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| Bernstein v Outback Steakhouse-NYC, Ltd. |
| 2008 NY Slip Op 33390(U) |
| December 1, 2008 |
| Supreme Court, Nassau County |
| Docket Number: 13058/06 |
| Judge: Antonio I. Brandveen |
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ANDREW BERNSTEIN,

Plaintiff,

- against -

OUTBACK STEAKHOUSE-NYC, LTD., MOYER
PACKING COMPANY, INC. and MERRICK
FIELDS, LLC,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 13058/06

Motion Sequence No. 002

The following papers having been read on this motion:

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| Notice of Motion, Affidavits, & Exhibits | <u>1</u> |
| Answering Affidavits | <u>2</u> |
| Replying Affidavits | <u>3</u> |
| Briefs: Plaintiff's / Petitioner's | _____ |
| Defendant's / Respondent's | _____ |

The defendant Merrick Fields, LLC moves for summary judgment dismissing the plaintiff's complaint with prejudice, and for summary judgment against the defendant Outback Steakhouse-NYC, Ltd. for common law and contractual indemnification, and damages based upon breach of contract by the defendant Outback Steakhouse-NYC, Ltd. for its failure to procure insurance for contractual and common law, as well as costs and attorney's fees. The plaintiff and the defendant Outback Steakhouse-NYC, Ltd. oppose the motion. The defendant Merrick Fields, LLC replies to counter their opposition. The underlying personal injury action arises from an alleged accident on March 7, 2005, in the parking lot driveway at 2124 Merrick Avenue, Merrick, New York. The plaintiff claims

slipping and falling on grease near a garbage dumpster. All depositions have been held in this matter. This Court has carefully reviewed all of the papers submitted with respect to this motion.

The attorney for the defendant Merrick Fields, LLC points, in a supporting affirmation dated April 30, 2008, to the deposition testimony to support the assertions in the affirmation, and contends actual and constructive notice are alleged in the plaintiff's claim. The attorney for the defendant Merrick Fields, LLC asserts the defendant Merrick Fields, LLC was not on notice of the presence of any grease nor created it on the floor of the driveway where this accident occurred, so summary judgment must be granted. The attorney for the defendant Merrick Fields, LLC states the Merrick Fields, LLC is entitled to common law and contractual indemnification from the defendant Outback Steakhouse-NYC, Ltd., and directs the Court's attention to lease agreement dated May 5, 1995, specifically Article VI - Maintenance Obligations, between Drayman Family Partnership, a New York partnership and Outback/Metropolis Joint Venture, a Florida general partnership. The attorney for the defendant Merrick Fields, LLC points to the affidavit dated April 28, 2008, by Scott Silverman, a member of the defendant Merrick Fields, LLC, who indicates the defendant Merrick Fields, LLC purchased the Merrick Mall in August 2003, which includes the Outback Steakhouse restaurant. The attorney for the defendant Merrick Fields, LLC asserts, at the time ownership transferred, all of the leases were subject to that transaction, and the defendant Merrick Fields, LLC is entitled to the benefits of the lease provisions. The attorney for the defendant Merrick Fields, LLC states the defendant Outback Steakhouse-NYC, Ltd., the tenant, is responsible for its own garbage disposal and pick, as

well as keeping the premises clean. The attorney for the defendant Merrick Fields, LLC maintains the plaintiff's claims relate to the garbage disposal, and so the defendant Merrick Fields, LLC is entitled to indemnification, as shown by Section 7.5 of the lease entitled Indemnity by the tenant and landlord, which hold harmless the landlord under these circumstances. The attorney for the defendant Merrick Fields, LLC avers the defendant Merrick Fields, LLC is entitled to damages for the breach of contract by the defendant Outback Steakhouse-NYC, Ltd. for the failure to procure insurance on their behalf under Article VII of the May 5, 1995 lease agreement entitled Tenant's General Liability Insurance.

The plaintiff's attorney refers, in an opposing affirmation dated August 14, 2008, to the moving attached to the moving papers of the defendant Merrick Fields, LLC, and adopts those papers by reference. The plaintiff's attorney asserts there is liability for the plaintiff's injuries, however the liability is of one or the other codefendants. The plaintiff's attorney points to the deposition of Carlos Verona, the driver who picked up the grease and refuse, and frequently saw grease on the premises. The plaintiff's attorney notes Section 6.2 of the lease entitled Maintenance by Landlord which states the landlord, to wit the defendant Merrick Fields, LLC is responsible for keeping, maintaining and replacing, if necessary the common areas in good condition and repair and in a neat and clean condition. The plaintiff's attorney asserts clearly these circumstances are questions of fact presented which led to the conclusion the motion for summary judgment should be denied.

