Verhill v Falanga
2013 NY Slip Op 32922(U)
November 18, 2013
Sup Ct, Richmond County
Docket Number: 102152/12
Judge: Joseph J. Maltese

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 102152/12
Motion No.: 002

GEORGE VERHILL,

Plaintiff

against

CIRO V. FALANGA, 1781 RICHMOND ROAD REALTY, LLC., MARIA PAPPAS and ANDREW PAPPAS

Defendants

X

1781 RICHMOND ROAD REALTY LLC. and ANDREW PAPPAS

Third-Party Plaintiffs

against

RICHMOND JEFFERSON, L.L.C.

Third-Party Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for summary judgement

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Affirmation in Reply	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The Defendants-Third Party Plaintiffs, Richmond Road Realty, LLC and Andrew Pappas move for summary judgement pursuant to CPLR § 3212 on their third party contractual indemnification and breach of contract claims against Third Party Defendant Richmond Jefferson, L.L.C. The motion is granted.

Facts

At or about 6 A.M on or about May 24, 2012 the plaintiff in this action, George Verhill was waiting for the M76 bus at a stop located in the vicinity of 1781 Richmond Road, Staten Island, New York when he was hit by a vehicle as it attempted to exit the parking lot of the business. As a result of the accident, plaintiff suffered numerous injuries and has been confined to Clove Lakes Nursing Home after leaving the hospital. The plaintiff alleges he suffered his injuries as a result of the

negligence, recklessness and carelessness of the named defendants. The sidewalk fronting 1781 Richmond Road forms the waiting area for the bus stop. The 1781 Richmond Road location is a strip mall with a two story mixed commercial and business rental space currently housing a Dunkin' Donuts franchise on the first floor as well as office space on the second floor. The location features front-in parking spaces for about three cars in front of the building which is accessible via two driveways requiring vehicles to cross over the sidewalk. There are currently no barriers or guardrails separating the sidewalk and bus stop area from the parking lot. The location previously had barriers and additional parking spaces on the side of the building when the Victory Diner was located on the premises but they were removed sometime during the construction phase of the Dunkin' Donuts.

The plaintiff commenced an action in the Supreme Court of the State of New York, County of Richmond against defendants: Ciro Falanga, Richmond Road Realty, LLC (hereinafter "Richmond Road"), Andrew Pappas and Maria Pappas to recover for his injuries. Thereafter, plaintiff discontinued the action with prejudice against Maria Pappas. The remaining defendants instituted a third party action for contribution, contractual and common law indemnification and breach of contract against Richmond Jefferson, L.L.C. (hereinafter "Richmond Jefferson") based on the existence of a triple net lease between landlord Richmond Road and tenant Richmond Jefferson signed in June of 2006 and still in existence at the time of the accident. Ultimately, plaintiff amended his action to include Richmond Jefferson, L.L.C. as a direct defendant.

Richmond Road seeks an order pursuant to CPLR § 312 granting summary judgement on their claims for contractual indemnification and breach of contract inasmuch as they allege Richmond Jefferson agreed to indemnify Richmond Road against any and all claims not arising from Richmond Road's own actions. To this point, Richmond Road argues Richmond Jefferson was wholly responsible for the reconstruction of the building and surrounding parking lot as well as maintaining the premises. Therefore, no act or omission of Richmond Road could have contributed to the plaintiff's injury. Richmond Road also argues Richmond Jefferson breached their lease agreement by failing to name Richmond Road as "an additional insured on all liability policies" mentioned in section 8 entitled "Insurance." Richmond Jefferson argues the lease is ambiguous as to whether the premises described in the lease covers incidents that occur on the sidewalk since there are two commencement dates present in the lease and whether indemnification is available.

Richmond Road further argues that it was not under an obligation to construct any barrier between the parking lot and sidewalk since they did not take possession of the premises until after the Victory Diner was moved in 2007. Moreover, Richmond Road asserts that the Department of Buildings did not require barriers to be constructed as part of the overall site approval.

Discussion

To obtain summary judgment it is necessary that the movant establish his position by submitting admissible evidentiary proof sufficient to allow the court to direct judgment in their favor.[1] "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[2] Summary judgment is an extraordinary remedy and only appropriate where a full examination of the facts indicates no triable issues of fact or arguable issues.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.

Indemnification

"The right to contractual indemnification depends on the specific language of the contract."[5] As such, "the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and surrounding circumstances."[6] Furthermore, an

---

[1]CPLR 3121(b); *Friends of Animals, Inc., v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979].

[2] *Marine Midland Bank, N.A., v. Dino*, et. al., 168 AD2d 610 [2d Dept. 1990].

[3] *American Home Assurance Co., v. Amerford International Corp*., 200 A.D.2d 472 (1st Dept 1994); *Rotuba Extruders v. Ceppos,,* 46 N.Y.2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept. 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 A.D.2d 331 [2d Dept. 1984] *Aff'd* 65 N.Y.2d 732 [1985].

[5] *Reisman v. Bay Shore Union Free School Dist.*, 74 A.D.3d 772, 773 [2d Dept. 2010].

[6] *George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 930 [2d Dept. 2009].

indemnification provision which contemplates a "complete rather than partial shifting" of liability from landlord to tenant runs contrary to General Obligations Law § 5-321 which states:

> 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[7]

Notwithstanding the applicable text of the General Obligations Law, courts look favorably on agreements which afford protection for the public and have recognized an exception to the general rule against total indemnification.[8] A property owner may contract with a commercial lessee for indemnification of its own negligence if: 1) the lease was negotiated at arm's length, 2) between sophisticated parties, 3) evinces a clear intent to provide indemnification and 4) uses insurance to allocate the risk of liability to third parties.[9] Under such circumstances, the purpose of the indemnity clause is "not to exempt the lessor from liability to the victim, but to allocate the risk of liability to third parties between the lessor and the lessee."[10] Nonetheless, "a landlord may not circumvent General Obligations Law § 5-321 merely by inserting a lease provision requiring the tenant to obtain insurance."[11]

The indemnification language in the lease requires Richmond Jefferson to indemnify and save harmless Richmond Road against all liability that may be imposed on Richmond Road by: 1) any default by tenant, 2) any use of the premises by tenant, 3) any negligence of the tenant during the term of the lease and construction period as well as 4) "any accident, injury or damage to any

---

[7] *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 793 [1997]; General Obligations Law § 5-321.

[8] *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153 [1977].

[9] *Great N. Ins. Co. v. Interior Constr. Corp*, 7 N.Y.3d 412 [2006].

[10] *DiBuono v. Abbey, LLC*, 83 A.D.3d 650, 654 [2d Dept. 2011]; *see also Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 772 [2d Dept. 2008].

[11] *Breakaway Farm, Ltd. v. Ward*, 15 A.D.3d 517 [2d Dept. 2005].

person, or property occurring in or on the demised premises unless same is caused by some act or omission" of Richmond Road after the commencement of the lease. There is also a parallel clause which states that Richmond Road will indemnify Richmond Jefferson against any claims arising out of landlord's gross negligence or intentional misconduct in the performance of their contractual obligations. This language does not purport to wholly exculpate Richmond Road for its own negligence as it is clear there are mutual clauses which requires both parties to indemnify the other for their own negligence.

Additionally, section 8 of the lease requires Richmond Jefferson to obtain "All Risk" property insurance, commercial general liability insurance in the amount of two million dollars, builders all risk insurance and workers compensation insurance on the demised premises. The lease further obligates Richmond Jefferson to name Richmond Road as an additional insured on all obtained insurance policies. Essentially, Richmond Jefferson is required to indemnify Richmond Road in a claim for any injury to any person occurring in or on the premises, regardless of Richmond Jefferson's negligence, except in instances of Richmond Road's gross or intentional misconduct. The addition of the insurance procurement language in section 8 of the lease works in conjunction with the indemnification provisions to ensure that Richmond Jefferson indemnifies Richmond Road for any share of liability without exempting Richmond Road from liability entirely. Thus, these sections ensure the lease does not violate General Obligations Law § 5-321 and as such the indemnity provisions are valid.

Contractual promises to indemnify must be "strictly construed" to avoid imputing a duty on parties which was not otherwise intended.[12] Here, the lease evinces an "unmistakable intent" to indemnify inasmuch as the indemnification language is specifically written to cover "any accident, injury or damage" to persons or property "occurring in or on the demised premises."[13] The parties are sophisticated entities who negotiated the lease in good faith and could have reworded the clause so that it did not include claims resulting out of injuries sustained on the demised premises. As written, the type of injury suffered by plaintiff is squarely within the indemnification clause agreed

---

[12] *Vigliarolo v. Sea Crest Constr. Corp.*, 16 A.D.3d 409, 410 [2d Dept. 2005].

[13] *Great N. Ins. Co.*, 7 N.Y.3d at 417.

to by the parties.[14] Furthermore, a review of the record shows that Richmond Jefferson has not proffered any additional leases which would contradict this language and the presence of merger language located in section 38 further buttresses the notion that the parties intended this agreement to be a full and final expression of all material terms contained within. As a result, the agreement is both valid and demonstrates an unequivocal intent on behalf of Richmond Jefferson to indemnify Richmond Road.

Finally, the claim falls within the indemnification provision as the area in which the accident took place may be fairly thought of as "in or on the demised premises." Richmond Jefferson's argument that the sidewalk fronting 1781 Richmond Road is not part of the demarcated area is unavailing. "A phrase such as in, on or about the Premises' is not to be read as limited in its spatial description to in the demised premises, 'for then the words or about' would have no meaning."[15] The phrase "in or on" is "frequently used synonymously to mean around 'or on the outside of,'" and as such covers sidewalks which are adjacent to leased buildings.[16] Here, the accident occurred as a result of an individual jutting onto the sidewalk as he attempted to leave the parking lot of 1781 Richmond Road. The incident location is sufficiently "in or on" the demised premises to fall within the otherwise valid and enforceable indemnification agreement.

Breach of Contract

"A party seeking summary judgement based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with."[17] Here, the lease between Richmond Road and Richmond Jefferson clearly requires Richmond Jefferson to obtain three separate types of insurance, including a commercial general liability policy in the amount of two

---

[14] *See, e.g. Sherry v. Wal-Mart Stores E., L.P.*, 67 A.D.3d 992, 995-6 [2d Dept. 2009].

[15] *Pritchard v. Suburban Carting Corp.*, 90 A.D.3d 729, 731 [2d Dept. 2011] (*quoting Hogeland*, 42 N.Y.2d at 159).

[16] *Id.*

[17] *Rodriguez v. Savoy Boro Park Assoc. Ltd. Partnership*, 304 A.D.2d 738, 739 [2d Dept. 2003].

million dollars. As "lease provisions by which the tenant covenants to procure insurance and name the landlord as an additional insured are generally valid and enforceable," this particular covenant qualifies under the first prong of the analysis.[18] The record reveals that Richmond Jefferson was issued an insurance policy by Seneca Insurance Company. However, in its response to Richmond Road's demand for discovery, Richmond Jefferson admits that "the Seneca policy does not have an additional insured endorsement." Thus, it is clear that the contractual provision requiring Richmond Jefferson to obtain an insurance policy listing Richmond Road as an additional insured was valid and breached. Richmond Road's damages for Richmond Jefferson's breach are limited to "out-of-pocket expenses in obtaining and maintaining its own separate insurance underwritten by its own insurance carrier" as well as the costs of "the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums."[19]

Accordingly, it is hereby:

ORDERED, that summary judgement is granted in favor of Third Party Plaintiff's Richmond Road Realty, LLC and Andrew Pappas; and it is further

ORDERED, that the Third Party Plaintiff's shall settle judgement

ENTER,

DATED: November 18, 2013

Joseph J. Maltese
Justice of the Supreme Court

[18] *Inchaustegui v. 666 5th Ave. Ltd. Partnership*, 96 N.Y.2d 111 [2001]; *see, e.g., Kel Kim Corp. v. Central Mkts.*, 70 N.Y.2d 900 [1987].

[19] *Netjets, Inc. v. Signature Flight Support, Inc.*, 43 A.D.3d 1016, 1018 [2d Dept. 2007]; *Inchaustegui*, 96 N.Y.2d at 114