

Kulich v CVS Corp.

2008 NY Slip Op 33533(U)

December 24, 2008

Supreme Court, Nassau County

Docket Number: 005879/06

Judge: Daniel Martin

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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

DOLORES KULICH and WILLIAM KULICH.

Plaintiffs.

- against -

**CVS CORPORATION and 2034 NORTH
JERUSALEM ROAD, LLC.**

Defendants.

**CVS NORTH BELLMORE, LLC. i/s/h/a CVS
CORPORATION.**

Third-Party Plaintiffs.

- against -

ADC INDUSTRIES, INC.

Third-Party Defendant.

**TRIAL/IAS, PART 31
NASSAU COUNTY**

**Sequence No.: 002 & 003
Index No.: 005879/06**

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motions and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion for summary judgment dismissing the complaint herein is denied and third-party defendant's motion for summary judgment dismissing the third-party complaint is granted solely as to the third-party's claim for contribution as a potential joint tortfeasor and all other branches of the third-party defendant's cross-motion are denied.

Defendant 2034 North Jerusalem Road, LLC (hereinafter "2034") is the owner of real property at 2034 North Jerusalem Avenue, North Bellmore, New York and defendant CVS Corporation, 2034's tenant operates a pharmacy there. Plaintiff Dolores Kulich alleges to have

suffered personal injuries as a result of the automatic exit door located at the subject premises' failure to properly operate.

Defendants move for summary judgment dismissing the complaint upon the grounds that this defendant did not create the alleged dangerous condition that caused plaintiff to suffer her injuries nor had actual or constructive notice of the condition and further moves for summary judgment on its indemnification claim against third-party defendant ADC Industries, Inc. (hereinafter "ADC"). Third-party defendant ADC moves for summary judgment dismissing the third-party complaint on the basis that 1) defendants may not seek contribution against ADC because ADC owed defendants no duty independent of that pursuant to its contract with CVS; 2) defendants may not seek common law indemnification against ADC because any negligence herein was committed by defendant CVS and there is no proof of negligence on ADC's part; and 3) defendants may not seek contractual indemnification on the grounds that pursuant to the contract ADC may only be required to indemnify CVS where ADC is itself negligent in creating the condition.

Any party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing such a motion must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

In support of their motion defendants first rely upon the deposition transcript of Mrs. Kulich in which she testified that on January 3, 2006 she and her husband went to the CVS store and when she went to exit the store the automatic exit door was stuck. Ms. Kulich testified that she pushed it a couple of times and on the third push it opened and plaintiff fell to the ground. Ms. Kulich testified that she did not complain about the door to anyone at CVS or 2034 prior to the accident, nor is she aware of anyone else who has complained about the door prior to her accident. Further, while on prior occasions she had to push the door to open it, she never had to push it so hard as she did on the date she suffered her injuries. (See, deposition transcript of Dolores Kulich, pp. 11- 24, 66, 74-80).

Mr. Kulich testified that in his experience he always had to push on the exit door to get it to open but never had to push as hard as he did on January 3, 2006 when he exited the store just prior to his wife's accident. He did not make any complaints to anyone from CVS about the door prior to the accident

Caron Falchek testified on behalf of CVS. Ms. Falcheck, CVS' assistant manager testified that:

- 1) she had been employed at that location for six months preceding the accident;
- 2) there were no other incidents involving people falling while attempting to use the exit door;

- 3) prior to the date of the accident she is not aware of any complaints about the door;
- 4) as part of her duties Ms. Falchek is required to make sure that the front doors were operating properly;
- 5) after Ms. Kulich's accident she inspected the door and found it to be working;
- 6) she has never seen repairs being made to the door;
- 7) she has never observed the doors not open in the normal fashion;
- 8) she would go out through the door on several occasions every day and never had problems with the door;

Defendants also submit the deposition transcript of Benny Giannone, a limited partner in 2034 who testified that he never received any complaints about the door and during his visits to the store he never had a problem with the doors.

Based upon the foregoing, defendants assert that the complaint herein should be dismissed because there is no issue of fact that defendants either created the dangerous condition or had actual or constructive notice of same prior to the happening of the accident.

Generally, a property owner is liable for injuries caused by a dangerous condition on its property where it created the condition or had actual or constructive notice of its existence. See, Penn v. Fleet Bank, 12 A.D.3d 584 (2nd Dep't 2004); Bationcela v. Staten Island Mall, 189 A.D.2d 743 (2nd Dep't 1989). Where defendants who own or possess the real property at which plaintiff alleges the dangerous condition existed demonstrate that they neither created the condition nor had actual or constructive notice of its existence, the court will find that defendants have met their *prima facie* burden on their motion for summary judgment. See, Tiano v. Nick's Lobster and Seafood Restaurant and Claim Bar, 300 A.D.2d 469 (2nd Dep't 2002); Constance v. Food Emporium, 289 A.D.2d 363 (2nd Dep't 2000). Here the moving defendants have met their initial burden.

In opposition to the defendant's motion both Mr. and Mrs. Kulich both testified that on prior occasions while shopping at the CVS they had had to push the door in order to get it to open. The plaintiffs also produced proof which indicates that numerous repairs were made on a frequent basis to the door in question. The plaintiffs also submitted an experts affidavit which asserted that scraping to the door opening mechanisms was indicative of either improper installation or maintenance of the doorway which would put the tenant in possession on notice that the door would stick. In order to provide a basis for constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants to discover and remedy the condition. See, O'Hanlon v. Bodouva, 251 A.D.2d 474 (2nd Dep't 1998); Ligon v. Waldbaum, Inc., 234 A.D.2d 347 (2nd Dep't 1996). Based upon the record before it, the court concludes that an issue of fact exists as to whether defendants had constructive notice of the defect which caused Mrs. Kulich to suffer her injuries or whether the defendants knew or should have known their several repair efforts were insufficient to make the doorway area safe.

Defendants also move for summary judgment on their claim of contractual indemnification. The indemnification provision upon which defendants rely provides as follows:

“Service Provider agrees to (I) indemnify and hold harmless buyer from and against all claims, liabilities and damages to the extent same are due to service provider’s negligence, willful misconduct or breach of this agreement or service provider’s failure to comply with or abide by any applicable law (other than by reason of act or omission of buyer), and (ii) to defendant promptly and diligently, at service provider’s sole expense, with attorneys reasonably acceptable to buyer, any claim, action or proceeding brought against buyer or buyer and service provider jointly or severally, arising out of or connected with any of the foregoing, and to indemnify and hold buyer harmless from any judgment, loss or settlement on account thereof.”

(See, Service Agreement between CVS and ADC).

The interpretation of a contract is a matter of law and as such is within the province of the court and is properly determined by motion for summary judgment. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450 (2nd Dep’t 1997).

The contract is “...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.” Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 (1960). “[C]lear, complete writings should generally be enforced according to their terms.” Automotive Management Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995).

When the contract is ambiguous and “...determination of the parties’ intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact.” Amusement Business Underwriters v. American International Group, Inc., 66 N.Y.2d 878 (1985). See, also, Icon Motors, Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463 (2nd Dep’t 1991). Whether the contract is ambiguous is to be determined by the court. Amusement Business Underwriters, supra.

The contract at issue herein unambiguously provides that ADC is required to provide defense and indemnification except where the claim is based upon “reason of act or omission of buyer [CVS].” As set forth above, the court has found an issue of fact as to whether defendants owner and tenant are liable for the accident. The court therefore finds that defendants have failed to meet their burden of proof on this branch of the motion.

In support of its motion for summary judgment third-party defendant ADC first asserts that as it did not owe a duty to CVS independent of its contractual obligations to maintain the doors, it may not be held liable under a cause of action based upon contribution. The service agreement herein provides that ADC will provide automatic door repair services.

