

Hill v Berdar Equities
2011 NY Slip Op 31344(U)
May 20, 2011
Supreme Court, New York County
Docket Number: 111281/2008
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 111281/2008

HILL, JACKIE J.

vs

BERDAR EQUITIES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 1/31/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for 55

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4, 5-6, 7

8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided by the annexed memorandum decision, order and declaratory Judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/28/11

JANE S. SOLOMON 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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
JACKIE J. HILL,

Index No. 111281/2008

Plaintiff,

DECISION, ORDER
and DECLARATORY JUDGMENT

-against-

BERDAR EQUITIES & FAME EQUITIES & M.
BERDAR EQUITIES, LLC AND FRAYOUN
REALTY CO.

Defendants.

-----X
BERDAR EQUITIES & FAME EQUITIES & M.
BERDAR EQUITIES, LLC AND FRAYOUN
REALTY CO.

Third-Party Plaintiffs,

UNFILED JUDGMENT

-against-

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

MAP LINGERIE, INC.,

Third-Party Defendant

-----X

SOLOMON, J.:

Plaintiff Jackie J. Hill (Hill) sues Berdar Equities & Fame Equities & M Berdar Equities, LLC (Berdar) and Fraydun Realty Co. i/s/h/a Frayoun Realty Co. (Fraydun) (together, Defendants) for injuries from an assault at 1217 Third Avenue, a retail store in Manhattan (the Store). Defendants impleaded MAP Lingerie, Inc. (MAP), the tenant of the Store. Defendants move for summary judgment dismissing the complaint, and granting the third party complaint, which seeks a declaration of rights under the lease. The motion is decided as follows.

Hill was employed by MAP at the Store. On November 30, 2007, she was assaulted by a customer. Hill alleges that the Store's security systems, consisting of a magnetic door lock and

buzzer and a "fake security camera" were non-functional.

Defendants argue that Berdar has no ownership interest in the building where the incident occurred (Broxmeyer Affirmation, attached to Motion, Ex. H, p. 9-10), and that Freyduan was an out of possession landlord. Plaintiffs submit an affirmation of no opposition. Accordingly, the branch of Defendants motion for summary judgment dismissing the complaint is granted.

In the third party complaint, Defendants seek a declaration of rights with regards to the indemnification provisions of their lease with MAP. Defendants argue that MAP is contractually obligated to indemnify them for all its expenses, including attorneys' fees. The lease and rider read, as relevant:

8. . . Tenant shall indemnify and save harmless Owner against and from all liabilities . . . 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 . . . or the carelessness, negligence or improper conduct of the Tenant.

54. Tenant Covenants and agrees that it will indemnify and save the Landlord free and harmless from and against any and all claims, liability, loss or damage . . . from or out of any occurrence in, or about the demised premises and the sidewalks and curbs appurtenant thereto

(Lease, attached to Motion, Ex. I).

MAP counters that paragraph 8 does not apply because the lease was not breached, and questions of fact remain regarding whether it acted negligently with regards to the door

lock.¹ It next argues that paragraph 54 should be read as modifying paragraph 8 to include certain appurtenances and not to eliminate the breach and negligence requirements of paragraph 8. Berdar argues that the plain meaning of paragraph 54 creates a broader indemnification right that is separate and distinct from paragraph 8.

Paragraph 54 is separate and distinct from paragraph 8, and creates a broad duty to indemnify, regardless of fault. By its language, it requires indemnification for "any and all claims" arising from "any occurrence" in the Store. MAP's interpretation would defeat this plain meaning. Accordingly, Defendants are entitled to a declaration that Fraydun (the only defendant that is a party to the lease) is entitled to indemnification for its expenses in this action, including attorneys' fees (*DiPerna v. ABC, Inc.*, 200 AD2d 267, 270 fn 3 [1st Dept., 1994][broad language in an indemnification clause construed to include defense costs, even if not expressly stated]).

Finally, MAP's counterclaims for contribution and indemnification are premised upon findings of negligence against Defendants in the main action. The complaint having been dismissed, and no findings of fault made, the counterclaims are dismissed as moot.

¹ Paragraph 8 includes several other contractual obligations beyond indemnification.

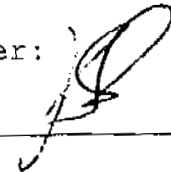
In accordance with the foregoing, it hereby is ORDERED that the branch of defendants' motion for summary judgment dismissing the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is

ORDERED that the branch of defendants' motion for summary judgment dismissing the third party defendant's counterclaims is granted, and it further is

ORDERED that the branch of defendants' motion for summary judgment on the third party complaint is granted, and it is ADJUDGED and DECLARED that third party defendant MAP is obligated to indemnify third party plaintiff Fraydun for all costs Fraydun incurred in this action; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 5/20/11, 2011

Enter: 

J.S.C.

~~APR 20 11 10 54 AM~~

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