Diaz v New York City Tr. Auth.

2008 NY Slip Op 32616(U)

September 19, 2008

Supreme Court, New York County

Docket Number: 0115735/2004

Judge: Donna M. Mills

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 9/26/2008

[* 1]

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

PRESENT : DONNA M. MILLS **PART 21**

Justice

116735/04

DIAZ, HEIDI

INDEX NO. 116735/04

Plaintiff,

-v-

MOTION DATE _____

MOTION SEQ. NO. 006

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO. _____

The following papers, numbered 1 to 4 were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ____ YES ✓ NO

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

Dated: 9/19/08

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

HEIDI DIAZ and ROLANDO DIAZ

Plaintiffs,

Index
No. 115735/04

-against-

LEXINGTON EXCLUSIVE CORP.,
THE NEW YORK CITY TRANSIT AUTHORITY
METROPOLITAN TRANSPORTATION AUTHORITY,
LILLIAN GOLDMAN and THE LILLIAN GOLDMAN
FAMILY LLC,

Defendants.

JANE GOLDMAN, AMY PATRICE GOLDMAN,
DIANE GOLDMAN KEMPER AND ALLAN GOLDMAN
AS EXECUTORS OF THE ESTATE OF LILLIAN
GOLDMAN a/h/a LILLIAN GOLDMAN and
THE LILLIAN GOLDMAN FOUNDATION L.L.C.,

Third Party Plaintiffs,

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

-against-

LEXINGTON EXCLUSIVE CORP.,

Third Party Defendant.

DONNA MILLS J. ,:

In this personal injury action, defendant, Lexington Avenue Corporation (Lexington), moves, pursuant to CPLR 3212 for summary judgment, dismissing plaintiffs' complaint, all cross claims and the third party complaint on the grounds that it neither owed nor breached any duty to plaintiffs and further, it is not obligated to indemnify third party plaintiffs. Plaintiffs, Heidi and Rolando Diaz and third party plaintiffs, Jane Goldman, Amy Patrice Goldman, Diane Goldman Kemper and Allan Goldman as executors of the Estate of Lillian Goldman s/h/a Lillian Goldman and the Lillian Goldman Family, LLC., (Goldman Defendants) oppose the motion.

FACTS

The plaintiff Heidi Diaz (plaintiff) alleges that on December 24, 2003 she slipped and fell on debris on the top step of the stairway leading to the Lexington Avenue subway on East 86th Street. The building located at 147-149 Lexington Avenue is owned by the Goldman Defendants (the Building).

Following the service of the Goldman Defendants' answer, a third-party action was commenced by them against Lexington. Lexington is a shoe repair and jewelry shop located on the arcade level of the Building, one flight down from the stairway at issue

that leases space from the Goldman Defendants (the Lease). In the third-party summons and complaint, the Goldman Defendants allege that Lexington breached the Lease by its failure "***to maintain (clean and free of snow and debris) the stairway leading to the demised premises,***" and as such, the Goldman Defendants are entitled to contractual indemnification from its tenant, Lexington [emphasis added].

By order dated April 28, 2006, this Court granted plaintiffs' motion to amend their complaint to add Lexington as an additional direct defendant. Plaintiff's sought to impose liability upon Lexington on the theory that Lexington's contractual duty to the Goldman Defendants to clean the stairways at issue somehow extended to pedestrians such as plaintiff.

After discovery, Lexington moved for summary judgment dismissing plaintiffs' direct action against it arguing that it owes no duty to plaintiff pedestrian. Lexington also seeks dismissal of the third party action because the Goldman Defendants admittedly have insurance, asserting that pursuant to the plain language of the Lease, Lexington's obligation to indemnify was limited to the extent that damages were not covered under the insurance policy of the Goldman Defendants.

DISCUSSION

To be granted summary judgment, the moving party must make a prima facie showing that there are no triable issues of fact (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). The absence of material facts entitles that party to judgment as a matter of law (id.). Once the prima facie case is made, the party opposing the motion for summary judgment must produce evidentiary proof that material issues of fact do indeed exist, thereby warranting a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is drastic remedy concerned with issue-finding not issue-determination (id.).

