, 19, 37-39). One Penn Plaza neither supervised nor instructed BMS with respect to BMS' contract to clean the Parsons Brinckerhoff office space (Deposition Transcript of James Bowen, Notice of Motion Exhibit H, p 37-39). One Penn Plaza therefore asserts that they are not liable for plaintiff's injuries because (1) they are an out of possession landlord and (2) they did not have notice of the claimed dangerous condition.

Contrary to the arguments maintained by opposing counsel,

this court agrees that One Penn Plaza, despite having an office in the building, is, for the purposes of this action, an out of possession landlord. Although the Lease clearly indicates that a right of re-entry was retained to the premises, there is nothing in the record that supports the contention that One Penn Plaza was responsible for the condition of the second floor in the absence of a serious structural problem with the building (cf., Massucci v. Amoco Oil, 292 AD2d 351 [2nd Dept 2002]). There is also nothing in the record that supports the contention that One Penn Plaza would somehow be responsible for supervising the cleaning services contracted for by Parsons Brinckerhoff and provided for by BMS. Under these circumstances, a claim of negligence premised on the condition of the subject property would only lie against One Penn Plaza if there existed (1) a contractual obligation to repair or maintain the premises or (2) a contractual right to re-enter, inspect and repair the premises and the liability is predicated on a structural or design defect that violates a specific statutory provision (see, Gavallas v Health Insurance Plan of Greater New York, 35 AD3d 657 [2nd Dept 2006]; Sostre v Jaeger, 38 AD3d 234 [1st Dept 2007]; Hakim v. 65 Eighth Ave, LLC, 42 AD3d 374 [1st Dept 2007]).

The papers submitted by the parties are devoid of any evidence that the water on the floor of the pantry was the result of a structural or design defect in the building that would

violate a specific statutory provision. The papers also do not support the contention that on the day of plaintiff's accident there existed some kind of leak which demanded the building's attention. In the absence of any admissible evidence to the contrary, this court has no choice but to dismiss the action insofar as it pertains to One Penn Plaza (see, Zuckerman, 49 NY2d 557). As such, the portion of the motion advanced by defendant One Penn Plaza to dismiss the primary action and cross-claims as it pertains to them is granted.

Partial summary judgment is additionally granted against third-party defendant Parsons Brinckerhoff on the contractual indemnity grounds. Contrary to the arguments made in opposition to this motion, the Court of Appeals has indicated that where a landlord and a tenant freely enter into an indemnification agreement and use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law §5-321 does not prohibit indemnity (Great Northern Insurance Co. v. Interior Construction Corp., 7 NY3d 412 [2006]). As in Great Northern, the Lease in the instant action was negotiated at arms length by two sophisticated commercial parties. The provision which purports to hold One Penn Plaza harmless for its own negligence is therefore not violative of the statute.

The portion of the instant motion seeking attorneys' fees, however is, at this juncture, denied. Although One Penn Plaza

claims entitlement to attorneys fees, the Lease does not appear to contain any language that specifically allows for their recovery (see, A.G. Ship Maintenance Corp. v. Lezak, 69 NY2d 1 [1986]). Accordingly, it is

ORDERED that the motion of defendant/third party plaintiff One Penn Plaza LLC is granted to the extent of dismissing plaintiff's complaint and the cross claims asserted against them, and granting partial summary judgment on the issue of contractual liability as against third party defendant/second third party plaintiff Parsons Brinckerhoff, Quade, & Douglas, Inc.; and it is further

ORDERED that the balance of the within motion is denied; and it is further

ORDERED that the Clerk of Court enter judgment in accordance with this decision.

Counsel for the parties are directed to appear in IA Part 15, Room 335 on January 25, 2008 at 11:00 a.m. for a Pre-Trial conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/7/08

FILED
JAN 10 2008
NEW YORK
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