

KARS Jewelry, Inc. v Levitan Design Assoc., Inc.

2011 NY Slip Op 30891(U)

April 11, 2011

Supreme Court, New York County

Docket Number: 600515/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 600515/2008

KARS JEWELRY

vs.

LEVITAN DESIGN

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

& Cross-motion
this motion to/for summary judgment

PAPERS NUMBERED

1, 2

5, 6

7, 9

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: **Yes** **No**

3, 4

Upon the foregoing papers, It is ordered that this motion *& cross-motion*

for summary judgment are decided in accordance with the attached memorandum decision.

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: *[Signature]*

[Signature]

JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION 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 CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
KARS JEWELRY, INC.,

Plaintiff,

Index No.: 600515/08

-against-

DECISION

LEVITAN DESIGN ASSOCIATES, INC., LEONARD
LEVITAN, SCARLET KIM and 39 WEST 29TH
STREET OWNERS CORP.,

Motion Seq. No.:
002

Defendants.

-----x
DORIS LING-COHAN, J.:

FILED

BACKGROUND

APR 12 2011

Defendants Levitan Design Associates, Inc. and Leonard Levitan (collectively, Levitan) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them, granting them common-law indemnification from co-defendants 39 West 29th Street Owners Corp. (39 West) and Scarlet Kim, and dismissing the cross claims for common-law indemnification asserted against them by co-defendants 39 West and Scarlet Kim. 39 West and Scarlet Kim cross-move, pursuant to CPLR 3212, for summary judgment on their cross claims, granting them common-law indemnification from Levitan, and dismissing Levitan's cross motion against them for common-law indemnification.

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39 West is the owner of the subject premises, a commercial, free-standing cooperative building. Leonard Levitan, the principal of Levitan Design Associates, Inc., is a shareholder

and director of 39 West, and the shareholder/tenant of the eighth floor of the building. Scarlet Kim, allegedly properly named Scarlet & Kim Co., LLC, is the managing agent for the premises, employed in that capacity by 39 West.

In 2004, Levitan sublet a portion of the eighth floor to plaintiff Kars Jewelry, Inc. (Kars). The remainder of the eighth floor was sublet by Levitan to another company, and Levitan retained no possessory rights to that floor, pursuant to these subleases. Kars is in the business of manufacturing jewelry, a fact of which Levitan was aware at the time the sublease was executed.

Pursuant to the paragraph 11 of the proprietary lease between Levitan and 39 West, Levitan, the Lessee,

"agrees to save the Lessor [39 West] harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting the Unit, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this Lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee."

(¶11, Exh. I, Motion for Summary Judgment).

Paragraph 2 of the proprietary lease states that "[t]he Lessor shall at its expense keep in good repair all of the building including all of the Units, the sidewalks and the courts surrounding the same, ... ," and paragraph 3 states that the Lessor is responsible to maintain and manage the building.

Paragraph 15 of the proprietary lease requires that the Lessee obtain written authorization by the board in order to sublet the premises, and paragraph 26 states:

"The failure of the Lessor to insist, in any one or more instances, upon a strict performance of any of the provisions of this lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or proceeding, shall not be construed as a waiver, or a relinquishment for the future, of any such provisions, options or rights, but such provision, option or right shall continue and remain in full force and effect. The receipt by the Lessor of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach, and no waiver by the Lessor of any provision hereof shall be deemed to have been made unless in a writing expressly approved by the Directors."

According to the sublease, identified on its face as a "lease," entered into between Levitan and Kars, Levitan is responsible for maintaining and repairing the exterior and public portions of the building, but Kars is obligated, pursuant to paragraph 50, for "all implementation and costs for security measures necessary to protect his business operations which involves gold and other valuable materials and indemnifies Owner [Levitan] from any losses of these valuables which may occur." (¶4, Exh. G, Notice of Motion). Additionally, pursuant to paragraph 51 of that lease, Kars "agrees, at its own expense, to install an alarm system on the [fire escape] emergency door," and Levitan is responsible, pursuant to paragraph 48 (4), to install a "fire alarmed lock on the rear fire escape door in the premises." Paragraph 8 of this agreement provides that Levitan

shall not be liable for any damage to Kars' property caused by theft or otherwise, "unless caused by or due to the negligence of [Levitan], its agents, servants or employees." This agreement between Levitan and Kars was never submitted to or approved by 39 West's board.

It is undisputed that Kars never installed any security measures, and Levitan did not install a fire alarmed lock on the rear fire escape door. However, according to the deposition of Richard Korwin (Korwin), president of Kars, the fire door had a deadbolt and security push bar lock, with bars going across the whole door, installed by Levitan after Kars took possession of the premises (Motion, Ex. F, at 257).

It is undisputed that, shortly after taking possession, Kars began to complain to Levitan about security lapses in the building, especially the fact that the lock on the front door to the building was often taped so that anyone could enter the premises. Access to the premises, as well as the freight elevator and stairwell to the lobby, all of which had locks, was supposed to be limited to persons who had authorized keys. Angel Silva (Silva) was employed by 39 West as the superintendent of the building, and states, in his deposition, that he often kept the door to the building unlocked to provide access for repairmen (Motion, Ex. K, at 25).

On August 29, 2005, Korwin sent a letter to Levitan regarding the security issues in the building. In response,

Leonard Levitan wrote to Kars on September 9, 2005, stating that he had sent a copy of Korwin's letter to Scarlet Kim, and that he agreed with Korwin's assessment of security problems in the building. (Exh. G, Korwin Affidavit). Leonard Levitan further stated that he had been complaining about the same problems himself for a long time. Leonard Levitan also states that the board had initiated various security measures after a 1996 burglary, and had installed a video camera on the premises. Additionally, in his deposition (Motion, Ex. H), Leonard Levitan testifies that he had voiced security concerns to Scarlet Kim many times over the years. This allegation is disputed by Scarlet Kim and the president of the board in their respective depositions (Opp, Exs. A & B), although Scarlet Kim does state that Silva had been told to make sure that all the building doors were locked.

On Monday morning, April 29, 2007, upon arriving at work, Kars' employees found that Kars had been burglarized, and the police were promptly notified. Upon examination, it was determined that the burglary occurred on the previous day, Sunday, that there was no break-in to the building, that the telephone lines in the building had been cut, thereby disabling the burglar alarm, and that one of Kars' safes had been drilled through, emptying it of its contents. Allegedly, the police indicated that they believed the burglary to have been perpetrated by someone employed in the building. It is noted

that there is no evidence that the building doors were left unlocked the day before the incident, and the police allegedly only said that there was no break-in, but never said that the building doors were open when they came to investigate. No other tenant in the building had been burglarized on this occasion, and, according to Leonard Levitan, the last burglary in the building occurred in 1996.

Korwin testified that he was responsible for checking all the doors to Kars' office, and, when he is the last person to leave, he locks the passenger elevator if it is in the "on" position (Opp Ex. C). Korwin further stated that, the week before the burglary, he was away on a business trip, and that the last time Kars was open was on the Friday before the incident. According to Korwin, Kars' production manager was the last person to leave the office on that Friday, and the production manager locked the office.

Silva, in his deposition, stated that, on the day before the burglary, Saturday, he did not do anything differently with respect to locking the doors to the building, and that he did not believe that he left the building doors open when he left for the day (Motion, Ex. K). Silva was not working at the building on the day of the burglary (*id.*).

Kars instituted the present action, alleging four causes of action: (1) negligence as against all the defendants; (2) breach of contract as against Levitan Design Associates, Inc.; (3)

breach of contract as against Scarlet Kim; and (4) breach of contract as against 39 West.

DISCUSSION

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Applying such principles to the within case, Levitan's motion with respect to dismissing the causes of action asserted against them is granted.

In order for Levitan to be found negligent, it must be demonstrated that they owed a duty to Kars, and the existence and scope of that duty is a question for the courts. See *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 (2001).

"A duty may arise from a special relationship that requires the defendant to protect against the risk of harm to plaintiff. Landowners, for example, have a duty to protect tenants, patrons and invitees from foreseeable

harm caused by the criminal conduct of others while they are on the premises, because the special relationship puts them in the best position to protect against the risk [internal." citation omitted]."

532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc.,
96 NY2d 280 (2001).

However,

"[w]hile landlords have a common law duty to take minimal precautions to protect tenants from foreseeable criminal activity by third persons, an injured tenant may recover damages only on a showing that the landlord's negligent conduct was a proximate cause of the injury. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, the burden of proof on the plaintiff at trial is to offer evidence that it is more likely or more reasonable than not, where the identity of the criminal actor is unknown, that the injury was perpetrated by an intruder who gained access to the premises through a negligently maintained entrance. To withstand summary judgment, the plaintiff need only raise a triable issue of fact as to whether the defendant's conduct proximately caused the injury. However, absent such a showing, the theory that the defendant's inadequate security measures permitted an intruder to gain entry to the premises necessarily entails speculation and will not survive summary judgment [internal citations omitted]."

Sakhai v 411 East 57th Street Corporation, 272 AD2d 231, 232-233
(1st Dept 2000).

In the instant matter, Kars asserts that Levitan's failure to see that the doors to the building were properly locked, and its failure to provide a fire alarmed lock on the fire escape door, evidence Levitan's negligence. However, Korwin himself testified that the fire escape door did have a security lock. The fact that that lock was not connected to a fire alarm does not mean that the fire escape door was not adequately secured.

Nor is there any evidence that the doors to the building were not properly fastened on the Sunday of the burglary. Silva testified that, whereas he did sometimes keep the doors to the building unlocked to allow access to repairmen, he felt that the doors were properly locked when he left work the night before the burglary, and there is no indication that a repairmen or tenant was expected to be on the premises on the day of the theft.

Further, a landlord's common-law duty only extends to protect tenants against reasonably foreseeable criminal acts by third persons. See *James v Jamie Towers Housing Co., Inc.*, 99 NY2d 639 (2003). "[T]o establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153 (2d Dept 1999). In cases in which such reasonable foreseeability has been found, multiple crimes had been committed in the subject building within the year preceding the incident in question (See *Rios v Jackson Associates*, 259 AD2d 608 [2d Dept 1999]) [within two years preceding the incident in question] (*Venetal v City of New York*, 21 AD3d 1087 [2d Dept 2005]) [multiple burglaries had occurred at the building] (*Anokye v 240 East 175th Street Housing Development Fund Corp.*, 16 AD3d 287 [1st Dept 2005]), or all of the tenants were jewelers, and the building was located in the "diamond district" (*Ratane Jewelry, Inc. v Art Jewelry Center, Inc.*, 253

AD2d 591 [1st Dept 1998]), thereby putting the landlords on notice of the distinct possibility of criminal activity taking place on their premises. None of these factors are present in the instant matter.

The evidence submitted indicates that only one burglary occurred on the premises, 11 years before the incident giving rise to this lawsuit, that the building is not located in a known jewelry area of the city, that not all of the tenants are jewelers, and that at least some of the premises are used for warehousing. Considering these factors, Levitan, as an out-of-possession landlord, absent a contractual obligation, is only required to supply minimum precautions to protect Kars from presumptive foreseeable harm. See *White v Jeffco Western Properties, Inc.*, 304 AD2d 824 (2d Dept 2003); *Florman v City of New York*, 293 AD2d 120 (1st Dept 2002); see also *Rossal-Daub v Walter*, 58 AD3d 992 (3d Dept 2009).

According to the papers submitted with the instant motions, the subject premises has front and back doors to the building with locks, a fire escape exit with security locks, a freight elevator that requires a key to operate, video camera surveillance, and a superintendent at the location six days per week. These precautions satisfy Levitan's duty to provide minimum protection for Kars, especially since it is Kars that is contractually bound to acquire security for its own offices.

Kars does not deny that it failed to meet its contractual

responsibility to provide security for its office, or to alarm the fire door. Also, pursuant to the same section of the lease between Levitan and Kars dealing with security measures, Kars is required to indemnify Levitan for any losses to its valuables. Furthermore, Kars asserts that the police believe the burglary to be an inside job.

All of Kars' opposition is based on supposition and hearsay, and "[w]hile hearsay evidence may be utilized in opposition to a motion for summary judgment, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated." *Narvaez v NYRAC*, 290 AD2d 400, 400-401 (1st Dept 2002).

The second cause of action asserted against Levitan is based on an alleged breach of contract, specifically the provision of paragraph 8 of the lease that states that Levitan is only to be liable to Kars for theft of Kars' property if occasioned by Levitan's negligence. For the reasons stated above, as there is no evidence that Levitan was negligent, Levitan cannot be found to have breached the contractual provision forming the basis of this cause of action.

Consequently, based on the foregoing, that portion of Levitan's motion for summary judgment seeking to dismiss the complaint as against it is granted, which renders that portion of its motion seeking common-law indemnification from its co-defendants moot.

Similarly, that portion of Levitan's motion seeking summary judgment dismissing the cross claims asserted against it by 39 West and Scarlet Kim is granted, and 39 West and Scarlet Kim's cross motion seeking summary judgment on their cross claims against Levitan is denied.

39 West and Scarlet Kim's cross motion for summary judgment is denied, as it was filed more than 60 days after the note of issue was filed; the note of issue was filed on June 23, 2000 and the cross-motion was not served until September 30, 2009, thus, the court is constrained to deny the cross-motion.¹ See *Colon v City of New York*, 15 AD3d 173 [1st Dept 2005]; *Thompson v Leben Home For Adults*, 17 AD3d 347 [2nd Dept 2005].

Moreover, even if this court would consider such late cross-motion, the cross-motion would be denied on the merits. The basis of 39 West and Scarlet Kim's motion is that, because Levitan failed to obtain board approval for its sublease to Kars, pursuant to paragraph 11 of the proprietary lease quoted above, Levitan has a duty to indemnify them, should they be found liable to Kars in the instant lawsuit; this argument unpersuasive.

The underlying claim alleges that 39 West and Scarlet Kim were negligent in maintaining security in the subject building, and there does not appear to be a causal link between that allegation and Levitan failing to obtain written approval to

¹ While the parties may have stipulated to extend the court imposed 60-day deadline to file a motion for summary judgment, as court approval was not obtained, such extension is ineffective.

sublet his unit. Furthermore, it is a question of fact as to whether 39 West had actual or constructive knowledge of the sublease, and, by not asserting its contractual rights, waived such written approval requirement, regardless of the proprietary lease's no-waiver clause. See *Madison Avenue Leasehold, LLC v Madison Bentley Associates LLC*, 30 AD3d 1 (1st Dept) *affd* 8 NY3d 59 (2006).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of defendants Levitan Design Associates, Inc. and Leonard Levitan's motion for summary judgment dismissing the complaint as against them is granted and the complaint is hereby severed and dismissed as against said defendants, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the portion of defendants Levitan Design Associates, Inc. and Leonard Levitan's motion seeking common-law indemnification from co-defendants 39 West 29th Street Owners Corp. and Scarlet Kim is hereby rendered moot; and it is further

ORDERED that the portion of defendants Levitan Design Associates, Inc. and Leonard Levitan's motion seeking summary judgment dismissing the cross claims asserted against them by co-defendants 39 West 29th Street Owners Corp. and Scarlet Kim is granted; and it is further

ORDERED that defendants 39 West 29th Street Owners Corp. and Scarlet Kim's cross motion seeking common-law indemnification from co-defendants Levitan Design Associates, Inc. and Leonard Levitan is denied; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, defendants Levitan Design Associates, Inc. and Leonard Levitan shall serve a copy upon all parties, with notice of entry.

Dated: 4/1/11



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Kars.levitan.wpd

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