

Voight v Heisser Mgt. Co.

2008 NY Slip Op 31872(U)

July 1, 2008

Supreme Court, Suffolk County

Docket Number: 0027558/2005

Judge: Sandra L. Sgroi

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SHORT FORM ORDER

INDEX NO. 05-27558

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

Hon. SANDRA L. SGROI
Justice of the Supreme Court

MOTION DATE 2-25-08
ADJ. DATE 4-17-08
Mot. Seq. # 001 MD

-----X
JOHN VOIGHT, :
: :
Plaintiff, :
: :
-- against -- :
: :
HEISSER MANAGEMENT CO., WERLAND :
& ASSOCIATES, LLC, :
: :
Defendants, :
-----X
HEISSER MANAGEMENT CO., WERLAND :
& ASSOCIATES, LLC, :
: :
Third-Party Plaintiff, :
: :
-- against -- :
: :
J & J LITHO, :
: :
Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/
Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers _____ ; Answering
Affidavits and supporting papers 20 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other _____ ; ~~(and
after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by defendants/third-party plaintiffs for summary judgment in their

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favor on the third-party claim for contractual indemnification is denied.

On February 16, 2004, plaintiff John Voight allegedly slipped and fell while attempting to open the outside door of a commercial printing business operated by third-party defendant J & J Litho, Inc. Plaintiff, who was employed as a pressman by J & J Litho at the time of the accident, allegedly slipped on a snow-covered, one-inch-thick patch of ice covering the ground in front of the door to the print shop. The print shop was located in a multi-tenanted industrial building known as 79 Heisser Court, Farmingdale, New York. The building, a one-story structure surrounded by a paved parking area, is owned by defendant/third-party plaintiff Heisser Management Company. Defendant/third-party plaintiff Werland & Associates allegedly is responsible for performing certain maintenance work at the property.

On June 4, 2003, Heisser Management, as landlord, and J & J Litho, as tenant, executed a one-year, standard form business lease agreement, along with a typewritten rider, for a unit in the building known as 79-83 Heisser Court. As relevant to the instant motion, the lease, which was drafted by Heisser Management, provides “[i]f the demised premises or any part thereof consist of a store, or of a first floor, or of any part thereof, the tenant will keep the sidewalk and curb in front thereof clean at all times and free from snow and ice.” It also states that the tenant will “forever indemnify and save harmless the landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the tenant.” Further, paragraph 57 of the rider states that “the parking area and driveways are not included in this lease,” but that the landlord “gives non-exclusive permission to the tenant, its employees and invitees to use the same without charge, in common with other tenants, their employees and invitees” during the lease term. In addition, Paragraph 61 of the rider states “[w]hensoever the word ‘sidewalk and/or curb’ appears in this lease, it shall also include the blacktopped area,” and paragraph 63 states that tenant agrees to pay \$17 each month “for maintenance of the common areas.”

Following his accident, plaintiff commenced this action against Heisser Management and Werland & Associates to recover damages for personal injuries he allegedly sustained as a result of the fall. The complaint alleges that Heisser Management and Werland & Associates were negligent in permitting a dangerous condition, namely ice on the pavement in front of the industrial space leased by J & J Litho, to exist and remain for an unreasonable amount of time. It further alleges that the ice “had been allowed to accumulate from the roof leaders and onto the pavement in front of the entrance to the plaintiff’s place of employment.” Thereafter, Heisser Management and Werland & Associates brought a third-party action against J & J Litho, asserting causes of action for indemnification, contribution and breach of a contractual obligation to procure liability insurance for their benefit. In particular, the first cause of action in the third-party complaint states that in the event plaintiff recovers against defendants/third-party plaintiffs “for any of the damages alleged in the [complaint], third-party defendant will be liable to indemnify defendants/third-party plaintiffs for all of any such judgment, plus expenses incurred.” J & J Litho’s answer to the third-party complaint asserts various affirmative defenses and

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interposes a counterclaim for indemnification and contribution against Heisser Management.

Heisser Management and Werland & Associates now move for summary judgment in their favor on the third-party cause of action for contractual indemnification, arguing that J & J Litho was obligated under the terms of the lease “to remove snow and ice from that area which included the blacktopped area in the vicinity of [its] store,” and, therefore, must indemnify Heisser for any negligence assessed against it. Defendants/third-party plaintiffs’ submissions in support of the motion consists of copies of the pleadings, the lease agreement between Heisser Management and J & J Litho, and transcripts of the parties’ deposition testimony. Plaintiff opposes the motion, arguing that his injury was due to a recurring icy condition outside the entrance to J & J Litho caused by the roof drainage system on the building, and that Heisser Management breached a duty owed to the public to keep such area in a reasonably safe condition.

