Sellitti v TJX Cos., Inc.
2014 NY Slip Op 33593(U)
March 14, 2014
Supreme Court, Kings County
Docket Number: 18213/11
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 14th day of March, 2014.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

VINCENT R. SELLITTI, an Infant by Father and Natural Guardian, CHARLES SELLITTI, and CHARLES SELLITTI, Individually,

PLAINTIFFS,

-VS-

THE TJX COMPANIES, INC. and 1832 REALTY, LLC,

DEFENDANTS.

Motion Sequence #1

INDEX No. 18213/11

The following papers numbered 1 to 7 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	1-2
Answering Affidavit (Affirmation)	3, 4
Reply Affidavit (Affirmation)	5, 6
Other Papers	7

Upon the foregoing papers, defendant Marshalls of MA, Inc. s/h/a The TJX Companies, Inc. ("TJX") moves for an order: (1) pursuant to CPLR 3212, granting summary judgment in its favor dismissing the complaint and all cross-claims as asserted against it; and (2) pursuant to CPLR 3212, granting it summary judgment on its cross-claims for contractual and common-law indemnification as against co-defendant 1832 Realty, LLC ("Realty").

Plaintiffs Vincent R. Sellitti, an infant ("the infant plaintiff") by his father and natural guardian, Charles Sellitti, and Charles Sellitti, individually, commenced the instant action to recover damages for personal injuries allegedly sustained by the infant plaintiff on February 18, 2010, when he slipped and fell on ice on the public sidewalk adjacent to the premises located at 86th Street and Bay 19th Street in Brooklyn, New York. Realty owns the subject premises and is an out-of-

possession landlord. TJX is a commercial tenant of the subject premises. At his deposition, the infant plaintiff testified that, at the time of the accident, he was walking along Bay 19th Street when he slipped and fell on a patch of black ice on the sidewalk (Deposition of infant plaintiff, p.55, l. 4-5). The infant plaintiff further testified that, after falling, he noticed water dripping from the second floor fire escape and onto the part of the sidewalk where he fell (Deposition of infant plaintiff, pg. 5, l. 3; p.60, l. 21-25; p. 61, l. 6-7, l. 17) . The infant plaintiff surmised that the dripping water froze forming the patch of black ice on which he slipped and fell (Deposition of infant plaintiff, p.54, l. 20).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should only be employed when no doubt exists about the absence of triable issues (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, summary judgment may be granted if, upon all the papers and proof submitted, the cause of action or defense is sufficiently established to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form to sufficiently establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Zuckerman*, 49 NY2d at 562; *see also Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

New York City Administrative Code §7-210, "which imposes a duty to keep sidewalks safe for pedestrians, applies only to landlords and is non-delegable." However, "a tenant could be held liable for damages that result from a violation of a lease provision" (*see Siuzdak v Killowen, Inc.*, 36 Misc3d 1237[A], *6 [Sup Ct, Kings County 2012]; *see also Collado v Cruz*, 81 AD3d 542, 542-43 [1 Dept 2011]). "A tenant has a common-law duty to remove dangerous or defective conditions from

the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair" (*Sarisohn v 341 Commack Road, Inc.*, 89 AD3d 1007, 1009 [2d Dept 2011]).

Pursuant to Section 8.1 of the lease ("the lease"), dated January 10, 1997, between TJX and Realty, TJX is "required to maintain ... the interior of the Demised Premises exclusively, but excluding all property which Landlord is required to maintain." Schedule A of the lease describes the "Demised Premises" to "consist of a building, to be constructed by Landlord." Section 8.2 of the lease provides, in relevant part, that "Landlord shall make all repairs, alterations and replacements to the property which Landlord is required to maintain ... the foundation, the roof, the exterior walls, the roof drainage system, the canopy, the structural parts of the Demised Premises ..." The lease is silent as to who is responsible for removing snow and ice on the sidewalk adjacent to the subject premises, either along 86th Street or along Bay 19th Street.

At her deposition, Rena Valdman ("Ms. Valdman"), the TJX manager at the subject premises, testified that TJX hired an independent contractor by the name of "Anthony" (Deposition of Ms. Valdman, pg. 13, l. 15-17), and his company ACP Landscaping, to remove snow and ice from the sidewalk adjacent to the subject premises. Ms. Valdman was unaware of whether Anthony removed snow and ice from the second floor fire escape above the sidewalk on Bay 19th Street (Deposition of Ms. Valdman, pg. 20, l. 13). In addition, Ms. Valdman denied ever seeing Anthony removing snow and ice from thc sidewalk on Bay 19th Street adjacent to the subject premises (Deposition of Ms. Valdman, pg. 21, l-10).

At his deposition, George Butsikaris ("Mr. Butsikaris"), a partner of Realty, testified that Realty did not assume the responsibility of removing snow and ice on the sidewalk adjacent to the subject premises or on the second floor fire escape above the subject sidewalk on Bay 19th Street

(Deposition of Mr. Butsikaris, pg. 22, l. 11-15). Indeed, Mr. Butsikaris testified that since the date the lease was entered into, Realty did not perform any snow and ice removal from the subject premises or from the sidewalk adjacent to the subject premises (Deposition of Mr. Butsikaris, pg. 22, l. 21).

Based upon a review of the record submitted by the parties, that branch of TJX's motion for summary judgment dismissing the complaint and all cross-claims against it is denied. The court finds that there are triable issues of fact including, but not limited to, whether TJX assumed the responsibility to remove snow and ice from the sidewalk at issue and whether TJX had actual or constructive notice of the ice thereon (*Zuckerman*, 49 NY2d at 562; *see Sarisohn*, 89 AD3d at 1009). While the lease is silent on the issue of which party is responsible for snow and ice removal on the subject sidewalk, Ms. Valdman testified that TJX had hired a snow and ice removal company to perform this particular task. As such, that branch of TJX's motion for summary judgment dismissing the complaint and all cross-claims against it is denied.

The court will now turn to that branch of TJX's motion for summary judgment on its common law and contractual indemnification cross-claims against Realty.

Section 12.2 of the lease provides that "Landlord shall save Tenant harmless from, and defend and indemnify Tenant against, any and all injury, loss or damage, or claims for injury, loss or damage, of whatever nature, to any person or property caused by or resulting from any breach of a covenant of this lease by Landlord, any act, omission or negligence of Landlord or its employees or agents ..."

The court notes that Realty did not specifically address this branch of TJX's motion. Nevertheless, the court finds that TJX has failed make a prima facie case showing (*Zuckerman*, 49 NY2d at 562) that Section 12.2 of the lease has been triggered so as to warrant an award of

contractual indemnification (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [2d Dept 1999]). As to common law indemnification, TJX has failed to establish that it was free from negligence at this juncture (*see Philadelphia Indemnity Insurance Co. v AMI Development, Inc.*, 111 AD3d 689, 689 [2013]). In this regard, that branch of TJX's motion for summary judgment on its contractual and common-law indemnification cross-claims is denied.

Accordingly, TJX's motion is denied.

The foregoing constitutes the decision and order of the court.

MAR 1 4 2014

ENTER,

HON. LARRY D. MARTIN
J.S.C.

For Clerks use only

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MD ✓

Motion Seq. #

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