DeSalvo v Ikonomopolous
2015 NY Slip Op 30486(U)
April 1, 2015
Sup Ct, New York County
Docket Number: 152753/2013
Judge: Arthur F. Engoron

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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DONNA DE SALVO,

Plaintiff,

- against -

CHRISTOS IKONOMOPOLOUS and EVELYN IKONOMOPOLOUS, VERISON REALTY CORP., PFW TRADING, INC. and PFW TRADING INC. d/b/a UNIVERSITY PLACE GOURMET,

Defendants.

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Index Number: 152753/2013

Sequence Number: 001

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on defendants Christos Ikonomopolous, Evelyn Ikonomopolous, and Verison Realty Corp.'s motion, pursuant to CPLR 3212, for summary judgment on their cross-claims and dismissing co-defendants' cross-claim:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Plaintiff's Affidavit in Opposition 2
Defendants' Affirmation in Opposition 3
Reply Affirmation 4

Upon the foregoing papers, the motion for summary judgment is conditionally granted.

Background

Plaintiff Donna DeSalvo sues to recover for injuries she allegedly sustained when, while purchasing flowers at the exterior flower stall of the deli located at 116 University Place, New York, New York, she tripped and fell on a "raised, uneven and hazardous sidewalk vault and vault doors" (a/k/a "cellar doors"). Defendant PFW Trading Inc. d/b/a University Place Gourmet ("University") owns and operates the deli. Defendants Christos Ikonomolpolous and Evelyn Ikonomopolous ("Defendants") own the mixed-use building at 116 University Place (the "Building") and are officers of defendant Verison Realty Corp. ("Verison"), which essentially manages the Building.

The instant complaint alleges negligence (first cause of action) and violations of Administrative Code §§ 7-210 and 19-152 and New York City Rules and Regulations § 2-09 (second cause of action). In their answer, Defendants denied the material allegations of the complaint and asserted cross-claims against University for contractual indemnity, common-law indemnity and breach of the lease provision requiring University to procure liability insurance on Defendants' behalf.

Similarly, in its answer, University denied the material allegations of the complaint and asserted a cross-claim against Defendants for contribution. The parties engaged in discovery, including party depositions, and on July 2, 2014, plaintiff filed a note of issue. Defendants now move for summary judgment on their cross-claims against University and to dismiss University's cross-claim asserted against them.

Discussion

At the outset, Defendants admittedly cannot, and do not, seek to avoid their non-delegable duty to plaintiff under Administrative Code § 7-210 and 19-152 to keep the sidewalk adjacent to its Building in good repair. See Collado v Cruz, 81 AD3d 542, 542-543 (1st Dep't 2011) ("Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk"). Indeed, Defendants do not move to dismiss plaintiff's complaint, they move only for summary judgment on their cross-claims against University for indemnification for any losses sustained by plaintiff, and recoverable from Defendants, which were caused by University's negligence in repairing and maintaining the cellar doors, and for breach of the insurance procurement provision of the Lease between Defendants and University. This Court's function on Defendants' summary judgment motion is issue finding, not issue determination. See Sillman v Twentieth Century–Fox Film Corp., 3 NY2d 395, 404 (1957). Because summary judgment is a drastic remedy, it should not be granted where triable issues of fact exist, even if such issues are only "arguable" or "debatable." See Sillman v Twentieth Century–Fox Film Corp., supra; Stone v Goodson, 8 NY2d 8, 12-13 (1960) ("It now seems well established that if the issue is fairly debatable a motion for summary judgment must be denied."). "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 Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Once that burden is met, the opponent must tender evidence in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim …mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Zuckerman v City of New York, 49 NY2d 447, 562 (1980).

Defendants met their initial burden of establishing that there are no questions of fact and, as a matter of law, they are entitled to summary judgment on their cross-claims for contractual indemnity, common-law indemnity and breach of the lease for failure to procure liability insurance. Defendants submit a copy of the June 26, 1996 lease between themselves and University, in which University is obligated to: (1) keep in "good repair" and "make all non-structural repairs" to "the sidewalks adjacent" to the premises; (2) indemnify Defendants for, and save Defendants harmless from, any liability for injury or damage to persons for which Defendants "shall not be reimbursed by insurance", unless such damage is caused by Defendants' negligence; and (3) procure $1,000,000 in liability insurance and name Defendants as additional insureds on the policy. Because the indemnification clause does not require University to indemnify Defendants for their own negligence, it is enforceable. See General Obligations Law § 5-321 (indemnification provision in lease which exempts owner from liability for its own negligence "shall be deemed to be void as against public policy and wholly unenforceable."). Moreover, University does not dispute the Lease terms or that, following the Lease's expiration in 2008, it continued as a month-to-month tenant on the same terms and conditions. See City of

New York v Pennsylvania R. Co., 37 NY2d 298, 300 -301 (1975) (tenant which remains in possession after expiration of lease "is a holdover and, pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument"); Rubin v Port Auth. of New York and New Jersey, 49 AD3d 422, 422-423 (1st Dep't 2008) (indemnification clause in lease "remained effective after expiration of the lease").

Defendants also submit the deposition transcripts of Christos Ikonomopolous and Haki Meier (owner of University) which establish, as a matter of law, that the sidewalk cellar doors were used exclusively by, and for the benefit of, University in order to access the basement in the operation of its deli, and that Defendants are "out of possession landlords" who did not create the alleged defective cellar door condition on which plaintiff allegedly fell; nor did they have actual or constructive notice thereof. Mr. Meier testified that University leased the basement (and the first floor) of the Building, which is accessible by three "separate independent cellar doors" in the sidewalk on the 13th Street side of the deli. Mr. Meier also testified that University locked the cellar doors with its own locks; that no deliveries into the basement were made without the assistance of University employees; that University kept the cellar doors open during the day; and that, prior to October 20, 2012, University repaired one set of the cellar doors at its own expense pursuant to its lease obligations. Additionally, Mr. Meier testified that he visited the deli from four to six days per week, during which he looked for any hazards to customers. On the other hand, Mr. Ikonomopolous testified that he visited the Building about once a month but did not "actually inspect" the premises, and received no complaints about defects in the sidewalk or cellar doors prior to October 20, 2012.

Contrary to University's argument, Defendants properly relied upon the parties' unsigned deposition transcripts. See Bennett v. Berger, 283 AD2d 374, 375 (1st Dep't 2001) ("Although defendant son's deposition transcript was not signed, it was certified by the reporter, and may be considered since the excerpts thereof included in the record are not challenged by plaintiff as inaccurate.").

In view of (1) the undisputed, unambiguous Lease provision that required University to keep the sidewalk in good repair and to make all non-structural repairs thereto; (2) the absence of any showing that the alleged defects in the cellar doors were structural in nature; and (3) the un-refuted proof that Defendants are free from negligence in that they are out of possession landlords who did not create or have notice of the alleged defective cellar door condition that caused plaintiff's accident, and that University exercised exclusive control over the cellar doors, Defendants are entitled to a conditional order of contractual indemnification against University for any losses not reimbursed by Defendants' insurance policy. See Collado v Cruz, supra, 81 AD3d at 542-543 (tenant "may be held liable to the owner for damages resulting from" tenant's violation of lease provision "which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store"); see also Rubin v Port Auth. of New York and New Jersey, supra, 49 AD3d at 422 (where lease provision required tenant to indemnify owner and questions of fact existed as to whether tenant "created or contributed to the dangerous condition," "[t]here should have been a conditional grant of summary judgment on the indemnification claim").

For the same reasons, Defendants are also entitled to a conditional order of common-law indemnity against University. The un-refuted proof established that Defendants reserved no

control over the cellar doors, whereas University exercised exclusive possession and control over the cellar doors throughout its tenancy. Thus, to the extent that the cellar doors constitute a "special use," as plaintiff argues, University's exclusive access and control over the "instrumentality" gave rise to a duty on the part of University to repair and maintain the cellar doors. See Kaufman v Silver, 90 NY2d 204, 208 (1997) ("where a tenant, in possession and occupation, carelessly causes injury by his or her use of the instrumentality, and the owner *reserved no control* over the special use structure, the owner is under no duty and incurs no liability"). Consequently, if it is shown at trial that University was negligent in its repair and/or maintenance of the cellar doors such that they became "raised, uneven and hazardous" and caused plaintiff's injuries, or that University had actual or constructive notice of a defect which caused plaintiff's accident, then Defendants will be entitled to common-law indemnification from University for plaintiff's losses caused by University's negligence and for which Defendants are held liable. See Glaser v. M. Fortunoff of Westbury Corp., 71 NY2d 643, 646 (1988) ("where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent").

Contrary to University's argument, because Defendants are out of possession landlords they were not required to offer specific evidence of their activities on the day of plaintiff's accident in order to establish the absence of notice as a matter of law. Therefore, University's reliance on Guerrero v Duane Reade, 112 AD3d 496 (1st Dep't 2013) – which addressed a tenant's burden of offering specific evidence of its activities on the day of an accident which allegedly occurred inside the tenant's store – is misplaced.

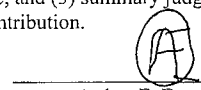
Finally, University does not dispute that it failed to procure $1,000,000 in liability insurance coverage and to name Defendants as "additional insureds." Accordingly, Defendants are entitled to summary judgment on their cross-claim against University for breach of its Lease requirement to procure liability insurance.

The Court has considered University's remaining arguments and finds them to be without merit.

Conclusion

Motion for summary judgment conditionally granted. Defendants Christos Ikonomopolous, Evelyn Ikonomopolous, and Verison Realty Corp. ("Defendants") are awarded: (1) a conditional order of contractual and common-law indemnification against defendant PFW Trading Inc. d/b/a University Place Gourmet ("University") for any of plaintiff's losses recoverable against Defendants caused by University's negligence, and that are not reimbursed by Defendants' insurance policy; (2) summary judgment on Defendants' cross-claim for University's breach of the Lease requirement to procure liability insurance; and (3) summary judgment dismissing University's cross-claim against Defendants for contribution.

Dated: April 1, 2015



Arthur F. Engoron, J.S.C.