

Morales v 424 Broadway Condominium
2016 NY Slip Op 30494(U)
March 17, 2016
Supreme Court, New York County
Docket Number: 105128/11
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

VICTORIA MALDONADO MORALES,
Plaintiff,

Index No.: 105128/11

Motion Date: _____

- v -

Motion Seq. No.: 03

424 BROADWAY CONDOMINIUM, CMK ROCK CORP.,
BONNIE FASHION INC., ISAAC SHIH and JOAN
SHIH,

Motion Cal. No.: _____

Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

FILED

MAR 24 2016

Cross-Motion: Yes No

Upon the foregoing papers, it is

COUNTY CLERK'S OFFICE
NEW YORK

ORDERED that the Order of April 20, 2015, motion sequence
003 in this action is VACATED, RESETTLED AND CORRECTED AS FOLLOWS
PURSUANT TO CPLR 5019. See Kiker v Nassau County, 85 NY2d 879
(1995); and it is further

ORDERED that this motion is resolved in accordance with the
attached Memorandum Decision and Order.

This is the decision and order of the court.

Dated: MAR 17 2016

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.
J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 59

-----x

VICTORIA MALDONADO MORALES,

Plaintiff,

Index No. 105128/11

-against-

424 BROADWAY CONDOMINIUM, CMK ROCK CORP.,
BONNIE FASHION INC., ISAAC SHIH and JOAN SHIH,

Defendants.

-----x

DEBRA JAMES, J.:

Motion sequence numbers 003 and 004 are consolidated herein
for disposition.

In motion seq. no. 003, defendants CM Rock Corp. ("CM
Rock"), Isaac Shih and Joan Shih (collectively, the "Shihs") move
pursuant to CPLR 3212 for summary judgment dismissing the cross-
claims of co-defendants 424 Broadway Condominium ("424 Broadway"
or "the condominium") and Joan Shih, and for sanctions and costs
against them pursuant to 22 NYCRR § 130-1.1.

In motion seq. no. 004, defendant Bonnie Fashions, Inc.,
s/h/a Bonnie Fashion Inc. ("Bonnie") moves pursuant to CPLR 3212
for summary judgment dismissing plaintiff's complaint and the
cross-claims asserted against it by 424 Broadway.

Plaintiff brought this action to recover for injuries

allegedly sustained on November 1, 2008, when she slipped and fell on the stairway of a Manhattan commercial condominium building owned by 424 Broadway (the "building").

424 Broadway acquired the building in 1986, when the Shihs, who owned it up to then, converted it into a condominium. The building has six stories, each containing a unit. Bonnie owns the units on the second and third floors. The second floor is occupied by a non-party which rents the space from Bonnie. RM Rock, which is owned by the Shihs, is the owner of the first-floor (and basement) unit. Joan Shih is also the vice president of 424 Broadway. Although not evident from the caption, Joan Shih appears in this action in both of her capacities, each represented by a different attorney. Even more unusual, she has asserted cross-claims against herself. The remaining unit owners and the other officers of 424 Broadway are not part of this litigation. Joan Shih is the only officer of 424 Broadway sued herein.

Plaintiff has discontinued this action with prejudice against all defendants but 424 Broadway and its vice president, Joan Shih, and all but these two defendants have signed off on the stipulations of discontinuance. CM Rock, the Shihs and Bonnie now move for summary judgment dismissing 424 Broadway's cross-claims against them.

According to plaintiff, she went into the building to buy handbags in the third-floor unit. On her way out of the building, she fell near the second floor landing of the building's stairway, which had worn edges on the steps and was defective. The court notes that no one, including the condominium, is disputing the existence of the stairway condition.

Under the condominium's declaration and bylaws, the stairway is part of the building's general common elements, and 424 Broadway is responsible for its upkeep). The condominium discharged this responsibility by hiring an individual (Mr. Chang) to operate the elevator and maintain the stairway, and by hiring an independent contractor whenever the stairway needs repairs.

In support of their motion (seq. no. 003), CM Rock and the Shihs argue that plaintiff has discontinued her claims against them, and that they did not own, operate or maintain the stairway at the time of plaintiff's accident. In fact, CM Rock's first-floor unit has its own entrance, separate from the rest of the building, and does not have access to the stairway at issue. Thus, they are not liable to 424 Broadway or Joan Shih for contribution or indemnification, and summary judgment dismissing

their cross-claims must be granted because there are no unresolved material issues of fact. CM Rock and the Shihs further argue that sanctions pursuant to 22 NYCRR § 130-1.1 are warranted because 424 Broadway and Joan Shih unreasonably failed to respond to seven requests made by CM Rock's counsel over the course of a year to sign the stipulation of discontinuance.

