

Negron v 605 Apartment Corp.

2011 NY Slip Op 33849(U)

September 29, 2011

Sup Ct, Bronx County

Docket Number: 17791/07

Judge: Jr., Kenneth L. Thompson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

C

10-12-11

OCT 12 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
JULIETA NEGRON,

Index No. 17791/07

Plaintiff,

-against-

DECISION/ORDER

605 APARTMENT CORP. and STEPHEN
KRONENBERG, M.D.,

Present:
HON. KENNETH L. THOMPSON, Jr.

Defendants.

The following papers numbered 1 to ___ read on this motion, _____

| No | On Calendar of | PAPERS NUMBERED |
|----|-----------------------------------------------------------------------------|-----------------|
| | Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed----- | _____ |
| | Answering Affidavit and Exhibits----- | _____ |
| | Replying Affidavit and Exhibits----- | _____ |
| | Affidavit----- | _____ |
| | Pleadings -- Exhibit----- | _____ |
| | Stipulation -- Referee's Report --Minutes----- | _____ |
| | Filed papers----- | _____ |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant 605 APARTMENT CORP.'s motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint and all cross-claims and granting summary judgment on its claim for contractual indemnification and Defendant STEPHEN KRONENBERG, M.D.'s cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint are consolidated for Decision herein.

Defendant 605 APARTMENT CORP.'s motion for summary judgment and dismissing the Complaint and all cross-claims is **GRANTED**.

Defendant 605 APARTMENT CORP.'s motion for summary judgment on its claims for contractual indemnification is **DENIED** as premature.

Defendant STEPHEN KRONENBERG, M.D.'s cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint is **DENIED.**

Simply stated, Plaintiff alleges that she tripped and fell down a flight of steps in Defendant STEPHEN KRONENBERG, M.D.'s office when she showed up for an appointment. This space was a converted apartment leased by the doctor from Defendant 605 APARTMENT CORP. Plaintiff claims that the room was dark when she entered, causing her to misstep on the black marble stairs leading into the space and fall.

Dismissing the Complaint as to 605

605 contends that it is entitled to summary judgment and dismissal of the Complaint on the grounds that it owed no duty to Plaintiff as an out-of-possession landlord. Plaintiff concedes the merit of this stance and Dr. Kronenberg offered no opposition to this issue. As such, this application is granted.

Contractual Indemnification

605 also argues that it is entitled to summary judgment in its contractual indemnification claims based on the Lease. Dr. Kronenberg opposes on the grounds that 1) 605's failure to obtain an insurance policy that provided for the waiver of the right of subrogation as to the doctor prevents 605 from seeking indemnification under the Lease and that 2) the issues of negligence have yet to be determined. The Court disagrees with the former and acknowledges the latter.

"The right to contractual indemnification depends upon the specific language of the contract." Bellefleur v Newark Beth Israel Med. Ctr., 66 A.D.3d 807, 808 (citations

omitted). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." George v. Marshalls of MA, Inc., 61 A.D.3d 925, 930 (citations omitted). The Court finds that ¶ 11 of the Lease specifically obligates Dr. Kronenberg's to indemnify 605.

And when ¶ 4(d) is read in conjunction with ¶ 11, the Court interprets ¶ 4(d) as a "condition subsequent" as opposed to a "condition precedent." "A condition precedent is one whose existence is necessary for the obligation to come into being. A condition subsequent is one that, if it arises, will defeat an existing obligation." Hershey v. Carter, 137 N.Y.S.2d 207, 208. The doctor's obligation to indemnify 605 stems from an independent clause, which the doctor agreed to when he executed the Lease. This existing obligation to indemnify 605 would have been defeated had 605 procured insurance "which provide[d] for waiver of subrogation against the [doctor]." That did not occur. As such, the obligation remains.

Regardless, the issue of negligence in this matter has yet to be decided, thus, 605's summary judgment motion seeking contractual indemnification is premature. See, e.g., Barracks v. Metro N. Commuter R.R., Amato v. Rock-McGraw, Inc., 297 A.D.2d 217; Langner v Primary Home Care Servs., Inc., 83 A.D.3d 1007; Auriemma v Biltmore Theatre, LLC, 82 A.D.3d 1.

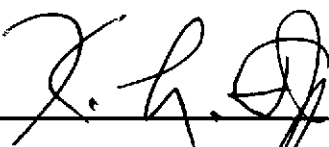
Dismissing the Complaint as to Dr. Kronenberg

Dr. Kronenberg argues that he is entitled to summary judgment and dismissal of the Complaint because Plaintiff failed to identify a defect as the cause of her accident. The staircase at issue is made of black marble. Plaintiff's basic contention is that the

light for the staircase was out, causing the black marble steps to blend together. This in turn caused her to miss a step and fall. The Court finds that these are sufficient triable issues of fact on the issue of whether Plaintiff's accident was due to Dr. Kronenberg's negligence. See Macri v. Smith, 12 A.D.3d 896 (denying summary judgment based on part on "the color of the carpeting and the dim lighting at the bottom of the stairway").

The foregoing shall constitute the decision and order of this Court.

Dated: SEP 29 2011



J.S.C.
KENNETH L. THOMPSON, JR.