

Chavez v Eastern Pork Prods. Co., LLC

2009 NY Slip Op 31157(U)

May 21, 2009

Supreme Court, New York County

Docket Number: 103683/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

ANTONIO CHAVEZ,

INDEX NO. 103683/2006

Plaintiff,

- v -

MOTION DATE 2/5/09

MOTION SEQ. NO. 001

MOTION CAL. NO. 21

EASTERN PORK PRODUCTS COMPANY, LLC,
EASTERN PORK PRODUCTS CO., THE DURST
ORGANIZATION INC., ROYAL REALTY CORP.,
HOTEL CASABLANCA, INC., IMRICH HENRY
KALLAN and HOTEL ELYSEE,

Defendants.

FILED

MAY 28 2009

COUNTY CLERK'S OFFICE
NEW YORK

(And a third-party action).

The following papers, numbered 1 to 11 were read on the motion and cross motions for summary judgment

	PAPERS NUMBERED
Notice of Motion— Affirmation — Exhibits A-N	<u>1-2</u>
Notice of Cross Motion— Affirmation — Exhibits A-G	<u>3-4</u>
Notice of Cross Motion— Affirmation — Exhibits A-D	<u>5-6</u>
Affirmation in Opposition – Exhibits A, B	<u>7</u>
Notice of Cross Motion— Affirmation — Exhibits A-D	<u>8</u>
Affirmation in Opposition	<u>9</u>
Replying Affirmations	<u>10-11</u>

Cross-Motions (3): X Yes No

Upon the foregoing papers, it is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN
J.S.C.

Dated: 5/21/09
New York, New York


J.S.C.

Check one: FINAL DISPOSITION X 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 STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 7**

ANTONIO CHAVEZ,

Plaintiff,

- against -

EASTERN PORK PRODUCTS COMPANY, LLC,
EASTERN PORK PRODUCTS CO., THE DURST
ORGANIZATION INC., ROYAL REALTY CORP.,
HOTEL CASABLANCA, INC., IMRICH HENRY
KALLAN, and HOTEL ELYSEE,

Defendants.

INDEX NO. 103683/06

MOTION SEQ. NO. 001

Decision and Order

EASTERN PORK PRODUCTS COMPANY, LLC
and ROYAL REALTY CORP.,

Third-Party Plaintiffs,

- against -

NORTH 43RD LLC,

Third-Party Defendant.

**THIRD PARTY
INDEX NO. 590288/07**

HON. MICHAEL D. STALLMAN, J.:

In this case, plaintiff Antonio Chavez (plaintiff) alleges that on June 22, 2004, he slipped and fell (the accident) at the premises located at 147 West 43rd Street, New York, New York (the building). On the date of the accident, defendant Eastern Pork Products Company LLC (Eastern Pork) was the owner of the building, and defendant Royal Realty Corp. (Royal Realty) was the managing agent of the building. Prior to the accident, defendant Eastern Pork Products Co., a partnership, was converted into a limited liability company, and is now named Eastern Pork.

Defendant The Durst Organization Inc. (Durst) is apparently affiliated with Eastern Pork but does not own, manage, maintain, or control the building. (Eastern Pork, Eastern Pork Products Co., Royal Realty, and Durst are collectively referred to as the landlord defendants).

At the time of the accident, the building had two tenants. One was third-party defendant North 43rd LLC (North 43rd), d/b/a Tony's DiNapoli restaurant (the restaurant), which employed plaintiff as one of its cooks. The other was defendant Hotel Casablanca, Inc. (the hotel), whose president is defendant Imrich Henry Kallan (Kallan) (collectively, hotel defendants).

Discovery has been concluded, and now the landlord defendants move for summary judgment. North 43rd cross-moves for summary judgment to dismiss the third-party complaint. The hotel defendants cross-move for summary judgment to dismiss the cross claims of the landlord defendants against them. The landlord defendants cross-move for leave to amend their cross claims against the hotel defendants.

BACKGROUND

On the day of the accident, plaintiff alleges that he entered the building from a service entrance and was walking along a service passageway (the passageway), where he slipped and fell on a mixture of water and grease (10/31/08 Harris Aff., exhibit E, 04/11/07 plaintiff's dep. tr., at 69-70, 86). Plaintiff testified that the grease came from the garbage bags placed on the floor of the passageway by the employees of either the hotel or the restaurant (*id.*, exhibit F, 03/06/08 plaintiff's dep. tr., at 90, 98).

Plaintiff alleges that at the time of the accident, all of the named first-party defendants were owners of, and controlled, operated, maintained, and managed the building, and that they had a duty to keep the building in a reasonably safe condition, and employed persons to inspect and maintain

the building. Plaintiff alleges that the passageway had an unsafe condition and lacked proper lighting, as a result of which he “was caused to fall and be injured ...” (complaint, ¶¶ 61-66, 70). The defendants were allegedly aware of these dangerous conditions in the passageway, which was caused by their negligence (*id.*, ¶¶ 67-68). Plaintiff claims that he suffered injuries and sustained damages, and seeks monetary judgment against the defendants.

In their answer to plaintiff’s complaint, the landlord defendants cross-claim against the hotel defendants and defendant Hotel Elysee, alleging that plaintiff’s injuries, if any, were caused by their negligence. The record on this motion does not disclose the status of Hotel Elysee vis-a-vis the building or any of the parties.

Eastern Pork and Royal Realty filed a third-party complaint against North 43rd. They allege that: (1) North 43rd, pursuant to its lease with Royal Realty, was responsible for non-structural repairs and maintenance of the restaurant premises, and that the accident occurred solely as a result of North 43rd’s failure to meet its obligations, rendering it liable to third-party plaintiffs for any judgment that plaintiff may recover against them (third-party complaint, ¶¶ 8, 12, 13, 15-16); (2) pursuant to an indemnification clause in its lease agreement with Royal Realty, North 43rd had a duty to indemnify third-party plaintiffs (*id.*, 18, 21); and (3) contrary to its obligation under the lease, North 43rd failed to obtain general liability insurance, naming third-party plaintiffs as additional insureds (*id.*, ¶¶ 23-24), rendering North 43rd obligated to indemnify them (*id.*, ¶ 25). The issue of North 43rd’s obligation to obtain insurance has not been raised in this motion.

In their answer, the hotel defendants cross-claim against the landlord defendants, asserting claims of common-law contribution and indemnification and contractual indemnification.

Pursuant to a stipulation, dated February 22, 2007 and entered on March 29, 2007, plaintiff, Eastern Pork and Royal Realty stipulated that (1) Eastern Pork was the owner of the premises in question and Royal Realty was the managing agent of said premises, (2) defendants Eastern Pork Products Company and Durst “had no relationship to the premises in question,” and, therefore, (3) plaintiff discontinued his action against defendants Eastern Pork Products Co. and Durst.

Plaintiff settled his claims with the hotel defendants, and, pursuant to a stipulation, dated August 6, 2008 and entered on November 19, 2008, discontinued with prejudice his case against them.

Pursuant to a stipulation, dated April 4, 2006, plaintiff discontinued his action, without prejudice, against Hotel Elysee.

The landlord defendants now move for (1) summary judgment dismissing the complaint on the ground that they were out-of-possession landlords; (2) contractual indemnification against North 43rd and the hotel; (3) common-law indemnity against North 43rd and the hotel; and (4) dismissal of the action against Durst and Eastern Pork Products Co. North 43rd cross-moves for summary judgment on the ground that the third-party plaintiffs are not entitled to indemnification. Hotel defendants cross-move for summary judgment dismissing the landlord defendants’ cross claim against them. The landlord defendants cross-move for leave to amend their cross claims against the hotel defendants to include a claim for contractual indemnification.

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant’s cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[T]o defeat a motion

for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact” (*id.*, citing CPLR 3212 (b) [internal quotation marks omitted]).

The landlord defendants move to dismiss the complaint on the ground that they were out-of-possession landlords.

A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision

(*Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]; *see also Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141-142 [1st Dept 2000]). The first issue is whether the landlord defendants were contractually obligated to make repairs or maintain the premises. The parties are in agreement that the accident took place in the service passageway on the ground floor, which a diagram attached to the restaurant’s lease labels as “Common Access” (*see* 04/11/07 plaintiff Dep. Tr., at 69-70, 86; 10/31/08 Harris Aff., exhibits J, N). A rider to the lease between Royal Realty and the restaurant provides that the restaurant “shall remain obligated to maintain, repair and clean such Common Access areas” (10/31/08 Harris Aff., exhibit D, restaurant’s lease, Inserts to Standard Form of Store Lease, Article 13 [c]). Both the restaurant’s general manager and the witness for the hotel defendants testified that the restaurant was responsible for the maintenance of the passageway (*see* 10/31/08 Harris Aff., exhibit H, Dimpflmaier Dep. Tr., at 18, 22-23; exhibit G, Kallan Dep. Tr., at 17-18).

In opposition, plaintiff argues that, pursuant to article four of the restaurant’s lease, “[o]wner shall maintain and repair the public portions of the building, both exterior and interior” (10/31/08

Harris Aff., exhibit D, § 4). Plaintiff contends that the passageway is an interior public portion of the building, because it is “[t]he only other means of egress from the restaurant” and it was used by the hotel and restaurant to keep and take garbage out of the premises, as well as for the restaurant deliveries (Maloney Aff. Opp., at 3-4). However, the passageway was clearly not a public portion of the building. The restaurant’s patrons did not use it to enter, or exit from, the restaurant (10/31/08 Harris Aff., exhibit J). The passageway did not lead into the restaurant’s dining room, but into its kitchen (10/31/08 Harris Aff., exhibit N; 04/11/07 plaintiff’s dep. tr., at 69) and was used only as a service entrance by the employees of the restaurant and the hotel (Dimpflmaier Dep. Tr., at 19-21, 33-34; 04/11/07 plaintiff’s dep. tr., 70, 74-75, 78). As the witnesses for Durst, the restaurant, and the hotel testified, “Commons Access” means that it is an area to which more than one tenant has access and is used by them for emergency egress (*see* 10/31/08 Harris Aff., exhibit I, Baccari Dep. Tr., at 18; Dimpflmaier Dep. Tr., at 21; Kallan Dep. Tr., at 20), and not that it is a public portion of the building (*see e.g. Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 498 [1st Dept 2008]).

Furthermore, plaintiff’s reliance on the Building Code of the City of New York, § 27-366, is unavailing. The fact that this statute requires that a building have “at least two independent exits” (Administrative Code of City of NY § 27-366 [1]) does not transform the service passageway into a public portion of the building (*see Reyes*, 50 AD3d at 498). Accordingly, the landlord defendants were not contractually obligated to make repairs or maintain the passageway (*Lane*, 276 AD2d at 141).

The other issue is whether the landlord defendants had a contractual right to reenter and make needed repairs, and whether liability is based on a significant structural defect that is contrary to a

statutory safety provision (*see id.* at 141). Plaintiff argues that article 13 of the restaurant's lease provides that the landlord has a right to enter the demised premises "to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable ..." (restaurant's lease, § 13). However, the rider to the restaurant's lease specifically placed the obligation "to maintain, repair and clean such Common Access areas" on the restaurant (*see* 10/31/08 Harris Aff., exhibit D, Inserts to Standard Form, § 13 [c]). Additionally, plaintiff slipped and fell on a mixture of grease and water, which is a transient condition, not a structural or design defect (*see Lane*, 276 AD2d at 141). To the extent that plaintiff claims that the building violated the aforementioned provision of the Building Code, § 27-366, the record before the court shows that the building had "two independent exits" and, hence, was in compliance with the Building Code (*see e.g.* 10/31/08 Harris Aff., exhibit N; Howard Aff., exhibit D, Sanango Dep. Tr., at 15). Even if the building had an insufficient number of exits, the liability here is not based on this alleged violation, and, thus, is irrelevant for plaintiff's claim (*see e.g. Lane*, 276 AD2d at 141-142).

Finally, plaintiff alleges in the complaint that the passageway lacked proper lighting (Complaint, ¶ 64). However, plaintiff testified that at the time of the accident, the lighting was sufficient for him to be able to see (04/11/07 plaintiff dep. tr., at 73-74). Additionally, plaintiff provides no expert report or testimony to substantiate his allegation of improper lighting. Therefore, the landlord defendants made a prima facie showing of entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see Vasquez*, 40 AD3d at 266-267; *Lane*, 276 AD2d at 141-142). Accordingly, plaintiff's complaint as against defendant landlords is dismissed. Dismissal of the complaint as against defendant landlords necessarily results in not only dismissal of the cross claims of defendants Hotel Casablanca and Kallan against the landlord defendants for

common-law indemnification, but also the defendant landlords' own cross claim against Hotel Elysee for common-law indemnification and contribution.

At common law, a party can seek indemnification only if it was not negligent and its liability is vicarious (*see e.g. Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, _AD3d_, 877 NYS2d 72, 75 [1st Dept 2009]). Because the landlord defendants have no vicarious or other liability, they may not seek indemnification (*id.*). Accordingly, that part of the landlord's motion that seeks common-law indemnification from the hotel is denied. The cross motion of the hotel defendants is granted and the cross claim for common-law indemnification by defendant landlords against the hotel defendants is dismissed. That part of the defendant landlords' motion that seeks common-law indemnification from North 43rd is denied, and the first cause of action in the third-party complaint to the extent that it seeks such relief is dismissed (*id.*).

Cross Motion of North 43rd

North 43rd opposes that part of the motion of the landlord defendants that seeks summary judgment on the second cause of action of the third-party complaint for contractual indemnification. North 43rd cross-moves for summary judgment on the ground that the third-party plaintiffs are not entitled to such indemnification.

In light of the dismissal of plaintiff's complaint against the third-party plaintiffs, the only issue is whether North 43rd is contractually obligated to indemnify and defend them.

Article 8a of the restaurant's lease provides in relevant part that

[t]enant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred *as a result of any breach by Tenant, Tenant's agent, contractors,*

employees, invitees, or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees

(10/31/08 Harris Aff., exhibit D, ¶ 8[a] [emphasis added]). North 43rd is correct that to the extent that the indemnification provision is triggered by the determination of its liability, the third-party plaintiffs are not now entitled to this relief, because there has not been such a determination. An issue of fact exists as to whether it was the hotel or the restaurant that placed the leaking garbage bags in the passageway, and whether the restaurant was negligent in failing to clean the area. Thus, at this juncture, the court cannot find that there is liability, nor can it dismiss the claim for indemnity.

Additionally, Workers' Compensation Law § 11, does not bar the claim of the third-party plaintiffs for contractual indemnification and defense (*see e.g. Acosta v Green Mgt. Corp.*, 267 AD2d 67, 68 [1st Dept 1999]). Therefore, the landlord defendants' motion, to the extent that it seeks summary judgment on its claim for contractual indemnification and defense from North 43rd, and the cross motion of North 43rd seeking to dismiss that claim, are both denied.

Cross Motion of the Landlord Defendants

The landlord defendants cross-move for leave to amend their cross claim against the hotel to include a claim for contractual indemnification and defense. In light of the dismissal of plaintiff's action against the landlord defendants, the issue is only whether the hotel's lease obligated the hotel to defend the landlord defendants. In its relevant part, article 37 of the hotel's lease obligates the hotel to indemnify the landlord for

all claims against Landlord arising from any accident ... caused to any person ... and occurring during the term of this Lease *in or about the Demised Premises*, where such accident ... results or is claimed to have resulted from an act or omission of Tenant

* * *

In case any action or proceeding is brought against Landlord by reason of any such claim, Tenant upon notice from Landlord, covenants to defend such action or proceeding by counsel reasonably satisfactory to Landlord

(10/31/08 Harris Aff., exhibit M, § 37 [emphasis added]).

Plaintiff here sued the landlord defendants for the accident that took place in the passageway, which is located “about the [hotel’s] Demised Premises” (*id.*). Plaintiff alleges, inter alia, that the accident occurred as a result of the negligence of the hotel (complaint, ¶¶ 36-43, 56-57, 61-68). Accordingly, the hotel’s obligation to defend the landlord defendants has been triggered.

Leave to amend is liberally granted where there is merit to the proposed cause of action (*see e.g. Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]). Accordingly, the cross motion of landlord defendants, to the extent that it seeks leave to amend its cross claim against the hotel on the ground of contractual indemnification and defense, is granted.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp. for summary judgment is granted to the extent that the complaint is dismissed as against them with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the cross claim of defendants Hotel Casablanca and Kallan for common-law indemnification is dismissed as against defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp; and it is further

ORDERED that the cross claim of defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp for common-law indemnification is dismissed as against Hotel Elysee; and it further

ORDERED that the cross motion of third-party defendant North 43rd, LLC, for summary judgment is partially granted and the first cause of action of the third-party complaint, to the extent that it seeks common-law indemnification, is dismissed, and the cross motion is otherwise denied; and it is further

ORDERED that the cross motion of defendants Hotel Casablanca, Inc., and Imrich Henry Kallan for summary judgment is granted and the cross claim for common-law indemnification by defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp. against defendants Hotel Casablanca, Inc., and Imrich Henry Kallan is dismissed; and it is further

ORDERED that the cross motion of defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp. for leave to amend their cross claim against defendant Hotel Casablanca, Inc., is granted, in part, to the extent that leave shall be granted to amend the cross claim for contractual indemnification and defense, and to this extent the amended cross claim in the form proposed as annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue as to:

(1) both cross claims by defendants Hotel Casablanca, Inc., and Imrich Henry Kallan against defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst

Organization Inc., and Royal Realty Corp.,

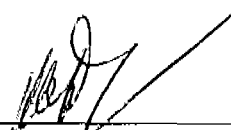
(2) the cross claim for contractual indemnification and defense by defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp. against defendant Hotel Casablanca, Inc., only to the extent that aforementioned leave to amend is granted,

(3) the cross claim for common-law indemnification by defendants Eastern Pork Products Company, LLC, Eastern Pork Products Co., The Durst Organization Inc., and Royal Realty Corp. against defendant Hotel Elysee, and

(4) in the third-party action, the first cause of action only to the extent that it is not based on common-law indemnification, and the second and third causes of action.

Dated: May 21, 2009
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN

J.S.C.

FILED

MAY 28 2009

COUNTY CLERK'S OFFICE
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