

Cucinotta v City of New York
2008 NY Slip Op 31395(U)
May 16, 2008
Supreme Court, New York County
Docket Number: 0101060/2005
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EILEEN A. RAKOWER

Part 5

PRESENT: _____ **J.S.C.**

PART _____

Index Number : 101060/2005
CUCINOTTA, DAVID
 vs.
CITY OF NEW YORK
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1, 2
3, 4
5, 6

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

MAY 19 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/16/08


EILEEN A. RAKOWER
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 5

-----X
DAVID CUCINOTTA,

Plaintiff,

Index No.
101060/05

Seq No.: 002

- against -

Decision and
Order

THE CITY OF NEW YORK, NORTHSIDE REALTY
CORPORATION, MERIKEN LTD. d/b/a MERIKEN
RESTAURANT and TROCOM CONSTRUCTION
CORPORATION,

FILED

MAY 16 2006

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X
NORTHSIDE REALTY CORPORATION,

Third Party Plaintiff,

Third-Party Index
No. 591111/06

-against-

TROCOM CONSTRUCTION CORPORATION,

Third Party Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries he allegedly sustained when he tripped and fell at "West 21st Street side of Meriken Restaurant, 162 West 21st Street, New York, New York, approximately 25 feet east of the southeast corner of West 21st Street and Seventh Avenue thereat" on August 21, 2004. Northside Realty Corporation (Northside) is the owner and Meriken Ltd. d/b/a Meriken Restaurant (Meriken) is the lessee of the adjacent property. Trocom Construction Corporation (Trocom) did repair work to a fire hydrant in the vicinity in 1999. Meriken makes this

motion to dismiss plaintiff's complaint as well as Northside's cross claims. Plaintiff opposes. Northside cross moves for indemnification. The City of New York ("City") files no papers. Trocom, by separate motion, moved to dismiss all claims and cross claims as against it. Plaintiff's opposition is addressed that motion as well. Trocom's motion was granted.

Meriken, in support of its motion, provides: the pleadings, plaintiff's verified bill of particulars, the transcript of the deposition of Northside's manager, Herman Roman, the transcript of the deposition of Koji Nakagawa, owner of Meriken, the transcript of the 50h hearing of David Cucinotta dated December 16, 2004, the transcript of the examination before trial of David Cucinotta dated July 27, 2006, the transcript of the examination before trial of David Cucinotta dated May 18, 2007, the transcript of the deposition of Anthony Santoro, Vice President of Trocom, and the lease for the premises known as the corner store first floor space and basement area of 162 West 21st Street between Northside and Meriken, commencing July 1, 2004 along with the rider to that lease dated July 1, 2004.

Meriken asserts that, as tenant of the adjoining property, it was not responsible for maintaining the subject sidewalk pursuant to New York City Administrative Code 7-210, it was not contractually obligated to make structural repairs to the sidewalk pursuant to its lease with Northside, and it did not create the allegedly dangerous condition which plaintiff claims caused his fall.

Plaintiff, in opposition to Meriken's motion, provides the Big Apple Map filed with the Department of Transportation on October 23, 2003, which plaintiff alleges, gives notice of an extended section of holes or hazardous depressions.

Pursuant to Administrative Code of the City of New York § 7-210 (a), effective as of September 14, 2003 (and applying to accidents occurring on or after such date), it is "the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition."

Plaintiff does not show how notice to City of the defective condition in 2003 raises an issue of fact as to Meriken, which is *the mere lease holder* of the adjacent premises and had no statutory responsibility to repair the sidewalk. Nor does plaintiff show that Meriken caused or created the condition on which he fell. Northside, however, does show that there is a view of the evidence where Meriken was contractually responsible for the maintenance of the sidewalk.

Northside, in opposition to Meriken's motion and in support of its own cross motion, merely provides an attorney affidavit and makes reference to the exhibits already produced by Meriken.

Meriken argues that the lease imposes upon it only the obligation to keep the sidewalk "free and clean of snow, ice, dirt, debris and other foreign matter and . . . take suitable arrangements to dispose of all waste and rubbish . . ." (Rider to the Lease at Paragraph 52).

Northside contends that, while it is statutorily responsible for the maintenance of the sidewalk abutting its property, Meriken was charged with the maintenance of this sidewalk pursuant to the lease between Meriken and Northside.