The attorney for the defendant Outback Steakhouse-NYC, Ltd. states, in an opposing affirmation dated August 11, 2008, contrary to the arguments raised in the motion, the defendant Outback Steakhouse-NYC, Ltd. did not operate nor control the location of the

plaintiff's alleged incident, and did not owe a duty to the defendant Merrick Fields, LLC to indemnify nor defend the defendant Merrick Fields, LLC in the underlying personal injury action. The attorney for the defendant Outback Steakhouse-NYC, Ltd. points to the lease with the defendant Merrick Fields, LLC, photographs, tax records of the Nassau County Department of Assessment, and the deposition testimony, and asserts that evidence raises questions of fact about operation and control of that parking lot area where the accident allegedly occurred; and who was responsible with respect to that parking lot area. The attorney for the defendant Outback Steakhouse-NYC, Ltd. also focuses attention on the lease agreement with the defendant Merrick Fields, LLC, and avers the defendant Outback Steakhouse-NYC, Ltd. owes no duty as to the common areas under Article VI, Section 6.2, and Article VII, Section 7.5 of the lease agreement for maintenance to the common areas nor an obligation to indemnify it under the circumstances of this personal injury action. The attorney for the defendant Outback Steakhouse-NYC, Ltd. states it is the defendant Merrick Fields, LLC which could be held liable to the defendant Outback Steakhouse-NYC, Ltd. under the lease agreement. The attorney for the defendant Outback Steakhouse-NYC, Ltd. avers the Nassau County records clearly reveal the parking area where the plaintiff claims to have fallen is not part of the Merrick Mall's lot, but is where the Roslyn Saving Bank is located, so the parking area is outside of the control and operation of the defendant Outback Steakhouse-NYC, Ltd. and the defendant Merrick Fields, LLC.

The attorney for the defendant Merrick Fields, LLC states, in a reply affirmation dated August 11, 2008, the opposition papers should be rejected as untimely served. The attorney for the defendant Merrick Fields, LLC states the plaintiff failed to refute this defendant's

arguments seeking dismissal of the plaintiff's complaint, and has not shown how this defendant had actual or constructive notice or breached any duty owed to the plaintiff. The attorney for the defendant Merrick Fields, LLC asserts the defense motion must be granted. The attorney for the defendant Merrick Fields, LLC contends the defendant Outback Steakhouse-NYC, Ltd. has not raised a triable issue of fact, and the defendant Outback Steakhouse-NYC, Ltd. failed to show it named the defendant Merrick Fields, LLC as an additional insured pursuant to the lease agreement section 7.1. The attorney for the defendant Merrick Fields, LLC states an insurance procurement clause of the contract is entirely independent of any indemnification provision within the lease agreement as a matter of law. The attorney for the defendant Merrick Fields, LLC avers the lease agreement obligates the defendant Outback Steakhouse-NYC, Ltd. to indemnify the landlord for any claims arising from or in connection with the conduct or management of the premises or any business or any work done or any condition created. The attorney for the defendant Merrick Fields, LLC takes issue with the photographs and tax records produced by the defendant Outback Steakhouse-NYC, Ltd. as to the authenticity, verification, and origination of the data, to wit the information is merely hearsay. The attorney for the defendant Merrick Fields, LLC contends there is no question the actions of the defendant Outback Steakhouse-NYC, Ltd. are directly related to the creation of the condition which caused the plaintiff's injury, and there is no question the defendant Merrick Fields, LLC is entitled, as well to common law indemnification.

Under CPLR 3212 (b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion

shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party ... [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325; *Andre v Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelan v GTE Sylvania*, 182 AD2d 446). Here, in view of the applicable legal standards, plaintiffs’ causes of action can be sustained. The complaint must not be dismissed. The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Gervasio v Di Napoli*, 134 AD2d 235, 236; *Assing v United Rubber Supply Co.*, 126 AD2d 590). Nevertheless, “ ‘the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated’ ” (*Gervasio v Di Napoli, supra*, 134 AD2d, at 236, quoting *Assing v United Rubber Supply Co., supra*; *see, Columbus Trust Co. v Campolo*, 110 AD2d 616, *affd* 66 NY2d 701). If the issue claimed to exist is not genuine and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v Pomeroy*, 35 NY2d, *supra*, at 364; *Assing v United Rubber Supply Co., supra*). Here, the defendant Merrick Fields, LLC has not demonstrated that, on the facts, it is entitled to judgment as a matter of law under CPLR 3212 (b). The issue of the defendant Outback Steakhouse-NYC, Ltd.


naming the defendant Merrick Fields, LLC as an additional insured pursuant to the lease agreement section 7.1 is left for resolution by the trial Court.

Accordingly, the motion is denied.

So ordered.

Dated: **December 1, 2008**

ENTER:



 J. S. C.
~~NON~~ ANTONIO L. BRANDVERE

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED
 DEC 09 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE