

Gregory v Wasserman
2015 NY Slip Op 32154(U)
October 14, 2015
Supreme Court, Bronx County
Docket Number: 308188/2011
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MABLE HOLDER GREGORY,

Plaintiff,

DECISION AND ORDER

Index No. 308188/2011

- against -

DAVID WASSERMAN, Dr. JUAN BARRAGAN and
DR. MUKESH ALMERA,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 10, 2015 of defendant Daniel Wasserman and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated August 11, 2015; the reply affirmation dated September 30, 2015 of defendant Daniel Wasserman; and due deliberation; the court finds:

Plaintiff brings this action to recover damages for injuries suffered on February 12, 2010 when she slipped on ice on the sidewalk in front of 1561 Westchester Avenue, Bronx County. Defendant owner Daniel Wasserman s/h/a David Wasserman ("Wasserman") leased the premises to defendant Dr. Juan Barragan ("Barragan") who then assigned the lease to defendant Dr. Mukesh Ajmera ("Ajmera") and non-party Dr. Prakash Shah ("Shah"). Wasserman now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on the grounds that he was an out-of-possession owner and that he did not create or have notice of an icy condition. He also moves for summary judgment on his cross-claim against Ajmera for "contribution and/or indemnification . . . based upon said party's negligence, culpable conduct and/or breach of contract." Submitted on the motion are the pleadings; deposition transcripts; lease documents; and a copy of Ajmera's insurance policy.

Plaintiff testified that she slipped on ice on the sidewalk abutting 1561 Westchester Avenue.

The building housed a medical office, and she never told anyone inside the office about the accident. She could not recall when she last walked on the sidewalk in front of the building before the accident.

It is not disputed that Wasserman leased the premises to Barragan in April 1997 or that Barragan assigned the lease to Ajmera and Shah in June 1997. Paragraph 30 of the lease provides that the tenant shall "keep the sidewalks and curbs free from snow, ice, dirt and rubbish." Pursuant to a lease modification, Wasserman maintained responsibility for all roof and sidewalk repairs. Wasserman, Barragan, and Ajmera testified unequivocally that Ajmera and Shah were required under the lease to remove snow and ice from the sidewalk. Wasserman never hired anyone to perform that task, and Ajmera stated that he always paid a local street vendor to perform snow removal. Wasserman, Barragan, and Ajmera could recall the weather or the condition of the sidewalk at the time of the accident. Wasserman could not recall receiving any complaints about snow or ice at any time.

"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.'" *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 420, 927 N.Y.S.2d 49, 51 (1st Dep't 2011) (internal citation omitted). Wasserman has shown that he is entitled to dismissal of plaintiff's complaint against him. See *Bing v. 296 Third Ave. Group, L.P.*, 94 A.D.3d 413, 941 N.Y.S.2d 141 (1st Dep't), *lv denied*, 19 N.Y.3d 815, 979 N.E.2d 815, 955 N.Y.S.2d 554 (2012).

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff argues that Administrative Code of the City of New York § 7-210 imposes a duty upon a property owner like Wasserman to maintain the sidewalk abutting his property in reasonably safe condition. See *Torres v. New York City Hous. Auth.*, 118 A.D.3d 540, 988 N.Y.S.2d 162 (1st Dep't 2014). Plaintiff, though, did not allege a violation of Section 7-210 in the complaint or in the amended complaint in the consolidated action. See

Bing v. 296 Third Ave. Group, L.P., supra; *Fox v. Infinity 103, Inc.*, 2013 N.Y. Misc. LEXIS 3226 (Sup. Ct. New York County July 24, 2013). The section also does not impose strict liability upon a property owner, and plaintiff must still prove the elements of negligence. *Khaimova v. City of New York*, 95 A.D.3d 1280, 1281-1282, 945 N.Y.S.2d 710, 711 (2d Dep't 2014) (internal citations omitted). Plaintiff offers no evidence demonstrating that Wasserman created or had actual or constructive notice of the icy condition. Counsel's statements concerning the weather conditions lacks evidentiary value.

According to Paragraph 45 of the lease rider, the "Tenant shall save Owner harmless and indemnify Owner from all injury, loss, claims or damage to any person or property caused by Tenant . . . unless caused or to the extent contributed by the willful acts and/or negligence of Owner." Given the dismissal of plaintiff's complaint against him, summary judgment on Wasserman's cross-claim against Ajmera seeking contractual indemnification is denied as moot. *See Reyes v. Morton Williams Associated Supermarkets, Inc.*, 50 A.D.3d 496, 858 N.Y.S.2d 107 (1st Dep't 2008).

Wasserman also moves for summary judgment on his cross-claim for breach of contract based upon Ajmera's failure to procure insurance coverage. Paragraph 43 of the lease rider required Ajmera to obtain liability and property damage insurance naming Wasserman as an insured. A lease provision requiring the tenant to procure insurance and name the landlord as an additional insured is generally valid and enforceable. *See Inchaustegui v. 666 5th Ave. Ltd. P'ship*, 96 N.Y.2d 111, 749 N.E.2d 196, 725 N.Y.S.2d 627 (2001). Although Ajmera obtained insurance coverage, Wasserman was not named as an additional insured. Ajmera is liable to Wasserman for failing to procure insurance with Wasserman's damages to be determined at the time of trial. Ajmera has submitted no opposition.

Accordingly, it is

ORDERED, that the motion of defendant Daniel Wasserman s/h/a David Wasserman for summary judgment dismissing plaintiff's complaint and for summary judgment on his cross-claims against defendant Dr. Mukesh Ajmera is granted to the extent of granting Wasserman summary

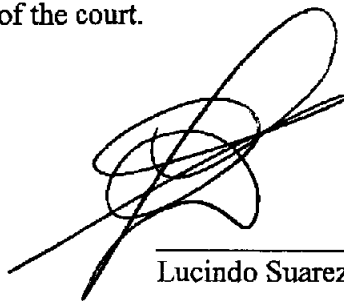
judgment dismissing plaintiff's complaint; granting Wasserman summary judgment on liability on the cross-claim against Ajmera for breach of contract for failing to procure insurance coverage with the amount of damages to be determined at the time of trial; and denying as moot that branch of the motion seeking summary judgment on the cross-claim against Ajmera for contractual indemnification; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant Daniel Wasserman s/h/a David Wasserman dismissing plaintiff's complaint against him; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendant Daniel Wasserman s/h/a David Wasserman on the issue of defendant Dr. Mukesh Ajmera's liability on the cross-claim for breach of contract for failing to procure insurance coverage.

This constitutes the decision and order of the court.

Dated: October 14, 2015



Lucindo Suarez, J.S.C.