

Prisco v Holiday Inn Express

2009 NY Slip Op 32088(U)

September 10, 2009

Supreme Court, Richmond County

Docket Number: 100108/2008

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MICHAEL PRISCO,

Plaintiff(s),
-against-

HOLIDAY INN EXPRESS, HOUSTON LODGING, LLC,
STERLING & CIE, LLC, and METRO EIGHT
HOTEL, LLC.,

Defendant(s).

DCM PART 5

Present:
HON. JUDITH N. MCMAHON

DECISION AND ORDER

Index No. 100108/2008
Motion No. 003

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The following papers numbered 1 to 4 were used on this motion this 14th day of July, 2009:

Notice of Motion [Sterling & CIE, LLC](Affirmation in Support).....	1
Affirmation in Partial Opposition [Defendant Holiday Inn]	2
Affirmation in Opposition [Plaintiff]	3
Reply Affirmation (Sterling & CIE).....	4

On or about December 9, 2005, plaintiff alleges that he sustained personal injuries after he allegedly slipped and fell on a wet ramp while delivering coffee at the Holiday Inn Express located at 153-70 Conduit Avenue, Jamaica, New York. This action for personal injuries was commenced on or about January 2, 2008. The property is owned by defendant Sterling & CIE, LLC, [hereinafter “Sterling”] and triple-net leased to defendant Metro Eight Hotel, LLC, [hereinafter “Metro Eight”]. Procedurally, issue has been joined and discovery is completed. At present, defendant Sterling is moving for summary judgment to dismiss the complaint and to dismiss defendant Metro Eight’s cross claim for indemnification.

It is well settled that a “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v. Prospect Hosp., 68 NY2d

320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006]; quoting, Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

It is well settled that “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 or maintain the premises” (Bouima v. Dacomi, Inc., 36 AD3d 739, 739-740 [2d Dept., 2007]). Further, “[a] reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for injuries caused by a dangerous condition, where ‘a specific statutory violation exists and there is a significant structural or design defect’” (Bouima v. Dacomi, Inc., 36 AD3d 739, 739-740 [2d Dept., 2007]; Yadegar v. Int’l Food Market, 37 AD3d 595, 596-597 [2d Dept., 2007]; Flores v. Baroudos, 27 AD3d 517, 517-518 [2d Dept., 2006]).

Here, defendant Sterling has presented sufficient evidence to establish that it was entitled to summary judgment (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Bouima v. Dacomi, Inc., 36 AD3d 739, 739-740 [2d Dept., 2007]; Yadegar v. Int’l Food Market, 37 AD3d 595, 596-597 [2d Dept., 2007]). In opposition, the plaintiff has failed to raise a triable issue of fact. The plaintiff has failed to allege any specific statutory violation existed or that

there was a significant structural or design defect sufficient to warrant denial of summary judgment (id.). As a result, the defendant Sterling's motion is granted with respect to dismissal of the complaint as against it.

With respect to defendant Sterling's motion for dismissal of codefendant Metro Eight's claim for contractual indemnification, that motion is also granted. Metro Eight has consented to takeover the defense of defendant Sterling in a letter dated March 20, 2009. With respect to the attorneys fees, courts have long held that parties are generally responsible for their own attorneys fees, to the extent not provided elsewhere, and the pursuit of indemnification is no exception (Chapel v. Mitchell, 84 NY2d at 349; Perez v. Spring Creek Assoc., 283 AD 2d at 627]. However, where indemnification for attorney's fees is provided for, the potential indemnitee is entitled only to recover attorneys fees incurred in the defense of the main action and shall not recover any fees that were incurred in the pursuit of indemnification (Chapel v. Mitchell, 84 NY2d 345, 349 [1994]; Roddy v. Nederlander Producing Company of Am., Inc., 44 AD3d 556, 557 [1st Dept., 2007]; Springstead v. Ciba-Geigy Corp., 27 AD3d 720, 722 [2d Dept. 2006]; Yacovacci v. Shoprite Supermarket Inc., 24 AD3d 539, 540 [2d Dept., 2005]; Perez v. Spring Creek Assoc., 283 AD2d 626, 627 [2d Dept., 2001]).

Here, the lease between Sterling and Metro Eight provides for attorneys fees incurred and as a result Sterling & CIE, is awarded attorneys fees incurred in the defense of the action against the plaintiff. No attorney fees incurred in pursuing the cross claim for indemnification against defendant Metro Eight will be recovered. For determination of the

amount and reasonableness of attorneys fees incurred by Sterling's attorneys in the defense of the main action, the Court will refer this issue alone to JHO Ajello to hear and determine.

Accordingly, it is

ORDERED that defendant Sterling & CIE, LLC's motion to dismiss the plaintiffs complaint as against it **ONLY**, is hereby granted, and it is further

ORDERED that the complaint is dismissed as against defendant Sterling & CIE, LLC **ONLY**, and it is further

ORDERED that defendant Sterling & CIE, LLC's motion for summary judgment on codefendant Metro Eight's contractual indemnification claim is hereby granted, and it is further

ORDERED that defendant Metro Eight is to reimburse defendant Sterling & CIE, LLCs attorneys fees to the extent that the defendant is entitled to be awarded attorneys fees that were incurred in his defense of the main action against plaintiff and no attorneys fees are to be awarded on the cross claim of indemnification, and it is further

ORDERED that the defendants report to JHO Ajello to determine the amount and reasonableness of attorneys fees that are appropriate in accordance with this decision, and it is further

ORDERED that any and all remaining requests for relief are hereby denied, and it is further

ORDERED that the Clerk enter judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: September 10, 2009

E N T E R,

Hon. Judith N. McMahon
Justice of the Supreme Court