Wolfe v Gallery Partners, LLC
2012 NY Slip Op 32301(U)
September 4, 2012
Supreme Court, New York County
Docket Number: 105807/10
Judge: Gishe
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SCANNED ON 9/6/2012
[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 105807/2010
WOLFE, PAMELA
vs.
GALLERY PARTNERS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

Mot. Seq # 001 + 002 are consolidated for decision.

FILED
SEP 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
SEP 05 2012
NEW YORK
COUNTY CLERK'S OFFICE

SEP 04 2012

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

Dated: 9/4/12

____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

---x

Pamela Wolfe,

Plaintiff (s),

-against-

Gallery Partners, LLC and Champion Parking 77th Street, Corp.,

Defendant (s).

---x

DECISION/ORDER
Index No.: 105807/10
Seq. No.: 001, 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

FILED
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Papers	Numbered
Motion Seq. No. 1	
Gallery n/m (3212) w/JHS affirm (sep back), exhs	1,2
Champion opp w/SAD affirm, exhs	3
Wolfe opp w/SCF affirm	4
Motion Seq. No. 2	
Champion n/m (3212) w/SAD affirm, exhs	5
Wolfe opp w/SCF affirm	6
Champion reply w/SAD affirm	7
Other:	
Stip of adj (6/6/12)	8

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a personal injury action in which plaintiff ("Wolfe") alleges she tripped and fell on a Manhattan sidewalk. Issue was joined, the note of issue was filed and paid for on March 16, 2012. These motions, each for summary judgment, were timely brought thereafter. Since the motions are properly before the court, they are consolidated for

decision and decided on their merits (CPLR 3212; Brill v. City of New York, 2 NY3d 725 [2004]).

Facts and Arguments

Defendant Gallery Partners, LLC ("Gallery" sometimes "landlord") owns a retail condominium unit at the building known as The Charles House Condominium. The Charles House Condominium uses the address of 47 East 77th Street a/k/a 40 East 78th Street, New York, New York for its residential units. Gallery owns the cellar and sub-cellar floors, as well as stores along Madison Avenue and a portion of the 2nd floor. Champion Parking 77th Street Corp. ("tenant") leases the cellar and subcellar from Gallery and operates that space as a parking garage. Pursuant the commercial lease agreement between Gallery and Champion dated January 22, 2010 ("lease"), Gallery is identified as the "owner" of the retail condominium unit and Champion as its "tenant." The garage has a separate address and is identified as being located at 51 East 77th Street.

Wolfe claims that on March 8, 2010 she tripped and fell on a misleveled sidewalk on 77th Street, in front of the building that has been identified as 47 East 77th Street a/k/a 40 East 78th Street. Although not denying there was a defective condition in the area where Wolfe fell, there are sharp disputes between the two defendants about whether the responsibility for this sidewalk lies with the retail condominium unit owner (i.e. Gallery) or its tenant. Only Champion has moved for summary judgment on the complaint. Gallery's motion is solely addressed to its cross claim for defense and indemnification by Champion (3rd cross claim). Champion also seeks summary judgment dismissing Gallery's remaining cross claims against it.

Wolfe was deposed and asked about the accident. She testified that as she was walking from east to west along 77th Street, her left foot got caught and got stuck in "something," causing her to lurch forward and fall. She testified it occurred so suddenly that she never got a chance to step forward with her right foot, but went right down. Wolfe landed on her left side, closer to the street (vehicular) side of the sidewalk. When she landed, "my head was facing towards Madison Avenue."

Wolfe was shown some color photographs taken of the area. She testified they were an accurate depiction of the condition of the area where she fell. One photograph shows Wolfe with her arm in a sling, pointing to an area on the ground. Wolfe stated she was pointing to the area where she fell and she described as being a "raised area in the sidewalk that isn't level and there is a hole in the...raised area...that has a hole, crack, in it." She identified the left side as the photograph as being towards Madison, or the west side of 77th Street. The left area is in front of the entrance to the building whereas the right side is towards the driveway/ramp leading into the garage below street level. When asked (with counsel's permission) to draw a circle on the photograph to show the defective condition alleged, Wolfe drew a "big" circle. Wolfe was asked why she drew the circle so big. She responded: "that's just me, I do everything big, okay?" She also stated that: "I am trying to indicate the area that is raised." In response to certain questions, it was elicited that Wolfe distinguished between a "lighter gray" area and a "dark gray" area in the sidewalk. When asked whether she had tripped "because of a condition on that strip of lighter gray running perpendicular to the building line?" Wolfe responded, "that is my recollection..." and added that the lighter gray area was raised. The circle Wolfe drew encompasses what

appears to be a strip of light colored concrete with darker concrete on either side. To the right side of the light colored concrete is the ramp; to the left, the residential building. The picture shows a somewhat triangular shaped crack/hole/divot or depression to the right side of the lighter strip of concrete. The larger part of crack is towards the ramp and the smaller point of the cracks is pointing towards the building.

Debra Fechter was deposed on behalf of Gallery. Not only is she a member of Gallery, she is also employed by non-party Digby Management, Gallery's property manager. Fechter stated that sometime before March 8, 2010, the date of the accident, she learned from the superintendent for the residential building that there was a problem with a height differential on the sidewalk between 47 and 51 East 77th Street. Fechter contacted non-party Palladino, a contractor, for a proposal to fix or replace the sidewalk. Although Palladino prepared a proposal dated October 15, 2009, the work was not approved until March 26, 2010, which is after the date of the accident. An area of the sidewalk was replaced in May 2010. The replaced sidewalk encompassed the light gray area and crack/crevice where plaintiff states she fell.

According to Fechter, Gallery made efforts to hone or smooth out the height differential before the sidewalk was replaced and Digby paid for the repairs which exceeded $59,000. The tenant's only involvement with this work was that it had to shut down access to its garage for three (3) days. Fechter also identified lease provisions which obligate the landlord to do structural repairs to the "ramp, concrete floor slabs and support columns located in the Demised Premises." This testimony is offered by the landlord to distinguish between structural repairs and simple patchwork. Gallery contends that the defective condition where Wolfe's accident occurred only required

minor patching, it was not structural repair and, therefore, not the landlord's obligation to fix.

Cesar Castrillon, a Champion employee and the manager of the garage, was deposed on behalf of the tenant. He testified that the garage consists of two floors and to gain access to the parking garage, cars must travel down a ramp to the garage. Although he testified that Champion salts the driveway when it snows, he is under the impression "the building" is in charge of keeping the sidewalk clear of snow and ice. He also testified he remembers someone using a machine to try to level the misleveled sidewalk, but he did not know who hired the company or did the work. Castrillon was shown certain photographs and asked whether he could identify where that machine was used to make repairs. He testified that the machine was used on the "right side of this picture that is not showing..."

According to Champion, the landlord is responsible under the lease to maintain the sidewalk because the sidewalk law applies, the repair that was needed to the sidewalk was a structural repair, and the sidewalk is not a part of the demised premises, as defined under the lease in Exhibit A to the rider.

Exhibit A consists of Exhibit A-1 and A-2. Both exhibits are diagrams and each exhibit has a legend stating that "[diagonal lines] = Demised Premises." Although diagonal lines are drawn in the areas identified as being the garage and interior ramp on the cellar and sub-cellar levels, there are no diagonal lines in the sidewalk area leading to the ramp. Champion argues that this means the landlord is responsible for repairs to the sidewalk and, in any event, that under the sidewalk law (Admin Code § 7-210), it is the owner's responsibility to monitor, maintain and make repairs to that area.

Champion states that it did assume a contractual duty to repair, etc., the sidewalk and its only obligation is to make sure the sidewalk is clear of rubbish.

Paragraph 85 (A) of the lease pertains to "maintenance and repair." It states in relevant part as follows:

> Owner [Gallery] shall repair structural portions of the Demised Premises to the extent that it is not the obligation of the Condominium, except if such repairs are due to the negligence or willful and wrongful acts of Tenant...For purposes of this Section, structural repairs shall mean only repairs to the ramp, concrete floor slabs, and support columns located in the Demised Premises....
> *Lease*, ¶*85*(A)

Paragraph 85 (A)(iv) contains a disclaimer, stating that repairs by the owner "shall not be deemed ...(iv) to relieve Tenant of any of its obligations under this Lease."

Paragraph 46 of the lease sets forth the terms of Use and Occupancy. It requires that the tenant:

> At all times, properly maintain (in a clean and neat condition) and police the sidewalk area directly in front of the Demised Premises continuing eighteen (18) inches into the street, including, without limitation, removing of any refuse and/or rubbish therefrom.
> *Lease*, ¶*46 (c)(vi)*.

Paragraph 56 of the lease pertains to "indemnification." Paragraph 56B states that the tenant agrees to indemnify the landlord from "any and all claims" that arise from "the performance, use, occupancy, repair, maintenance or control of the Demised Premises or the sidewalks adjacent thereto or any part thereof used by Tenant..." Tenant seeks summary judgment dismissing Gallery's cross claim for defense and indemnification (3rd cross claim). Gallery also seeks summary judgment on the 3rd cross claim. A principal disagreement between them is whether, as a matter of law, the

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indemnification provision in the lease violates the General Obligations Law. According to the tenant, the landlord is seeking to be indemnified for its own negligence and the absence of qualifying language, such as "to the fullest extent permitted by law," renders this provision wholly unenforceable. In another branch of its motion, the tenant has moved to dismiss Gallery's remaining cross claims against it, among which there is a breach of claim.

Although Wolfe takes no position on whether Gallery's motion for contractual indemnity should be granted or denied, she raises the doctrine of special use and benefit in opposition to Champion's motion. Wolfe points out that the sidewalk abuts the driveway/ramp where numerous vehicles enter and leave the garage each day. She argues that there is a triable issue of fact whether the tenant's use of that driveway, which traverses a public sidewalk, caused the defective condition that is alleged to exist on the day of the accident. Wolfe relies on testimony by Champion's manager, that this driveway/ramp was the only entrance into and out of the garage. Wolfe also cites to Frechter's testimony that the repair of the sidewalk had to be coordinated with Champion because the garage had to be shut down while the work was being done. Thus, according to Wolfe, Champion made a special use of and derived a substantial benefit from using the sidewalk to run its business.

Discussion

A movant seeking summary judgment in its favor 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 (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853[1985]). In deciding the motion, the court must draw all

reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 [1st Dept 1990] lv dismissed 77 NY2d 939 [1991]); Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]).

Champion's Motion

Champion's motion is addressed first because if the complaint is dismissed, this impacts the relief sought by Gallery, which is for summary judgment on its cross claims for defense and indemnification.

A lease is a contract and contracts are to be construed "according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense" (Johnson v. Travelers Insurance Co., 269 NY 401 [1936]). Champion has established that the tenant's duty with respect to the respect to the sidewalk is set forth in the lease and there are no ambiguities, nor does Gallery claim any of the relevant provisions are ambiguous.

Under paragraph 46 (C)(iv) of the lease, the tenant is only responsible for keeping the sidewalk "directly in front of the demised premises and continuing eighteen (18) inches into the street" clean and neat. No obligation to make repairs or otherwise maintain the sidewalk is referenced in that paragraph. References to "rubbish and refuse" indicate Champion's obligations with respect to the sidewalk are not of a structural nature, but purely non-structural. Gallery's argument, that it does not own the building, but only the retail condominium unit is unavailing against Champion's motion, although it may raise a possible dispute between the commercial condominium owner

and the residential condominium. That dispute (if any) is not a part of this case or before the court to decide. Furthermore, it is difficult to see how Gallery could shift responsibility to the tenant to make sidewalk repairs if Gallery itself does not have that obligation.

Pursuant to Admin Code § 7-210, frequently referred to as the "sidewalk law," the owner of real property abutting any sidewalk must maintain such sidewalk in a reasonably safe condition. Champion is not the owner of the retail condominium unit, it is simply a lessee. Unless a lease specifically obligates the tenant to be responsible for structural repairs and identifies what they are, such obligation will not be implied nor imposed Cucinotta v. City of New York, 68 AD3d 682 [1st Dept 2009]). Furthermore, repairs to a city public sidewalk are considered structural, not non-structural repairs (Cucinotta v. City of New York, supra). The lease specifically holds Gallery responsible for structural repairs, unless they are the obligation of the Condominium.