Section 4 of the lease states, in relevant part:

Repairs: . . . Tenant shall, throughout the term of this lease, take good care of the demised premises and . . . the sidewalks adjacent thereto and 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 causality excepted. (emphasis added).

Initially, a lease and a rider must be read together and all parts must be given effect unless the language of the rider is "irreconcilable with the language of the provision given in the standard form." (*Hukle v. Great Am. Ins. Co.* 230 A.D. 477[1st Dept. 1930]). If the contract language is unambiguous, the court determines the rights and obligations of the parties (*State of New York v. Home Indemnity Company*, 66 N.Y.2d 669[1985]). Here the lease and the rider are consistent, and under no reasonable interpretation can it be said that Meriken was contractually responsible for making **structural** repairs to the sidewalk.

Plaintiff does not allege that he tripped over "snow, ice, dirt, debris [or] other foreign matter." Rather, the photographs of the area where plaintiff alleges he fell, submitted not by Northside, but by Trocom in its separate motion, show a defect in the sidewalk. Plaintiff testifies to a caved in area of the sidewalk. Plaintiff's big apple map shows holes and depressions in the area. Neither Northside nor Meriken

provides any evidence in support of their own conclusions that the defect is non-structural or structural, respectively. Whether such defect is a structural defect or one requiring non-structural repairs is an issue best determined by the trier of fact.

Northside asserts further that the lease required Meriken to obtain and keep liability insurance naming it as an additional insured. Thus, Northside argues, that in the absence of such policy (it claims there is no evidence such insurance exists), Meriken is contractually bound to assume the defense and indemnify Northside.

Section 45(b) of the rider states, in relevant part:

Without limiting Tenants liability under the indemnity provided for in this Article, Tenant shall provide on or before the Commencement Date, and shall keep in force throughout the term of this lease, for the benefit of Owner and Tenant, insurance of the kinds and in the limits hereinafter specified against any liability whatsoever occasioned by any occurrence in, on or about, or resulting from the use, operation and/or maintenance of, the Premises, or the fixtures or equipment therein or the sidewalks . . . and shall cause Owner . . . to be named as additional insureds in all policies of such insurance . Such kinds and limits of insurance are as follows:

- ii. Comprehensive general public liability and property damage insurance with a broad form contractual liability endorsement with a minimum combined single limit of liability with respect to each occurrence in an amount of not less than two million(\$2,000,000.00) dollars for injuries and/or deaths . . .

Section 45 (a) requires Meriken to indemnify Northside for claims, etc. which arise, relate or in connection with:

- (i) Tenant's use or occupancy of the Premises or the conduct of business in or management of the Premises . . . or any work or thing whatsoever done or any condition created in or about the Premises . . . (ii) any act or omission of Tenant . . . (iii) any default in the performance or observance of any of the terms, provisions, conditions, or covenants of this lease . . .

Section 45(b) differs from Section 45(a) in that procurement of insurance in Northside's name is independent of Meriken's management of the property, acts/omissions or its defaulting on requirements of the lease . Meriken, in opposition to Northside's cross motion, fails to provide proof of insurance naming Northside as an additional insured as required under the lease.

When one sophisticated commercial entity agrees to indemnify another through the employment of insurance, that agreement is enforceable. The penalty for breaching this agreement to procure such insurance is to be liable for all resulting damages. Those damages include costs of defending a third-party suit.(*Morel v. City of New York*, 192 A.D.2d 428[1st Dept. 1993]).

Meriken shall, therefore, be liable for all damages, including the costs of defending the instant lawsuit, which arise from its failure to procure insurance naming Northside as an additional insured according to the lease governing the agreement between Meriken and Northside. Such damages, however, cannot be determined until the trial of the action.

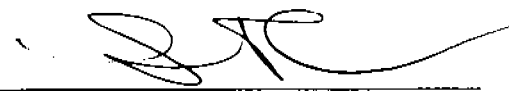
Wherefore it is hereby

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the cross-motion is granted only to the extent that defendant Meriken Ltd. d/b/a Meriken Restaurant shall be liable for all damages, including the costs of defending the lawsuit as against Northside, which arise from its failure to procure insurance naming Northside as an additional insured. The trial of such damages shall be referred to the trial court and shall be determined upon the trial of the remainder of the action.

All other relief requested is denied.

Dated: May 16, 2008



Eileen A. Rakower, J.S.C.

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