SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY PART 8

Index Number : 155872/2012
VELEZ, CINDY
vs
31 OLIVER ST. NYC, LLC
Sequence Number : 003
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 8/14/14

_____, J.S.C.
JOAN M. KENNEY

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 8

----------X

Cindy Velez

Plaintiffs,

-against-

31 Oliver St. NYC, LLC, and Madison 51 Trading, Inc.,

Defendants.

----------X

DECISION AND ORDER
Index Number: 155872/12
Motion Seq. No.: 003

KENNEY, JOAN M., J.

Recitation, as required by CPLR §2219(a), of the papers considered in review of this motion for summary judgment.

Papers	**Numbered**
Notice of Motion, Affirmations, Exhibits, and Memo of Law	1-14
Opposition Affirmation and Exhibits	15
Reply Memo of Law	16

In this trip and fall action, defendant 31 Oliver St. NYC, LLC, (31 Oliver) moves for an Order, pursuant to CPLR §3212, granting summary judgment on its contractual indemnification claim against co-defendant Madison 51 Trading, Inc., (Madison 51).

Factual Background

In this action, plaintiff Cindy Velez (Velez) alleges that on June 14, 2011, she was caused to trip and fall on a defective sidewalk in front of the premises known as the Metro PCS at 53 Madison Street, New York, New York. At the time of the incident, Madison 51 was the tenant of the demised premises known as 51-53 Madison Street, New York, New York.

At the time of the incident, plaintiff lived at 46 Madison Street, which was directly across the street from the Metro PCS store. Plaintiff crossed Madison Street, stepped onto the sidewalk , turned right, and within one or so steps, she allegedly tripped due to a defective portion of the sidewalk in front of Metro PCS.

At the time of the incident, 31 Oliver owned the property located at 51-53 Madison Street. The property is located at the intersection of Madison Street and Oliver Street, New York, New York. The property bears two separate street address names–one associated with Oliver Street and the other with Madison Street. The property is a mixed use property which included four commercial units. Two of the units have the 51 and 53 Madison Street address and the other two have the 31 and 33 Oliver Street address. The two commercial units with the address designations of 51 and 53 Madison Street were leased to the same lessee and share a lease agreement. These two units were the 99 Cent Store and the Metro PCS store. The lessee was Madison 51.

The written lease agreement between 31 Oliver and Madison 51 for the commercial units located at 51 and 53 Madison Street was entered into on May 25, 2010, for a term of 5 years. The lease agreement was in effect on June 14, 2011, the date of the incident. The lease agreement was executed by Kambiz Eli Nazarian on behalf of 31 Oliver and by Runan Zhang on behalf of Madison 51. The Metro PCS store, located at 53 Madison Street, was then subleased to a family friend. This sublease between Madison 51 and the family friend was not co-signed by 31 Oliver.

With regard to the responsibility for the maintenance and repair of the sidewalks in front of the demised premises, the lease agreement reads, in pertinent part:

> Lessee, at all times during the Lease Term and at Lessee's expense, shall keep the equipment thereon, and the adjoining sidewalks, curbs, vaults and vault space, if any, streets and ways, an all appurtenances to the Demised Premises, in a good and clean order and condition and in such condition as may be required by all Legal Requirements and Insurance Requirements, and promptly shall make all necessary or appropriate repairs, replacements and renewals thereof, ordinary or extraordinary, or foreseen or unforeseen, INCLUDING TO WINDOWS. All repairs, replacements and renewals shall be equal in quality and class to the original work. Lessee waives any right

> created by any law now or hereafter in force to make repairs to the Demised Premises at Lessor's expense.
>
> Notwithstanding the foregoing, Lessor's responsibility shall be limited to roof and structural repairs, which shall be part of Common Area Maintenance as defined herein.

With regard to indemnification, the lease agreement reads, in pertinent part:

> Lessee shall indemnify and hold Lessor harmless from and against all liabilities, obligations, claims, damages, fines, penalties, interests, causes of action, costs and expenses, including reasonable attorney fees (but excluding any income or excess profits or franchise taxes of Lessor determined on the basis of general income or revenue or any interest or penalties in respect thereof), impose upon or incurred by or asserted against Lessor or the Demised Premises by reason of the occurrence or existence of any of the following, whether or not resulting from any negligent act or omission of Lessor: any accident, injury to or death of persons (including workers) or loss of or damage to property occurring, or claimed, to have occurred, on or about the Demised Premises or any part thereof, or any improvements now or hereafter erected thereon, or the adjoining sidewalks, curbs, vaults or vault spaces, if any, streets or ways, or appurtenances thereto, any use or condition of the Demised Premises...

Mr. Nazarian, on behalf of 31 Oliver, testified that he would inspect the sidewalk of the property about once a week after the tenants moved into the premises. Additionally, Mr. Nazarian hired a superintendent, Louis Vargas, to clean and maintain the sidewalks on a daily basis. Mr. Nazarian also noted that if Madison 51 were to take action with regard to repairing the sidewalk, they would need to seek permission and approval from 31 Oliver. Mr. Zhang, on behalf of Madison 51, also testified that he and his employees cleaned the sidewalk in front of the demised premises on a regular basis.

Arguments

Defendant 31 Oliver argues that it is entitled to contractual indemnification from Madison 51 because, pursuant to the lease agreement, Madison 51 was responsible for the repair of the

sidewalk abutting the demised premises.

Defendant Madison 51 argues that 31 Oliver's motion must be denied because there are triable issues of fact as to who actually bore the responsibility to repair and maintain the sidewalk.

Discussion

Pursuant to CPLR §3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial. *Id.*

An out-of-possession landlord is generally not liable for the condition of the demised

premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision (see *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 349, 499-500, 856 N.Y.S.2d 573 [2008]). While a landlord may not delegate its duty to keep its premises in a safe condition with regard to third parties, a landlord is free to contract with its tenant to maintain and repair the premises, and to allocate the risk of liability to third parties by the procurement of liability insurance for their mutual benefit (*Schumacher v. Lutheran Community Services,* 177 A.D.2s 568, 576 N.Y.S. 2d 162). If that party violates the contract by failing to maintain the premises, that party may be required to indemnify the landowner, and in such a case the landowner's liability would be vicarious. (See, *Tamhane v. Citibank N.A.,* 61 A.D.3d 571 [1st Deot. 2009]).

Here, the lease between 31 Oliver and Madison 51 provides that Madison 51 was to keep the adjoining sidewalks in a good and clean order and condition, and to promptly make all necessary or appropriate repairs. A plain reading of the lease agreement assigns to tenant the responsibility for repair and maintenance of the adjoining sidewalks and provides that the tenant will indemnify landlord for damages arising out of any accidents on the adjoining sidewalks. However, according to the testimony of both the owner of 31 Oliver and Madison 51, 31 Oliver was present on the property to inspect the sidewalk and premises on a weekly basis, and had even hired a superintendent to clean the sidewalks on a daily basis. "When a landlord retains control over a portion of the premises, he or she is liable for injuries resulting from faulty condition of those premises. Control of the premises may be established...by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the

premises." (*Cherubini v. Testa,* 130 A.D.2d 380 [1st Dep't. 1987]). The testimony of both 31 Oliver and Madison 51 support the contention that 31 Oliver was present on a regular basis and that the superintendent cleaned the sidewalks daily, and that Madison 51 also had workers cleaning and inspecting the sidewalk. While 31 Oliver was not obligated under the lease to repair the sidewalks, there is an issue of fact as to whether 31 Oliver assumed such an obligation through its course of conduct. Nevertheless, this factual issue only affects whether a duty was owed to the injured plaintiff (see generally *Id.; Michaelov v. 632 Kings Highway Realty Corp.,* 36 Misc. 3d 1228(2), 959 N.Y.S.2d 90 [2012]; *Reidy v. Burger Kings Corp.,* 250 A.D.2d 747 [1998]).

The lease agreement unambiguously assigned the obligation to the tenant to maintain the subject premises and to keep the sidewalk in good and clean order and condition. The fact that 31 Oliver may have also helped in cleaning the sidewalks does not relieve Madison 51 of its contractual duty owed to the landlord to maintain the sidewalk. The indemnification provision of the lease agreement is unambiguous and required that the lessee indemnify and hold lessor harmless.

A contract providing for indemnification is valid where it is clear and unambiguous. *(Rodrigues v. N & S Bldg. Contrs. Inc.,* 5 N.Y.3d 427, 805 N.Y.S.2d 299, 839 N.E.2d 357 [2005]). General Obligations Law § 5–321 deems void and unenforceable an agreement in lease "exempting the lessor from liability for damages or 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...." However, a lessor/property owner can contract with a commercial tenant for indemnification of its own negligence "[w]here, as here, a lessor and

lessee freely enter into an indemnification agreement [negotiated at arm's length between two sophisticated parties] whereby they use insurance to allocate the risk of liability to third parties between themselves". *(Great N. Ins. Co. v. Interior Constr. Corp.,* 7 NY3d 412, 419 [2006]; *Gary v. Flair Beverage Corp.,* 60 AD3d 413, 414–415 [1st Dept 2009].) In such circumstances, the landlord is not exempting itself from liability to the victim for its own negligence, but rather the parties are allocating the risk of liability to third parties between themselves through the employment of insurance, and courts do not, as a general matter, look unfavorable on agreements which, by requiring parties to carry insurance, afford protection to the public. (See *Great N. Ins. Co. v. Interior Constr. Corp*, 7 N.Y.3d 12, 417 [2006], *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153 [1977], *Schumacher v. Lutheran Community Servs.*, 177 A.D.2d 568 [1991]).

Here, the commercial lease was negotiated by two sophisticated parties who included a broad indemnification clause, coupled with an insurance procurement requirement. Madison 51 argues that because Mr. Zhang could not read English, he cannot be considered a sophisticated party. However, a review of all the evidence shows otherwise. Mr. Zhang formed a corporation for his businesses. Mr. Zhang retained counsel to represent him in negotiating and signing the commercial lease with 31 Oliver. His attorney read every page of the lease agreement, upon which Mr. Zhang initialed every page. Mr. Zhang obtained insurance as required by the terms of the lease agreement. Mr. Zhang negotiated a sublease for this space. In sum, the allegation that Mr. Zhang's purported inability to read English does not establish that he did not understand the terms of the lease when his attorney was representing him in the negotiations and signing of the lease.

Although there may be a question of fact as to whether 31 Oliver was negligent in its duty

to the injured plaintiff by its conduct in cleaning the sidewalk, there is no question of fact as to its entitlement to contractual indemnification by Madison 51. The lease was negotiated at arms length by two parties represented by counsel. The provision which purports to hold 31 Oliver harmless for its own negligence is therefore not violative of General Obligations Law § 5–321. Accordingly, it is

ORDERED, that the motion of defendant 31 Oliver St. NYC, LLC, pursuant to CPLR §3212 for summary judgment against Madison 51 for contractual indemnification is granted; and it is further

ORDERED, that the parties proceed to trial/mediation forthwith.

Dated: August 14, 2014

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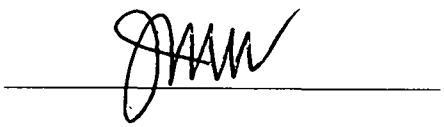

Joan M. Kenney, J.S.C.