Whether under the lease or the sidewalk law, Champion has proved that it is not responsible for repairing the sidewalk area directly in front of its garage. Although Champion argues that the sidewalk is not a part of the demised premises because neither diagram comprising Exhibit A to the lease has diagonal lines in that area, it is unlikely that Gallery could have conveyed a public sidewalk to the tenant (i.e. rented it out) because it is not Gallery's privately owned property. Furthermore, the language in paragraph 56 (B) makes a distinction between "Demised Premises" and "sidewalks adjacent thereto." Notwithstanding these latter unsuccessful arguments, Champion has otherwise made a prima facie showing of being entitled to summary judgment in its favor.

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Wolfe has, however, raised the doctrine of special use and benefit. This doctrine applies when, for example, a public sidewalk is being used a driveway by a party (Campos v. Midway Cabinets, Inc., 51 AD3d 843 [2nd Dept 2008]). Such use is a special use of public land. Since the party is deriving a benefit from that special use, the party benefitted by that use must maintain it in a reasonably safe condition to avoid injury to others (Petty v. Dupont, 77 A.D.3d 466, 468 [1st Dept 2010] internal citations omitted).

The undisputed facts are that cars wishing to park in the tenant's garage must come out of the vehicular roadway, and make a turn onto the sidewalk. Upon doing so, the vehicles proceed along the ramp to the parking garage below. Examining the color pictures submitted by each side shows that the defect plaintiff alleges caused her accident is on the extreme left side of the driveway/sidewalk area. Champion claims that it is impossible for the defective condition to have been caused by cars entering and exiting its parking garage because the defect is all the way to the left side of the ramp/ driveway. As the moving party, however, Champion has the burden of proving it is entitled to summary judgment, as a matter of law, or by eliminating all triable issues of fact. Champion's statement is made by its attorney and unsupported by any evidence in admissible form. There is a triable issue of fact whether the tenant's use of the sidewalk in this manner created or contributed to the defect alleged to have existed when plaintiff's accident occurred. Champion has also misstated the holding of Tedeschi v. KMK Realty Corp. (8 A.D.3d 658 [2nd Dept 2004]) which its cites for the legal proposition that plaintiff must prove the special use. In Tedeschi, the landlord proved the tenant had exclusive use of the driveway, but plaintiff failed to raise triable

issues of fact to defeat the landlord's motion for summary judgment, leading the court to dismiss the complaint against the landlord. Here, although Champion has made a preliminary showing that it is entitled to summary judgment based upon the lease and sidewalk law, Wolfe has come forward with legal and factual arguments that the tenant made special use of the sidewalk, thereby assuming a responsibility to keep it in a safe condition. Since Wolfe has not moved for summary judgment, she has met her burden and successfully defeated Champion's motion (Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 [1st Dept 1990] lv dismissed 77 NY2d 939 [1991]); Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]). Therefore, Champion's motion for summary judgment dismissing the complaint is denied.

Turning to each defendant's motion with respect to Gallery's 3rd cross claim for defense and indemnification, the issue is whether, as Champion argues, the indemnification provision in the lease is void as against public policy. The terms of indemnification are set forth in Paragraph 56 of the lease which provides in relevant part as follows:

> A. Except to the extent of Owner's negligence or willful act, Owner shall not be responsible or liable to Tenant, or any person claiming by, through or under Tenant in case of any accident or injury including death to Tenant (if Tenant is an individual) ... or to any person or person in or about the Demised Premises
>
> B. Tenant agrees to indemnify and hold harmless Owner ... from and against any and all claims, actions, damages ... that arise out of or in connection with (i) the performance, use, occupancy, repair, maintenance or control of the Demised Premises or the sidewalks adjacent thereto or any part thereof. Tenant shall, at its own cost and expense, pay any and all legal fees and other expenses incurred by, and defend any an all actions, suits and proceeding which may be brought against, and pay, satisfy and discharge any and all judgments, orders and decrees which may

> be made or entered against the Owner...of the demised premises...The comprehensive general liability coverage maintained by Tenant pursuant to this Lease shall specifically insure the contractual obligations of Tenant as set forth in this Section and as provided in this Lease.
> *Lease, ¶56(A), (B), (C)*

GOL § 5-322.1, entitled, "Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases," applies to agreements "relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances." GOL § 5-321, however, entitled "Agreements exempting lessors from liability for negligence void and unenforceable." Since the subject agreement is a commercial lease, this is the section of the General Obligations Law that applies. GOL § 5-321[1] provides that:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

An indemnification clause coupled with an insurance procurement provision obligating the tenant to indemnify the landlord for its share of liability does not violate General Obligations Law § 5–321, because insurance in being used to allocate the risk of liability to third parties between themselves (Great Northern Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d 412, 419 [2006]). Furthermore, even where an agreement to

[1]Notwithstanding these distinct statutory provisions, many courts apply the same principles of law to both sections.

indemnify does not limit the obligation to what the law allows and purports to indemnify the indemnitee from liability for its own negligence, the statute does not apply where the indemnitee is found to have been free of negligence (Haynes v. Estate of Sol Goldman, Newmark & Co. Real Estate, Inc., 62 A.D.3d 519, 522 [1st Dept 2009] citing Crouse v. Hellman Const. Co., Inc., 38 A.D.3d 477 [1st Dept 2007]).

The indemnification provision in the lease does not violate the General Obligations Law because Champion is obligated under the lease to obtain insurance for Gallery's benefit. Champion provides (in connection with a different branch of its motion, discussed *infra*) proof it obtained insurance for Gallery's benefit.[2]

Gallery has proved the indemnification provision in the lease is enforceable. Under the lease, the tenant's duty to defend and indemnify applies to all claims arising from Champion's use and occupancy of the commercial unit, regardless of fault. Having met its burden of showing it is entitled to summary judgment on its defense and indemnification cross claim, Gallery's motion for summary judgment on its 3rd cross claim is granted. Champion's motion for summary judgment dismissing the 3rd cross claim is, therefore, denied.

Champion has also moved with respect to Gallery's other cross claims against it. Those cross claims are for indemnity, contribution and judgment over (1st cross claim), breach of contract for failing to procure and maintain the insurance tenant is obligated

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[2]Even were the court persuaded (which it is not) that the indemnification provision violates GOL § 5-321, this would not require the wholesale nullification of that provision, but would require the denial of this motion with leave to renew once the issue of Gallery's negligence, or freedom therefrom, is decided.

to provide under its lease (2nd cross claim) and indemnification (4th cross claim). Since neither side distinguishes the 1st and 4th cross claims from the 3rd cross claim in any meaningful way, and only tenant has moved for summary judgment on these claims without presenting substantiative arguments, Champion's motion for summary judgment on Gallery's 1st and 4th cross claim is denied for failure of proof.

Although Gallery contends that Champion has breached the lease by failing to acquire proper general liability insurance for Gallery's benefit (2nd cross claim), Champion has provided a Certificate of Insurance showing Gallery as a named additional insured. The certificate shows the insurance was in effect March 1, 2009 through March 1, 2010. Wolfe's accident occurred March 8, 2010. Another exhibit is a renewal policy issue by Chartis, insuring Champion with an effective date of March 1, 2010. The insurance limits are those required under the lease. A third exhibit is an endorsement stated that "managers or lessors of premises" are additional insureds "where required by contract." Gallery does not address any of Champion's arguments or challenge its proof. Therefore, Champion's motion for summary judgment on Gallery's 2nd cross claim against it for breach of contract for failure to comply with the terms of the insurance procurement provision in the lease is granted and the 2nd cross claim is hereby severed and dismissed.

Conclusion

Champion's motion for summary judgment dismissing Wolfe's complaint is denied for the reasons stated. Champion's motion for summary judgment for Gallery's 3rd cross claim against it is denied. The 2nd cross claim by Gallery is, however, severed and dismissed as Champion has met its burden of showing it is entitled to summary

judgment on that cross claim for breach of contract. Although Champion has moved for summary judgment on the 1st and 4th cross claim against it, the motion is denied for failure of proof.

Gallery's motion for summary judgment on its 3rd cross claim for defense and indemnification by Champion against plaintiff's claims is granted.

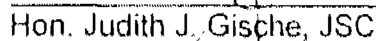
Since the note of issue was filed, this case is ready for trial. Wolfe shall serve a copy of this decision/order upon the Office of Trial Support so the case can be scheduled

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
September 4, 2012

So Ordered:



Hon. Judith J. Gische, JSC

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