

Mazzaferro v 372 Jericho Corp.

2008 NY Slip Op 32750(U)

October 3, 2008

Supreme Court, Suffolk County

Docket Number: 05-16784

Judge: Ralph F. Costello

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ORDERED that this cross motion (004) by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment striking the defendant 372 Jericho's affirmative defenses, and plaintiffs' cross motion (005) for an order pursuant to 3212 granting summary judgment striking the defendant M & M's affirmative defenses are denied as untimely.

This is an action to recover damages, individually and derivatively, for personal injuries allegedly sustained by the infant plaintiff Jacob Mazzaferro as a result of a fall while descending a staircase at 22355 Route 48, Unit 13, Cutchogue, New York on June 4, 2004. The subject premises was owned by the defendant 372 Jericho Corp. and leased to the defendant M & M Creative Cabinetry, which made custom cabinets.

Pursuant to the lease agreement, the tenant was required to maintain the premises and make all non-structural repairs (paragraphs 3 and 50), although the owner retained the right of reentry to examine the premises and make repairs (paragraph 13) including structural repairs (paragraph 50). Additionally, pursuant to the lease, the tenant agrees to indemnify and hold the owner harmless against "all liabilities" for which the owner shall not be reimbursed by insurance including reasonable attorneys fees paid or incurred as a result of any breach by the tenant of any covenant on condition of the lease or the negligence of the tenant (paragraph 8). Pursuant to the lease, the tenant is also obligated pay as additional rent any increase in insurance premiums caused by the tenant's business, and shall "at its sole cost and expense" for the mutual benefit of the owner and tenant maintain personal injury and property damage liability insurance against claims for bodily injury occurring in the leased premises of not less than \$1,000,000 (paragraph 48).

The complaint includes two causes of action. The first, which is asserted by Sara Gunderson on behalf of the infant, alleges that the accident was caused by the negligence of the defendants in that they permitted an unsafe staircase in the premises which caused the infant plaintiff's fall. The second, which purports to be on behalf of the plaintiff Sara Gunderson individually (even though the caption does not so indicate), asserts a cause of action for the infant plaintiff's medical care and treatment as a result of his injuries. In its answer, M & M asserts two cross claims against 372 Jericho sounding in common law contribution and indemnity, while 372 Jericho has asserted four cross claims in its answer sounding in common law contribution, common law indemnification, contractual indemnification and breach of contract for failure to procure insurance.

The plaintiffs claim, in their bill of particulars, that the accident was caused by the negligence of defendants in that they permitted an unsafe staircase in the premises which caused the infant plaintiff's fall. More specifically, the plaintiffs claim that defendants constructed or caused to be constructed an unsafe, inadequate staircase which lacked a properly built handrail with properly spaced spindles and that was otherwise in violation of the applicable New York State Building Code.

Joseph Macari testified at his deposition before trial that he is the president of 372 Jericho. He did not install the subject staircase in the premises and did not know whether any prior tenants had installed it. He also did not know whether it existed at the time that his company acquired the building. According to Mr. Macari, he did not retain the right to re-enter the premises. He was not aware of any alterations or carpentry work being performed in the suite after he acquired the building. Mr. Macari further testified that he never visited M & M's suite, Unit 13, during its tenancy.

Mr. Eric N. Izzo testified at his deposition that his company, Peconic Telco, rented Unit 13 or 14 sometime at the end of 1999 or the beginning of 2000 from 372 Jericho. According to Mr. Izzo, the stairway had neither guardrails nor spindles at the time he was a tenant. He denied making any changes to the premises during his company's tenancy, and he did know who had built the stairway. Mr. Izzo further testified that the landlord's rental agent, Ronald Babarcich, visited his suite a few times during his tenancy.

Mr. Rinaldo Babarcich testified that he is the owner of Eastland Realty and that he moved into suite "17" of the building in 2003. He acted as a rental agent for 372 Jericho and was involved in negotiating the terms of leases for the other tenants, subject to 372 Jericho's approval. Peconic Telco occupied suite "13" prior to M & M's occupancy which began in January 2004. After Peconic Telco vacated, Mr. Babarcich showed the premises to prospective tenants, one of which was M & M. When he first showed the suite to M & M, the stairway and the "enclosure" in the loft were not present. He first noticed the staircase leading to the loft as well as a two-room apartment after M & M vacated the premises. Mr. Babarcich further testified that he had keys to the unit and that Mr. Macari would come by every week or two to visibly inspect the premises.

Michael Mazzaferro testified at his deposition that he and his partner Timothy Milkowski conducted business as "M & M Creative Carpentry." The premises was first shown to Mr. Mazzaferro by Mr. Babarcich in December 2003. While he was given Eastland's permission to make improvements, he never applied for permits from the Town of Southold. Neither he nor his partner ever made any changes or alterations to the staircase with the exception of two strips of wood which were used to hang things. Mr. Babarcich never complained to him about these modifications. Mr. Mazzaferro produced a certificate of insurance to Eastland Realty when he first rented the premises, but he did not know if he included or whether he was required to include the landlord as an additional insured. Concerning the accident itself, Mr. Mazzaferro testified that he was directly behind his wife and his son Jacob as they descended the staircase immediately prior to his son's fall. According to Mr. Mazzaferro, Jacob fell straight down onto the concrete through the open end of the staircase after attempting to grab the handrail.

Sara Gunderson testified at her deposition that her son Jacob was approximately three years old on the day of the accident. After entering the premises, she and her son Jacob ascended the staircase to get some snacks for her husband. She held Jacob's left hand as he descended. After proceeding two steps, he suddenly slipped under the handrail and then fell head-first down to the floor. According to Mrs. Gunderson, Jacob attempted to grab the handrail but was unable to reach it.

The defendant M & M now moves for an order granting summary judgment dismissing the complaint and all cross claims against it on the basis that it did not create the alleged dangerous condition and on the basis that it had no obligation to perform structural repairs to the staircase. The defendant 372 Jericho cross moves for an order pursuant to CPLR 3212 granting summary judgment (i) dismissing the complaint against it on the basis that it did not violate any code or ordinance with respect to the stairway, on the basis that it had no obligation to repair or maintain the staircase, and on the basis that it did not receive actual or constructive notice of any defect in the staircase, (ii) in its favor on its cross claims for contractual and common law indemnification, or (iii), in the alternative, dismissing co-defendant M & M's cross claims for contractual indemnification. The plaintiffs cross move for an order pursuant to CPLR 3212 granting summary judgment (i) striking the defendant 372 Jericho's affirmative defenses, and by way of separate motion (ii) for an order granting summary judgment striking the defendant M & M's affirmative

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defenses. The defendant 372 Jericho partially opposes the defendant M & M's cross motion to the extent it relates to M & M's own entitlement to summary judgment asserting that M & M did not make its prima facie showing of entitlement to summary judgment.

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions, Lindquist v C & C Landscape Contrs., 38 AD3d 616 [2d Dept 2007]; Gibson v Bally Total Fitness Corp., 1 AD3d 477 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises, Gelardo v ASTHMA Realty Corp., 137 AD2d 787 [2d Dept 1988]. Reservation of the right to enter the premises for the purpose of inspection and repair may constitute sufficient retention of control to permit a finding that the owner or lessor had constructive notice of a defective condition only if a specific statutory violation exists and there is a significant structural or design defect, Bouima v Dacomi, Inc., 36 AD3d 739 [2d Dept 2007]; Thompson v Port Auth. of N.Y. & N.J., 305 AD2d 581 [2d Dept 2003].

The defendants 372 Jericho and M & M failed to establish their prima facie entitlement to judgment as a matter of law that they did not create the defect or have actual or constructive notice of the condition, see, Taylor v Lastres, 45 AD3d 835 [2d Dept 2007]; Lopez v 1372 Shakespeare Ave. House Dev. Fund Corp., 299 AD2d 230 [1st Dept 2002]; cf., Kornspan v Hertzberg, 197 AD2d 673 [2d Dept 1993]. Instead, the deposition testimony submitted by the defendants in support of the motion and cross motion raise unresolved issues of fact as to which entity or person installed the subject staircase, the date of same and whether it complied with the existing building code, see, Spencer v Schwartzman, 309 AD2d 852 [2d Dept 2003]; cf., Kornspan v Hertzberg, supra; Vill. of Westbury v Straehle, 307 AD2d 931 [2d Dept 2003]. The record also reflects that M & M had exclusive possession of the premises for approximately five months prior to the accident during which time it made substantial alterations. While Babarcich had knowledge of some of M & M's alterations and never objected to them, he also testified that he was not aware of the staircase and the accessory apartment. Additionally, contrary to Mr. Macari's testimony, the plain terms of the lease show that 372 Jericho retained the right of re-entry to examine the premises and make repairs including structural repairs, thus raising an additional issue of fact, see, Spencer v Schwartzman, supra; Lopez v 1372 Shakespeare Ave. House Dev. Fund Corp., 299 AD2d 230 [1st Dept 2002]. In any event, there are questions of fact as to whether the absence of a guardrail/spindles and the height of the handrail contributed to the infant plaintiff's accident and whether the defendants were each negligent in failing to correct these alleged structural and design defects, see, Jackson v Fenton, 38 AD3d 495 [2d Dept 2007]; cf., Asaro v Montalvo, 26 AD3d 306 [2d Dept 2006]; Swerdlow v WSK Properties, Corp., 5 AD3d 587 [2d Dept 2004].

Turning to the issues raised in the cross claims, where a party is held liable at least partially because of his or her own negligence, contribution against all other culpable tort-feasors is the only available remedy, see, Glaser v M. Fortunoff of Westbury Corp., 71 NY2d 643 [1988]. Conversely, "the predicate for common law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine," Kagan v Jacobs, 260 AD2d 442, 442 [1999]. Where indemnity is at issue, one party is alleging that the other party should bear complete responsibility for the tort, McDermott v City of New York, 50 NY2d 211, 220 [1980], and that he or she is not responsible in any way for the injuries to the

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plaintiff, see, Barry v Hildreth, 9 AD3d 341, 342 [2004]. The right to indemnity “springs from a contract, express or implied, and full, not partial, reimbursement is sought,” McDermott v City of New York, supra at 216). Thus, the indemnitor is either totally responsible or not, see, McDermott v City of New York, supra at 220.

Neither 372 Jericho nor M & M established their prima facie entitlement to summary judgment on their cross claims against each other sounding in common law contribution and indemnification as issues of fact exist as to whether the defendants were free from negligence and whether one or both of them are solely responsible for the accident, see, Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616 [2d Dept 2008]; Baillie Lumber Co., L.P., v Al L. Burke, Inc., 43 AD3d 1290 [4th Dept 2007]; Watters v R. D. Branch Assocs., LP, 30 AD3d 408 [2d Dept 2006]. Additionally, neither 372 Jericho nor M & M established their prima facie entitlement to summary judgment on 372 Jericho’s fourth cross claim for breach of contract for failure to procure insurance as triable issues of fact exist concerning whether M & M procured the contractually-mandated insurance, see, Natarus v Corp. Prop. Investors, Inc., 13 AD3d 500 [2d Dept 2004]; Hajdari v 437 Madison Ave. Fee Assocs., 293 AD2d 360 [1st Dept 2002]; cf., Watters v R. D. Branch Assocs., LP, 30 AD3d 408, supra.

Contrary to M & M’s contentions, the contractual indemnification provision set forth in paragraph 8 of the parties’ lease agreement is enforceable as it is limited to M & M’s acts or omissions and limits 372 Jericho’s recovery to insurance proceeds, see, Yuen v 267 Canal Street Corp., 41 AD3d 812 [2d Dept 2007]; Colosi v RATL, LLC, 7 AD3d 558 [2d Dept 2004]. In any event, 372 Jericho failed to establish its prima facie entitlement to summary judgment on its third cross claim for contractual indemnification because it did not establish that it was free from any negligence with regard to plaintiff’s accident, see, Gil v Manufacturer’s Hanover Trust Co., 39 AD3d 703 [2d Dept 2007]. As M & M also failed to demonstrate that it was free from negligence, the branch of its motion for summary judgment dismissing 372 Jericho’s cross claim for contractual indemnification against it is also denied.

The plaintiffs’ two cross motions are denied as untimely, having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay, see, CPLR 3212 [a]; Brill v City of New York, 2 NY3d 648 [2004]. Moreover, while a court may entertain a belated cross motion for summary judgment if a timely motion for such relief has been made on “nearly identical” grounds, Grande v Peteroy, 39 AD3d 590 [2d Dept 2007]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496 [2d Dept 2005], on the facts presented it cannot be said that the basis on which the plaintiffs seek summary judgment are nearly identical or even, for the most part, remotely similar to the basis on which the timely motion-in-chief by 372 Jericho or the cross motion by M & M are based.

Dated: Oct 3, 2008


J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION