

Cornet v Baychester Supermarket Corp.

2014 NY Slip Op 33112(U)

March 26, 2014

Supreme Court, Queens County

Docket Number: 9178/2012

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

PHILIP N. CORNET,
Plaintiff,

Index
No. 9178 2012

- against -

Motion
Date February 24, 2014

BAYCHESTER SUPERMARKET CORP., et ano.,
Defendants.

Motion
Cal. No. 40

Motion
Seq. No. 3

The following papers numbered 1 to 12 read on this motion by defendant Daveen Properties, LLC (Daveen) for an order granting it summary judgment dismissing the complaint and awarding judgment in its favor on its cross-claims against defendant Baychester Supermarket Corp. (Baychester).

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion - Affirmation - Exhibits..... | 1-4 |
| Answering Affirmation - Exhibits..... | 5-10 |
| Reply..... | 11-12 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a trip-and-fall accident which occurred on February 7, 2012, in the parking lot of a C-Town grocery store. Baychester (d/b/a C-Town) leases the subject premises from Daveen.

On that branch of its motion for summary judgment dismissing plaintiff's complaint, Daveen first asserts that it cannot be held liable for plaintiff's accident since it is an out-of-possession landlord not responsible for the maintenance and repair of the parking lot. "An out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, by contract, or by a course of conduct" (*Mercer v Hellas Glass Works Corp.*, 87 AD3d 987 [2011]; *see Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633 [2011]).

Here, Daveen has submitted, inter alia, a copy of the Store Lease agreement, dated September 14, 1993,¹ governing the parties' conduct with respect to the demised premises and, more specifically, the parking lot thereat. The lease specifically provides that Baychester agrees, at its sole cost and expense, to keep and maintain the parking lot in good repair (*see Rider at ¶ 46*), and that – with the exception of structural repairs, which is not at issue here – Baychester shall, at its sole cost and expense, make all other repairs to the demised premises including the parking lot (*id.* at ¶ 53).

Daveen also submits the affidavit of its general counsel, Michael D. Blaymore, who indicates that Daveen has not been in physical possession of the property since its formation in 1995, and that Daveen has never undertaken to perform any repairs, particularly with respect to the parking lot. Finally, Dominick Decicco, owner of the C-Town, appeared for deposition on behalf of Baychester and testified that Baychester is responsible for maintenance and repair of the premises, and that Daveen has never made any such repairs thereto. The above submissions are sufficient to demonstrate that Daveen was an out-of-possession landlord, that it was not contractually obligated to make repairs to the premises, that it never undertook maintenance or repair of same, and that there is no duty to plaintiff which arises out of statute or regulation (*see Castillo v Wil-Cor Realty Co., Inc.*, 109 AD3d 863 [2013]; *Volpe v Hudson View Assoc., LLC*, 109 AD3d 814 [2013]; *Mastrokostas v 673 Madison, LLC*, 109 AD3d 459 [2013]).

Neither Baychester nor plaintiff has raised a triable issue of fact in opposition to the motion. Both parties have argued that the motion should be denied as premature, since they have not yet had the opportunity to depose a representative of Daveen on the issue of whether

1. The lease agreement was originally between Daveen's predecessors-in-interest and 9802 Meat & Produce Corp as landlord and tenant, respectively. That lease was subsequently assigned to Baychester as tenant by agreement dated December 31, 1996. The lease was then modified and extended in May 2006. Said lease modification and extension agreement is between Daveen as owner and Baychester as tenant. The provisions of the lease were in effect on the date of the subject accident.

it had notice of the alleged dangerous condition.² However, the issue of notice is not triggered absent a duty owed, which – as indicated above – is limited with respect to out-of-possession landlords (*see Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 [2011]). To that end, denial of the motion to obtain further discovery on that issue is unwarranted (*see Brewster v Five Towns Health Care Realty Corp.*, 59 AD3d 483 [2009]). In light of this finding, the argument raised by Daveen regarding plaintiff’s inability to identify the cause of his fall will not be considered as academic.

Turning to the remaining branches of Daveen’s motion, this defendant has moved for summary judgment in its favor on its cross-claims for common-law and contractual indemnification, and breach of contract for failure to procure insurance. The relevant provision of the lease, at paragraph 8 thereof, entitled “Tenant’s Liability Insurance Property Loss, Damage, Indemnity,” reads as follows:

“Owner or its agents shall not be liable for . . . any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees . . . Tenant agrees, at Tenant’s sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner. On Tenant’s default in obtaining or delivering any such policy or policies or failure to pay the charges therefor, Owner may pay the charges for any such policy or policies and charge the Tenant as additional rent therefor. Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs 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, Tenant’s agents, contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence, or improper conduct of the Tenant, Tenant’s agents, contractors, employees, invitees, or licensees. Tenant’s liability under this lease extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee or licensee of any subtenant. In case any action or proceeding is brought against Owner by reason of any such claim, Tenant,

2. To the extent Baychester seeks an order compelling the deposition of a principal from Daveen pursuant to CPLR 3126, the court will not consider such a request in the absence of a cross-motion for such relief (*see also* CPLR § 8020 [a]).

upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by Counsel approved by Owner in writing such approval not to be unreasonably withheld.”

Further, the Rider, at paragraph 49, states:

“Tenant agrees that it will, at its own cost an expense, take out and maintain in force at all times while this Lease is in effect, for the benefit of the Owner and Tenant, as their respective interests may appear, plate glass insurance and public liability insurance with limits of not less than \$3,000,000, in the case of injury or death to any one person in any one occurrence . . . All premiums and charges for all of said policies shall be paid by the Tenant and if the Tenant shall fail to make any such payment when due, or fail to carry any such policy, the owner may, but shall not be obligated to, make such payment or carry such policy, and the amount paid by the owner . . . shall be repaid to the owner by the Tenant on demand, and . . . shall be considered as additional rent payable hereunder.”

Daveen has not demonstrated that it is entitled to summary judgment on its cross-claims for breach of contract for failure to procure insurance. Baychester, in opposition to the motion, has submitted evidence that Daveen obtained its own policy of insurance naming itself as the insured and, consequently, submitted invoices to Baychester for reimbursement of insurance premiums paid by Daveen. This practice appears to have been contemplated by the parties as per terms of the lease, the relevant portions of which are noted above. Accordingly, there is an issue of fact as to whether Baychester breached the terms of the lease by failing to procure insurance on behalf of Daveen or whether Daveen secured its own policy and passed the charges as additional rent to Baychester, and whether Baychester reimbursed Daveen therefor.

Daveen's contention in reply that Baychester's principal admitted that Baychester was responsible for providing a defense to Daveen and, accordingly, should unequivocally provide one in this matter, is without merit. It is noted that the lease agreement speaks for itself and its interpretation is a matter of law (*see Farm Stores, Inc. v School Feeding Corp.*, 79 AD2d 504 [1980]), *aff'd* 53 NY2d 910 [1981]).

To the extent Daveen seeks indemnity from Baychester in this case – whether contractual or common-law – same is denied, inasmuch as Daveen is not liable to plaintiff as a result of this accident (*see generally Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]). Finally, it is noted that recovery of attorneys fees is not available under the theory of common-law indemnification (*see Chapel v Mitchell*, 84 NY2d 345 [1994]).

Accordingly, the branch of Daveen's motion for an order granting it summary judgment dismissing the complaint is granted. The remaining branches of the motion, including that which seeks sanctions, are denied.

Dated: March 26, 2014

J.S.C.