It has been held that a contractor will not be held liable for contribution to the owner or operator of real property being sued by a plaintiff who alleges a dangerous condition on the property absent evidence that the contractor owed the owner or operator a duty of reasonable care independent of its contractual obligations or that it breached any independent duty of care owed to the victim. See, Barratta v. Home Depot USA, Inc., 303 A.D.2d 434 (2nd Dep't 2003). The court finds that ADC has satisfied its prima facie burden on this branch of its motion.

In opposition to this branch of the motion defendants assert that they detrimentally relied upon ADC to perform the repairs and ADC breached its duty to properly repair the doors. Such is not a duty independent of its contractual duty to repair the doors. The contract itself provides that ADC is to repair the doors at CVS' request. Further, CVS claims ADC failed to demonstrate that the contract was not a comprehensive and exclusive obligation on ADC's part which displaced CVS' duties. The breach of a contractual obligation may give rise to a claim for contribution where the subject contract constitutes a comprehensive and exclusive maintenance contract. See, Malcom v. Kapur, 278 A.D.2d 926 (4th Dep't 2000). Where, as here, the contractor makes the repairs at the request of the owner or operator, the contract will not constitute comprehensive and exclusive contract. See, McKeon v. Town of Oyster Bay, 292 A.D.2d 574 (2nd Dep't 2002). Thus, the court finds that ADC is entitled to summary judgment dismissing the third-party cause of action for contribution.

In support of those branches of the motion which seek summary judgment dismissing the claims for common law and contractual indemnification ADC asserts that such claims may not be maintained because there is no evidence herein of negligence on ADC's part. In support of this position ADC points to the deposition testimony of CVS' assistant manager who testified that he used the door on the date of the accident and found it to be operating properly. Furthermore, a post accident inspection by ADC revealed the door to be operating properly.

A common law indemnification claim may be maintained where the injury's cause can be attributable solely to the negligent performance or non-performance of an act solely within the province of the contractor. See, Murphy v. M.B. Real Estate Development Corp., 280 A.D.2d 457 (2nd Dep't 2001). Further, a contractual indemnification clause will be enforced where the party seeking indemnification is not itself negligent. See, Naranjo v. Star Corrugated Box Co., Inc., 11 A.D.3d 436 (2nd Dep't 2004). In the instant matter the testimony relied upon by ADC does not establish that it was not at fault or that CVS was at fault. It is undisputed that ADC performed repairs on the doors prior to the accident and further, that plaintiffs have both testified that the doors had not functioned properly prior to the accident on several occasions. Thus, as issues of fact exist as to which of these parties' negligence, if any, caused the accident, the court finds that ADC has failed to demonstrate that it bore no responsibility for the doors failure to operate safely.

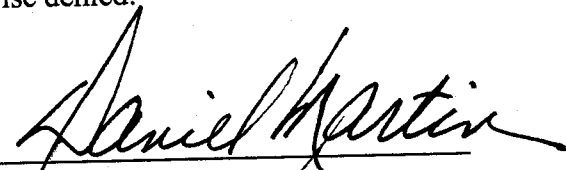
Further, ADC's position that General Obligations Law §5-322.1 prohibits the enforcement of the contractual indemnification clause at issue herein is misplaced. That section only prohibits the enforcement of contractual indemnification clauses where the party seeking

indemnification is itself negligent. Naranjo v. Star Corrugated Box Co., Inc., 11 A.D.3d 436, supra. At this juncture, it appears as indicated previously an issue of fact exist as to this issue. Thus, to the extent ADC seeks dismissal of defendants' claims for common law and contractual indemnification, the motion is denied.

That branch of ADC's motion which seeks summary judgment dismissing defendants' claim for breach of the procurement provision of its contract with CVS is denied. ADC's position that the contract did not place such a requirement on ADC is belied by the copy of the contract annexed to ADC's moving papers which provides at paragraph VI(b) that ADC is required to obtain and maintain liability insurance for the duration fo the contract.

Based upon the foregoing the fourth cause of action in the third-party complaint is dismissed. The motion and cross-motion are both otherwise denied.

So Ordered.


A.J.S.C.

Dated: December 24, 2008

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