

Lopez v Guei Shun Shiau

2010 NY Slip Op 32800(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 114050/08

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 114050/2008
LOPEZ, MARIA ISABEL
VS.
SHIAU, GUEI SUN
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion*
are decided per attached

FILED
OCT 08 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/30/10.

[Signature]

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 17

-----X

MARIA ISABEL LOPEZ,

Plaintiff,

-against-

GUEI SHUN SHIAU and SHEBA ETHIOPIAN
RESTAURANT, INC., d/b/a QUEEN OF SHEBA
ETHIOPIAN RESTAURANT,

Defendants.

-----X

GUEI SHUN SHIAU,

Third-Party Plaintiff,

-against-

Sheba Ethiopian Restaurant, Inc.,
d/b/a QUEEN OF SHEBA ETHIOPIAN
RESTAURANT,

Third-Party Defendant.

-----X

EMILY JANE GOODMAN, J.S.C.:

Defendant third-party plaintiff Guei Shun Shiau (Shiau) moves for an order granting summary judgment on its cross claims for contractual indemnification against co-defendant/third-party defendant Sheba Ethiopian Restaurant, Inc., d/b/a Queen of Sheba Ethiopian Restaurant (Queen of Sheba), and dismissing Queen of Sheba's cross claims against Shiau.¹ Queen of Sheba cross-moves for summary judgment dismissing plaintiff's complaint and Shiau's third-party complaint and cross claims.

¹ Shiau does not discuss Queen of Sheba's cross claims in its papers and therefore, that portion of the requested relief is not treated separately in this decision.

Index No. 114950/08

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TP Index No. 590306/09

This action arises from an incident in which plaintiff Maria Isabel Lopez (Lopez) allegedly tripped and fell on an area of uneven sidewalk located on 10th Avenue, between 46th and 45th Street, New York, New York, in front of the Queen of Sheba restaurant. Queen of Sheba occupies the first floor of a building owned by Shiau, pursuant to a lease agreement. The lease agreement contains the following provision:

Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. . . . On Tenant's default in obtaining or delivering any such policy or policies or failure to pay the charges therefor, Owner may secure or pay the charges for any such policy or policies and charge the Tenant as additional rent therefor. Tenant 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.

Agreement of Lease, § 8.

The rider to the lease contains the following provision:

Tenant agrees at all times during the term of this lease, at its sole cost and expense, to carry general liability insurance for the benefit of Owner indemnifying Owner against loss and liability in connection with bodily injury or death or property damage from any accident in the demised premises and damage from any accident in or about the demised premises and appurtenances.

Rider, § 7.

Relying on the decision of the Court of Appeals in *Hogeland*

v Sibley, Lindsay & Curr Co. (42 NY2d 153 [1977]), Shiau argues that he is entitled to summary judgment on his cross claim for contractual indemnification against Queen of Sheba. According to Shiau, in *Hogeland*, the landlord was entitled to contractual indemnification from its tenant, where a customer, while leaving a store within the landlord's shopping center, tripped over a low-lying concrete planter box which was obscured from view by snow that had not been removed from the sidewalk. A closer examination of the facts in *Hogeland*, however, suggests that it is far from clear whether the Court's ruling in that case would require the granting of Shiau's motion.

In *Hogeland*, the Court noted that: 1) the injured plaintiff was leaving the tenant's store when she tripped; 2) although the planter on which the plaintiff tripped was fabricated by the landlord, it was made to the specifications of the shop owner; and 3) the landlord and the shop owner both had responsibilities for snow removal and had a mutual agreement for the work which was carried out by the employees of each, at certain intervals. The Indemnity and Public Liability Insurance provisions in the *Hogeland* lease contemplated indemnification in three different sets of circumstances, "(a) claims against [the landlord] arising from the negligence of [the tenant], its contractors or licensees, (b) claims against [the landlord] arising from any accident occurring 'in or about' the [tenant's] premises and (c)

claims arising out of negligence of [the tenant] anywhere in the shopping center." *Id.* at 157-158. The court further noted that the detailed lease containing the indemnification provisions was negotiated at arm's length by two sophisticated business entities, one a large department store and the other a real estate corporation which organized and owned a large shopping center. Finally, the Court noted that the obscured planter over which plaintiff tripped was under the store's canopy, in an area the store occasionally used as an extra sales area. *Id.* at 159. According to the Court, it was against that background that it concluded that the parties were allocating the risk of liability between themselves through the use of insurance, and courts generally do not look unfavorably on such agreements. *Id.* at 161.

In opposing Shiau's motion, relying on *Cavanaugh v 4518 Assoc.* (9 AD3d 14 [1st Dept 2004]), Queen of Sheba argues that *Hogeland* is no longer the current law, that an agreement to indemnify is distinct from an agreement to purchase insurance, and that, to the extent that Lopez's accident was caused by Shiau's negligence, which Queen of Sheba contends that it was, any agreement to indemnify Shiau is void under Section 5-322.1 of the General Obligations Law, which prohibits indemnification of an owner or contractor for its own negligence.

For the purposes of Shiau's motion for summary judgment,

however, the court need not reach Queen of Sheba's contentions. The facts here are sufficiently different from those in *Hogeland*, on which Shiau relies, for this court to conclude that the motion for summary judgment must be denied.

Here, Lopez was neither entering, nor leaving the Queen of Sheba restaurant, but just walking past the restaurant, along 10th Avenue. Nor did she trip over a planter or any street furniture which belonged to, or was made for, the restaurant. Rather, she tripped on an allegedly uneven portion of the sidewalk. See Deposition of Maria Isabel Lopez, at 27-28. Despite allegations to the contrary in the third-party complaint, there is no evidence that Queen of Sheba had any responsibility for maintaining the sidewalk, other than sweeping it and removing snow during the winter. See Deposition of Philipos Mengistu, at 13-14; Deposition of Guei Shun Shiau, at 15.

According to the testimony of Shiau and Mengistu, Shiau took general responsibility for the condition of the sidewalk. Shiau testified that, prior to August 2008, when the alleged accident occurred, he periodically noticed that the sidewalk was mis-leveled or there was a gap in the sidewalk, and repaired the areas with cement. Shiau Deposition, at 22-26. Shiau again patched the sidewalk in December 2008, after he received the summons and complaint in this action. *Id.* at 27-28.

Furthermore, unlike in *Hogeland*, where the lease provisions

governing insurance and indemnification were detailed and appeared to be specifically negotiated by the parties, here the lease is a standard form, and there is no indication that the rider was negotiated in detail. More importantly, Shiau has failed to establish that the sidewalk in front of the restaurant where Lopez allegedly fell was part of the "demised premises" under the lease, or, that section 8 of the lease, which requires the tenant to maintain public liability insurance against claims for bodily injury "occurring in or upon the demised premises," covers an accident occurring on the sidewalk in front of the restaurant involving a passerby, rather than a customer who was entering or leaving the restaurant. The language of the rider requires the owner to carry insurance indemnifying the owner "against loss and liability in connection with bodily injury or death or property damage from any accident in the demised premises and damage from any accident in or about the demised premises and appurtenances (emphasis supplied)." Again, Shiau has not established whether the sidewalk is covered by the "in or about" language. Furthermore, the court notes that the portion of the sentence which mentions any accident "in or about the demised premises or appurtenances" does not mention bodily injury.

As the Court of Appeals noted in *Great Northern Ins. Co. v Interior Constr. Corp.* (7 NY3d 412, 419 [2006]) a landlord and

tenant may "freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves" and such an agreement is not prohibited by General Obligations Law § 5-321. The Court further stated, however,

"[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances."

Id. at 417 (quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989], additional citations omitted). Shiau has not established that the lease and rider requires that the tenant's insurance policy cover this accident.

Finally, the lease provides that should Queen of Sheba fail to purchase insurance, Shiau's remedy is to purchase his own policy and charge Queen of Sheba for the policy as additional rent. The only other discussion of indemnification in the lease states that Queen of Sheba is responsible for those costs for which Shiau is not reimbursed by insurance, "paid, suffered or incurred as a result of any breach by Tenant." Lease, ¶ 8. Shiau has not demonstrated that there has been any breach by Queen of Sheba, which has resulted, or will result, in Shiau incurring any costs not reimbursed by insurance.

For these reasons, Shiau's motion for summary judgment is

denied.

CROSS MOTION

Defendant/third-party defendant Queen of Sheba moves for summary judgment to dismiss the complaint and third-party complaint and cross claims against it.

Citing the depositions of Lopez, Shiau, and Mengistu, the owner and manager of the restaurant, Queen of Sheba asserts that Lopez testified that she fell on an uneven area of the sidewalk in front of the restaurant (Lopez Deposition, at 27-28); that several years prior to the accident, Shiau had hired Hergan Company to dig up and repair the sidewalk in connection with the installation of a sprinkler system (Shiau Deposition, at 17); that during 2008, the year that the accident occurred, Shiau had done work on the sidewalk (Mengitsu Deposition, at 17-19; Shiau Deposition, at 22-26); that prior to the accident, Shiau had noticed that the sidewalk was mis-leveled and that he fixed it with cement (Shiau Deposition, at 22-26); and that, although, pursuant to the lease, the restaurant has the duty to sweep the sidewalk in front of the restaurant and to remove snow, it does not have the duty to repair the sidewalk (Mengitsu Deposition, at 13-14).

Citing *Cavanaugh v 4518 Assoc.* (9 AD3d 14, *supra*), a Labor Law case, Queen of Sheba argues that Shiau's cross claims for indemnification should be dismissed. Queen of Sheba argues that

in *Cavanaugh*, the Appellate Division stated that the decision in *Hogeland* no longer represents the current state of the law. Queen of Sheba further contends that Shiau is mixing the agreement to procure insurance with an agreement to indemnify, which the Court in *Cavanaugh* indicated were separate and distinct obligations. Moreover, according to Queen of Sheba, Lopez's accident occurred as a result of Shiau's negligence, and to the extent that Shiau seeks indemnification, it is barred by General Obligations Law § 5-322.1.

In opposition to Queen of Sheba's cross motion, Shiau initially argues that, under this court's preliminary conference order, all motions were to be filed by June 1, 2009; that the cross motion was not filed until June 14, 2009, and it is, thus, untimely; and that Queen of Sheba has failed to show "good cause" for its delay or to show that the motion seeks relief on the same issues raised in the main motion. See *Conklin v Triborough Bridge and Tunnel Auth.*, 49 AD3d 320 (1st Dept 2008).

Queen of Sheba contends that, even assuming that its cross motion is untimely, its opposition to Shiau's motion is timely and should be considered by the court. Citing *Filannino v Triborough Bridge and Tunnel Auth.* (34 AD3d 280 [1st Dept 2006]), Queen of Sheba further argues that this court may consider an untimely cross motion if the cross motion is seeking relief which is "nearly identical" to that sought in the main motion.

As the Court stated in *Filannino*, even where good cause is not shown, the court "may search the record and grant summary judgment to any party without the necessity of a cross motion. The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion (interior citations omitted)." *Id.* at 281. On the basis of that principle, this court may consider Queen of Sheba's arguments opposing Shiau's motion seeking indemnification under the lease; however, its arguments concerning Shiau's alleged negligence, Queen of Sheba's lack of negligence, and Queen of Sheba's lack of duty to the plaintiff are beyond the scope of Shiau's motion, and therefore, will not be considered by this court.

With respect to the question of whether *Hogeland* no longer reflects current law, this court notes that *Cavanaugh*, on which Queen of Sheba relies, considered the application of General Obligations Law § 5-322.1 to the question of contractual indemnification in a Labor Law case. Two years after the decision of the Appellate Division, First Department, in *Cavanaugh*, the Court of Appeals expressly declined to overrule *Hogeland* in the context of commercial obligations between a landlord and tenant which are governed by Section 5-321 of the General Obligations Law (see *Great Northern Ins. Co. v Interior Construction Corp.* [7 NY3d at 419-420]), stating that "[c]ourts

will construe a contract to provide indemnity to a party for its own negligence ... where the contractual language evinces an 'unmistakable intent' to indemnify" and holding that where "a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity." *Id.* at 417, 419 (citation omitted). In any event, this court has previously discussed the factual differences between this case and *Hogeland*, which make summary judgment on the obligation of Queen of Sheba to indemnify Shiau inappropriate.

For these reasons, Queen of Sheba's cross motion is denied. Accordingly, it is hereby

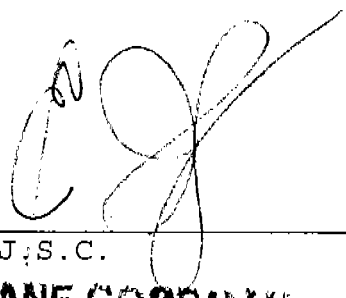
ORDERED that the motion for summary judgment of defendant third-party plaintiff Guei Shun Shiau is denied; and it is further

ORDERED that the cross motion of co-defendant/third-party defendant Sheba Ethiopian Restaurant, Inc., d/b/a Queen of Sheba Ethiopian Restaurant is also denied.

Dated: September 30, 2010

FILED
OCT 08 2010
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 NEW YORK

ENTER:



J.S.C.

EMILY JANE GOODMAN