In reviewing the record, we must assess the evidence in the light most favorable to the non-movant and draw all reasonable inferences in his favor (id.). If the court has any doubt as to the existence of genuine issues of material fact, summary judgment should be denied (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]).

Lexington's Motion to Dismiss for Lack of Duty to Plaintiff

To sustain a cause of action for negligence, a plaintiff must prove that defendant had a duty to plaintiff, breached that duty, and that the breach was the proximate cause of plaintiff's injury. Damages and foreseeability must also be shown (*Hyatt v*

Metro-North Commuter Railroad, 16 AD3d 218 [1st Dept 2005]).

It is well settled that liability for a dangerous condition on real property must be predicated upon a defendant's ownership, occupancy, control, or special use of that property (*Morrison v Gerlitzky*, 282 AD2d 725 [2nd Dept 2001]).

In support of its motion for summary judgment, Lexington submitted the testimony of its principal, Aman Munarov, who avers that he did not own, occupy or control the subway stairs at issue. Rather, Munarov avers that Lexington's duty was limited to upkeep of his store and maintaining two or three feet along the perimeter of his front store windows.

In fact, Munarov testified that the 86th street subway had been undergoing construction for six months before the accident and it was not unusual for the stairway at issue to be used as a passageway by construction workers to remove debris and materials from below the subway, past the Store and out to the sidewalk (id.).

Further, NYCTA employee Dominick Tinelli confirmed that, according to NYCTA records, there was ongoing construction work at the 86th Street station which involved cordoning off one of the two stairways at any time to remove rubbish (Antanesian Aff. Ex N).

Finally, Lexington submits the testimony of plaintiff, who avers that defendant NYCTA had construction workers occupying the station for at least six months, repairing something under the subway, moving debris up and down the stairway at issue at the 86th Street subway station (Deposition of Heidi Diaz, annexed to the Antanesian Affirmation, Lexington's Ex H).

In fact, although plaintiff alleges structural defects to the stairs in her bill of particulars, she testified at her examination before trial in October 2005 that she slipped because of the accumulation of dirt, water and sand at the top of the stairs leading to the subway (*id.*).

The aforementioned testimonial evidence is sufficient to make a prima facie showing that Lexington, as a tenant, had no duty to plaintiff, a member of the public, to maintain the subway stairs in question (*id.*).

Plaintiff asserts that the Lease creates a duty to the plaintiff as a pedestrian (see *Palka v Servicemaster Mgt Services Corp.*, 83 NY2d 579 [1994]).

Paragraph 40 of the Rider to the Lease relied upon by plaintiff states in relevant part:

> It is further understood and agreed that the Tenant has examined the demised premises and herein agrees to accept possession of same in its "as is" condition and ***to maintain***

> ***(clean and free of snow and debris) the stairway leading to the demised premises*** **and the platform in front of the demised premises.** [emphasis added]).

However, a contractual obligation standing alone, will generally not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]). Contractual duties between a landlord and commercial tenant, as imposed by a lease, does not create a duty to a plaintiff pedestrian (*Berkowitz v Dayton Constr. Inc.*, 2 AD3d 764 [2nd Dept 2003]; *Hagan v Comstat Security Inc.*, 214 AD2d 435 [1st Dept 1995]). Where plaintiff is a stranger to the Lease and merely a member of the public on a landowner's property, as in the case herein, at best, she can be considered an incidental beneficiary (*id.*).

In the unusual facts of Palka, relied upon by plaintiff, a nurse employed by a hospital was injured when a wall mounted fan fell from its mount and struck her as she was attending to a patient. The hospital had contracted with the defendant to develop a maintenance program which was a comprehensive and exclusive contractual undertaking including a duty to train, maintain, manage and inspect the property at issue. There was also testimony from one of the defendant's own employees with knowledge of the intention and comprehensive purpose of the

contract. This testimony supported the reasonable expectations of the defendants and the reasonable reliance of plaintiff nurse creating a duty of care extending to plaintiff employee as an intended beneficiary of the contract, a circumstance clearly distinguishable from the facts herein.

Thus, any failure of Lexington to maintain the stairway as required under the Lease does not create liability extending plaintiff. Therefore, Lexington is entitled to dismissal of the Complaint as against it.

Lexington's Duty to Contractually Indemnify the Goldman Defendants

As stated above, the Goldman Defendants contend that the Lease between them and Lexington obligates Lexington to indemnify them for any award to plaintiff, as pursuant to the Lease, it was Lexington's responsibility to maintain the stairway at issue. In fact, Kathleen Weeks, manager, testified at a deposition on behalf of the Goldman Defendants that the Goldman Defendants had no duties with respect to the cleaning and sweeping of the stairwells leading to and from the public sidewalk and to the arcade level. She testified that pursuant to Article 40 of the Lease, Lexington had the responsibility to clean and sweep the

stairwells leading to and from the public sidewalk and to the arcade.

Lexington concedes that it assumed a contractual duty in the Lease "to maintain (clean and free of snow and debris) the stairway leading to the demised premises" (Lease, annexed to Lexington's Motion for Summary Judgment Ex K) and that it did not do so (Munarov Deposition, Lexington Ex J). Lexington argues that according to the clear language of the Lease, however, assuming the action is not dismissed against the Goldman Defendants, the Goldman Defendants are only entitled to contractual indemnification against Lexington to the extent that the Goldman Defendants are not covered by their own insurance. Since the Goldman Defendants concede that they are covered by their own insurance ( ), Lexington asserts that there is no further liability relying completely on what Lexington characterizes as identical language in the Lease in *Arteaga v 231/249 W 39 Street Corp.*, 45 AD3d 320 [1st Dept 2007]).

Paragraph 8 of the Lease states in relevant part:

> Tenant agrees, at tenant's sole cost and expense, to maintain *general public liability insurance* in standard form in favor of owner and tenant against claims for bodily injury or property damage occurring in or upon demised premises, effective from the date tenant enters into possession of the demised premises and during the

> terms of the lease ... to indemnify and save harmless owners against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which owners shall not be reimbursed *by insurance* [emphasis added].

It is well settled that a party, such as the Goldman Defendants, is entitled to full contractual indemnification "provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances [citation omitted]" (*Drzwenski v Atlantic Scaffold and Ladder Co. Inc.*, 70 NY2d 774 [1987]).

The law is clear that "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" (*Morel v City of New York*, 192 AD2d 428, 429 [1st Dept 1993]).

Sophisticated commercial parties are permitted "to allocate the risk of liability to third parties by the procurement of liability insurance" (id.). Unambiguous language in a lease should be enforced [citations omitted] (*Arteaga v 231/249 w 39 Street Corp*, 45 AD3d 320, supra. In that matter, a subcontractor

agreed to indemnify the owners only for costs "for which Owner shall not be reimbursed by insurance." Importantly, the clause went on to state that "[f]urther, each party 'waives *any* claim ... insofar as such claim is based on a risk insured under any insurance policy carried by the waiving party'" [emphasis added].

Lexington has failed to make a prima facie showing that the clear intention of the Lease language unambiguously requires any indemnification claims to be dismissed because the Goldman Defendants have their own insurance. Here, the Goldman Defendants apparently allocated their risk of loss to Lexington to obtain insurance and Lexington has not demonstrated an intent to specifically waive any claim to the extent that they are covered by their own insurance, as the parties did in *Arteaga* and thus, summary judgment is denied at this juncture. Moreover, the penalty for breaching an agreement to procure insurance as Lexington admittedly did herein is to be liable for all resulting damages including both the costs of the lawsuit and any liability to plaintiff, including damages resulting from the indemnitee's negligence (*Morel v City of New York*, 192 AD2d 428, supra.

In sum, it is

ORDERED that the portion of Lexington's motion that seeks

dismissal of the complaint as against it is granted; it is further

ORDERED that the portion of the motion that seeks dismissal of the third party action is denied.

Dated: 9/19/08

ENTER:

J.S.C.

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK