

Leo Internet Cafe Inc. v A&M E. Broadway LLC

2015 NY Slip Op 30970(U)

May 29, 2015

Supreme Court, New York County

Docket Number: 150327/2011

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

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LEO INTERNET CAFÉ INC. and LEO YANG
YONG LU,

Index No. 150327/2011

Plaintiffs

- against -

DECISION AND ORDER

A&M EAST BROADWAY LLC, HO YIN WONG
a/k/a PETER WONG, HONG KONG
SUPERMARKET, INC., and PCK REALTY
INC.,

Defendants

-----X
LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for defendants' negligence that destroyed the premises they leased in a building at 107 East Broadway, New York County, owned by defendant A&M East Broadway LLC, of which defendant Wong is a member. Plaintiffs allege that a fire originating in premises defendant Hong Kong Supermarket, Inc., leased from defendant PCK Realty Inc., in an adjacent building at 109 Broadway, spread to 107 East Broadway and caused both buildings to become unstable, requiring their demolition, from which plaintiffs sustained property damage and loss of business.

Defendants A&M East Broadway and Wong move for summary judgment dismissing the complaint and all cross-claims against these defendants. C.P.L.R. § 3212(b). In a stipulation dated October 2, 2014, plaintiffs discontinued their action against

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Hong Kong Supermarket and PCK Realty. For the reasons explained below, the court now grants the motion by the remaining defendants A&M East Broadway and Wong.

II. SUMMARY JUDGMENT STANDARDS

Defendants A&M East Broadway and Wong, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendants satisfy this standard, the burden shifts to plaintiffs to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of defendants' motion, the court construes the evidence in the light most favorable to plaintiffs. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. A&M EAST BROADWAY'S SUMMARY JUDGMENT MOTION

The complaint supports a theory of defendants' liability for negligence based on their creation of a hazardous condition, but not based on their notice of a hazardous condition. Paragraph 27

first alleges that defendants' negligence caused the fire that destroyed the premises leased to plaintiffs by defendant A&M East Broadway. Paragraph 28 then limits that negligence to defendants' "ownership, operation, maintenance and control of PCK premises in maintaining, creating, permitting and failing to correct conditions, resulting in a dangerous fire hazard and in such a condition such that a fire was likely to intensify, go out of control and spread to adjacent premises." Aff. of John Piccirillo Ex. A ¶ 28. These "adjacent premises" are the premises A&M East Broadway leased to plaintiffs.

Plaintiffs' bills of particulars also limit their theory of liability. Suits v. Wyckoff Hgts. Med. Ctr., 84 A.D.3d 487, 489 (1st Dep't 2011); Valderrama v. New York City Tr. Auth., 18 A.D.3d 251, 252 (1st Dep't 2005). See Harris v. Ariel Transp. Corp., 37 A.D.3d 308, 309 (1st Dep't 2007). Their supplemental response dated March 1, 2013, to Hong Kong Supermarket's demand for a bill of particulars unmistakably eliminates any claim by plaintiffs that defendants received actual or constructive notice of a hazardous condition in either of defendants' buildings that caused or contributed to the origin or spread of the fire or either building's instability. Piccirillo Aff. Ex. F ¶ 2. Thus plaintiffs' claim depends on defendants' creation of a hazardous condition.

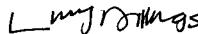
The parties do not dispute that the fire originated in the building where PCK Realty leased space to Hong Kong Supermarket at 109 Broadway and then spread to and caused instability in the

adjacent building premises that A&M East Broadway leased to plaintiffs at 107 Broadway. Neither the complaint nor any bill of particulars by plaintiffs, however, identifies any hazardous condition in A&M East Broadway's building that contributed to the fire's spread to this building or its instability, causing plaintiffs' property damage or lost business, or identifies any cause of plaintiffs' losses other than the fire at 109 Broadway. See Parkman v. 149-151 Essex St. Assoc., LLC, 122 A.D.3d 439 (1st Dep't 2014); Godfrey v. Mancini Safe Corp., 121 A.D.3d 413, 414 (1st Dep't 2014); Beahn v. New York Yankees Partnership, 89 A.D.3d 589, 590 (1st Dep't 2011); Goldfischer v. Great Atl. & Pac. Tea Co., Inc., 63 A.D.3d 575 (1st Dep't 2009). Nor does the complaint or any bill of particulars identify any duty that A&M East Broadway or Wong owed to plaintiffs. New Delhi Tel. Ltd. v. Nielsen Holdings N.V., 111 A.D.3d 437 (1st Dep't 2013). Plaintiff Lu's deposition testimony, that he did not know what act or omission A&M East Broadway or Wong may have committed that contributed to the fire or the buildings' instability, does not remedy plaintiffs' failure to indicate what negligence on these defendants' part caused plaintiffs' property damages or business losses. Wyckoff v. Jujamcyn Theaters, Inc., 11 A.D.3d 319, 320 (1st Dep't 2004); Reilly v. Newireen Assoc., 303 A.D.2d 214, 223 (1st Dep't 2003). See Fintzi v. Riverdale Riding Corp., 32 A.D.3d 701, 702 (1st Dep't 2006); DeFilippo v. New York Downtown Hosp., 10 A.D.3d 521, 523 (1st Dep't 2004); Shaw v. Bronfman, 284 A.D.2d 267, 268 (1st Dep't 2001).

IV. CONCLUSION

For these reasons, the court grants the motion by defendants A&M East Broadway LLC and Wong for summary judgment dismissing the complaint. C.P.L.R. § 3212(b). Since plaintiffs discontinued their action against defendants Hong Kong Supermarket, Inc., and PCK Realty Inc., these defendants' cross-claims for implied indemnification against A&M East Broadway and Wong are academic and therefore dismissed. See Eckardt v. Starr Bldg. Realty LLC, 106 A.D.3d 477, 478 (1st Dep't 2013); Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496, 498 (1st Dep't 2008); Hill v. Stahl, 49 A.D.3d 438, 443 (1st Dep't 2008); Butler-Francis v. New York City Hous. Auth., 38 A.D.3d 433, 435 (1st Dep't 2007). This decision constitutes the court's order and judgment of dismissal.

DATED: May 29, 2015



LUCY BILLINGS, J.S.C.LUCY BILLINGS
J.S.C.