The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a “practical interpretation of the expressions of the parties so that their reasonable expectations will be realized” (*Joseph v Creek & Pines, Ltd.*, 217 AD2d 534, 535, 629 NYS2d 75 [2d Dept], *lv dismissed* 86 NY2d 885, 635 NYS2d 950 [1995], *lv denied* 89 NY2d 804, 653 NYS2d 543 [1996]; *see Matter of Matco-Norca, Inc.*, 22 AD3d 495, 802 NYS2d 707 [2d Dept 2005]; *Tikotzky v City of New York*, 286 AD2d 493, 729 NYS2d 525 [2d Dept 2001]; *Partrick v Guarniere*, 204 AD2d 702, 612 NYS2d 630 [2d Dept], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]). As it is a question of law whether or not a contract is ambiguous (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (*see Chimart Assoc. v Paul*, 66 NY2d 570, 498 NYS2d 344 [1986]). When a contract term or clause is ambiguous, and the determination of the parties’ intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (*Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880, 498 NYS2d 760 [1985]; *see Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

It is well established that any ambiguity in a contract is to be construed against the party who drafted such contract (*see Guardian Life Ins. Co. of Am. v Schaefer*, 70 NY2d 888, 524 NYS2d 377 [1987]). Further, “[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491, 549 NYS2d 365 [1989]; *see Heimbach v Metropolitan Transp. Auth.*, 75 NY2d 387, 553 NYS2d 653 [1990]). Thus, a contract provision granting a party who has been actively negligent the right to indemnification is carefully scrutinized by the courts for an expression of an intent to indemnify and for an indication of the scope of such indemnification (*see Levine v Shell Oil Co.*, 28 NY2d 205, 321 NYS2d 81 [1971]). Moreover, to determine the parties’ intent, the language of such provision must be analyzed in light of the surrounding facts and circumstances (*see Hooper Assoc. v AGS Computers, supra; Margolin v New York Life Ins.*

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Co., 32 NY2d 149, 344 NYS2d 336 [1973]). Stated differently, “[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract” (*Niagra Frontier Trans. Auth. v Tri-Delta Constr. Corp.*, 107 AD2d 450, 453, 487 NYS2d 428 [4th Dept], *affd* 65 NY2d 1038, 494 NYS2d 695 [1985]). Moreover, while parties to a lease agreement are free to allocate the risk of liability to third parties through use of insurance coverage, a contractual indemnification clause in which a lessor seeks to exempt itself from liability for its own acts of negligence is void and unenforceable (*see* General Obligations Law § 5-321; *Roni v Rahim*, 49 AD3d 850, 854 NYS2d 486 [2d Dept 2008]; *Breakaway Farm, Ltd. v Ward*, 15 AD3d 517, 789 NYS2d 730 [2d Dept 2005]).

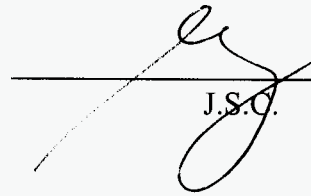
As general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see, Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *Millman v Citibank, N.A.*, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also, Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2003]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see, Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). An out-of-possession owner or lessor is not liable for injuries that occur on the premises unless it has retained control over the premises or is contractually obligated to repair or maintain the premises (*see Robinson v M. Parisi & Son Constr. Co., Inc.*, __ AD3d __, 856 NYS2d 678 [2d Dept 2008]; *Lindquist v C & C Landscape Contrs., Inc.*, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; *Bouïma v Dacomi, Inc.*, 36 AD3d 739, 829 NYS2d 572 [2d Dept 2007]). Also, an owner or lessor who has knowledge that members of the public will be invited onto the premises has a nondelegable duty to provide the public with a reasonably safe premises and a reasonably safe means of ingress and egress, even if it is an out-of-possession owner or lessor, and will be liable for injuries if it knew or should have known the premises were in a dangerous condition at the time of the lease (*see Landau v Beach Haven Shopping Ctr.*, 276 AD2d 752, 715 NYS2d 334 [2d Dept 2000]; *Richardson v David Schwager Assoc.*, 249 AD2d 531, 672 NYS2d 114 [2d Dept 1998]).

Heisser Management and Werland Associate’s submissions are insufficient to demonstrate prima facie entitlement to judgment against J & J Litho on the claim for contractual indemnification. Contrary to the conclusory assertions by their counsel, the lease agreement between Heisser Management and J & J Litho is ambiguous as to the parties’ respective obligations to keep the entrance to the demised premises clear of snow and ice (*see Pearson v Parkside Ltd. Liability Co.*, 44 AD3d 833, 843 NYS2d 442 [2d Dept 2007]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). The Court notes it is undisputed that there are no sidewalks or curbs around the subject building; rather, the area surrounding the building is completely paved over. Further, under the terms of the lease, “the parking area and driveway” were expressly excluded from the demised premises, and Heisser Management retained responsibility for maintaining the “common areas.” In fact, Ethan

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Auslander, the managing agent for Heisser Management, testified that Heisser Management had retained Dumor Construction to perform snow and ice removal services for the building at 79 Heisser Court during the period from December 2003 to March 2004, and had regularly contracted for such services during its ownership of the property. Moreover, the movants failed to demonstrate that the indemnification clause in dispute is, in fact, enforceable under General Obligations Law § 5-321 (*see Roni v Rahim, supra; Breakaway Farm, Ltd. v Ward, supra*). Accordingly, the motion for summary judgment against J & J Litho on the third-party cause of action for contractual indemnification is denied.

Dated: 7/1/08



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION