

D'Amore v Metlife, Inc.
2008 NY Slip Op 33041(U)
November 12, 2008
Supreme Court, New York County
Docket Number: 102164/05
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 102164/2005

D'AMORE, DEBRA

vs

METLIFE

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/11/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1-3
4-5
6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided together with motion sequence 04 in accordance with the entered memorandum decision and order.

N.B. -- Pre-trial conference scheduled for 12/15/08 at 2 PM.

FILED
NOV 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/12/08

J.S.
JANE S. SOLOMON 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
DEBRA D'AMORE,

Plaintiff,

-against-

METLIFE INC., METROPOLITAN INSURANCE
CO., CB RICHARD ELLIS, INC., and
AMERICAN BUILDING MAINTENANCE CO.
OF NEW YORK,

Defendants:

JANE S. SOLOMON, J.:

Index No.: 102164/05

DECISION and ORDER

FILED

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NEW YORK

Plaintiff Debra D'Amore (D'Amore) alleges that she slipped and fell on stairs leading out of the Metlife Building located at 200 Park Avenue in Manhattan. She claims that defendants are negligent because she slipped in a puddle of water that had accumulated on the steps. Defendants Metlife, Inc. and Metropolitan Insurance Co. (Metlife) are the building owners, and defendant CB Richard Ellis, Inc. (CBRE) is the managing agent. CBRE hired defendant American Building Maintenance Co. Of New York (ABM) to provide building maintenance. Metlife and CBRE sued ABM in a third-party action, and plaintiff amended her complaint to bring her claim against ABM directly.

Metlife and CBRE move for summary judgment on their cross-claim against ABM for common law and contractual indemnity. ABM opposes the motion and separately moves for summary judgment dismissing the complaint and cross-claims as against it.

D'Amore claims that she fell on steps leading out of

200 Park Avenue to Vanderbilt Avenue at about 1:30 PM on July 14, 2004. She testified that she had been outside at approximately 11 AM, and observed a light mist of rain falling. She testified that no rain mats were on the steps, and she did not see "wet floor" caution signs or warning cones before she fell.

CBRE hired ABM to perform cleaning and other maintenance in the building pursuant to a contract (Contract, Metlife/CBRE Notice of Motion, Ex. G). ABM promised to set out rain mats "as necessary upon sighting of inclement weather" (Contract, at 21), and to take "all necessary precautions" for the safety of its employees and "all other persons" (*id.*, at Schedule 1, paragraph 7[c]). The Contract includes an indemnification clause whereby ABM agrees to indemnify and hold CBRE and MetLife harmless from all claims and liabilities arising or allegedly arising from any act or omission of ABM or its employees, or arising from any bodily injury occurring incident to ABM's work in the building (*id.*, at Schedule 1, paragraph 7[b]).

ABM relies upon a National Climatological Data for New York City (Central Park) record for the date of the accident, which indicates that the weather was recorded as "BR" and "RA" from 1 AM through 1 PM (Notice of Motion, Ex N). "BR" refers to mist, and "RA" refers to rain. ABM argues that this evidence compels dismissal of the complaint under the "storm in progress"

doctrine, whereby a landowner's liability for a condition caused by inclement weather may be limited to permit the landowner a reasonable period of time after the cessation of a storm to take corrective action (see, Mosqueara v Orin, 48 AD3d 935 [3d Dept 29008]). The theory underlying the "storm in progress" defense is that a landowner is presumed to lack actual or constructive notice of a condition caused by current weather conditions, and a plaintiff must show actual notice of a dangerous condition to maintain her claim (Id.).

ABM's argument fails for two reasons. First, there is a question of fact regarding the weather. Plaintiff submits an affidavit from a meteorologist who opines that the rain stopped at about 11 AM, and therefore there was a two to two and a half hour period after rain stopped for ABM to take corrective action. A jury could find that this provided ABM with a reasonable opportunity to take corrective action. Second, ABM was obligated by the terms of its contract with CBRE to take immediate action during a rain storm, and it is alleged that a breach of this contractual duty is a proximate cause of plaintiff's accident. ABM contends that its employees knew of the storm and placed warning signs and cones near the stairs (as required under its contract) before the accident. If believed, this is proof of actual notice of the alleged condition and an opportunity to take corrective action. The deposition testimony of ABM's witness

regarding its procedures during inclement weather provides further evidence that it had actual notice of the condition of the stairs.

ABM also contends that while it owed a contractual obligation to CBRE and Metlife to maintain the stairs in a safe condition, it had no privity with plaintiff, and therefore owed her no duty of care. In the circumstances of this lawsuit, however, ABM can be liable in tort for its breach of a contractual obligation resulting in an injury sustained by a third party (see, Zinn v Jefferson Towers, Inc., 14 AD3d 398 [1st Dept 2005], and Palka v Servicemaster Management Svces Corp., 83 NY2d 579 [1994]).

MetLife and CBRE seek contractual and common law indemnification from ABM. ABM contends that the indemnity clause in the Contract is over-broad and runs afoul of General Obligations Law section 5-322.1. That statute provides that certain contracts, including ones relative to building maintenance, are void to the extent that they purport to indemnify a building owner or contractor from damages arising from its own negligence. Here, paragraph 7(b) of the Contract is indeed very broadly written, and could be construed as over-broad under GOL section 5-322.1 (cf, Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., [1997] [statute merely bars enforcement of contractual clauses to extent that they would require

indemnification of that portion of awards attributable to negligence of the indemnitee].

However, even if paragraph 7(b) runs afoul of GOL section 5-322.1, MetLife and CBRE are entitled to common law indemnification from ABM with respect to D'Amore's claim. ABM specifically undertook to set out rain mats upon sighting inclement weather, and to take all necessary precautions for the safety of pedestrians in the building. There is no evidence of any act or omission by MetLife or CBRE that proximately caused D'Amore's accident, and their liability, if any, is vicarious of ABM's failure to carry out its contractual obligations (see, Raquet v Braun, 90 NY2d 177 [1997]). Accordingly, it hereby is

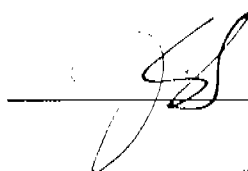
ORDERED that the motion by Metlife and CBRE for summary judgment on their cross-claims for indemnification against ABM (motion sequence 03) is granted as to liability; and determination of damages thereon shall abide trial of the remainder of the action; and it further is

ORDERED that the motion for summary judgment by ABM (motion sequence 04) is denied; and it further is

ORDERED that counsel shall appear in Part 35 for a pre-trial conference on December 15, 2008 at 2 PM.

Dated: November 12, 2008

ENTER



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J.S.C.
JANE S. SOLOMON

FILED