In opposition, 424 Broadway argues that the condominium declaration relied on by CM Rock is not certified or authenticated and must thus be rejected by the court as hearsay. The summary judgment motion must thus be denied since it is not supported by competent evidence. 424 Broadway also argues that the branch of the motion seeking sanctions must be denied because CM Rock and the Shihs have not offered any evidence beyond counsel's affirmation that they ever attempted to obtain a stipulation of discontinuance from 424 Broadway and Joan Shih.

In reply, CM Rock and the Shihs argue that the condominium declaration relied on by them - and furnished by 424 Broadway in discovery as one of the condominium's "governing documents" - was authenticated through the deposition testimony of 424 Broadway's witness, Joan Shih. Furthermore, the declaration is authenticated pursuant to CPLR 4520 and 4540 and the common law because it bears the signature and seal of the City Register as evidence that the declaration was officially recorded in New York

County.

The court finds that summary judgment dismissing the condominium's cross-claims against CM Rock and the Shihs is warranted. As movants' counsel points out, 424 Broadway has not disputed that it was solely responsible for maintenance of the stairway, or suggested that CM Rock or the Shihs had any obligation to indemnify 424 Broadway for plaintiff's injuries. A technical challenge to the validity of a document previously furnished by the condominium in response to a demand for a valid document cannot defeat a motion for summary judgment (see Mallad Construction Corp. v County Federal Savings and Loan Association, 32 NY2d 285, 290 [1973]; Evert v Banco Popular de Puerto Rico, 172 AD2d 324, 325 [1st Dept 1991]). It is well established that on a motion for summary judgment the court is to decide whether there exists a factual issue (see S.J. Capelin Associates, Inc. v Globe Manufacturing Corp., 34 NY2d 338 [1974]), "accept[ing] as true the evidence presented by the opposing party" (Hotopp Associates, Ltd. v Victoria's Secret Stores, Inc., 256 AD2d 285, 286 [1st Dept 1998]). There is no such evidence here. The condominium's only opposition to the motion is a meritless attack on CM Rock's evidence, not accompanied by even an unsupported allegation that there was either a factual or contractual basis for CM Rock's liability. Indeed, the court finds 424 Broadway's

opposition more frivolous than the conduct complained of by CM Rock, but since in their reply CM Rock and the Shihs appear to have abandoned their request for sanctions, the court will not address them.

Bonnie also moves (seq. no. 004) for summary judgment dismissing the cross-claims asserted against it by 424 Broadway and Joan Shih, as well as plaintiff's complaint against it. As with CM Rock, all parties except 424 Broadway have executed a discontinuance of their claims against Bonnie. Bonnie further argues that it has no liability for plaintiff's injuries because it did not own, control or maintain the stairway in which plaintiff fell and there is no contractual provision requiring it to indemnify 424 Broadway.

In opposition to Bonnie's motion, 424 Broadway raises the same baseless objection to the condominium declaration that it raised with respect to CM Rock's motion. Here, 424 Broadway also argues that it is entitled to common law indemnification against Bonnie because Bonnie breached its duty to plaintiff by failing to inform the condominium of any defects in the stairway adjacent to Bonnie's second-floor unit. In reply, Bonnie too establishes the lack of validity of 424 Broadway's objection to the condominium declaration, disputes the condominium's contention

that Bonnie had the duty to warn of stairway defects, and argues that even if it had such a duty, it would not absolve 424 Broadway of its responsibility to maintain the stairway.

"[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the nondelegable duty imposed by Labor Law § 240(1)" (Correia v Professional Data Management, Inc., 259 AD2d 60, 65 [1st Dept 1999]). The "predicate of common law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee" (Trustees of Columbia University in the City of New York v Mitchell/Giurgola Associates, 109 AD2d 449, 453 [1st Dept 1985]). Here, 424 Broadway has not proved that it was not negligent, or that Bonnie was (see Bellefleur v NewARK Beth Israel Medical Center, 66 AD3d 807 [2d Dept 2009]).

424 Broadway argues that Bonnie, through its deponent, Sherwood Hsieh, admitted it had a duty to notify 424 Broadway of any defect in the heavily used stairway, and was the "actively negligent tortfeasor" because it neither alerted the condominium

of the stairway defect nor fixed it.

At her deposition, Joan Shih testified that the building is self-managed; if any of the unit owners happened to notice a problem they would call a meeting of all the unit owners, discuss it, and decide what to do about it. If repairs needed to be made, the owners would notify 424 Broadway, which would get them done. Sherwood Hsieh, one of Bonnie's principals, consistently testified that if there was something wrong with the stairs adjacent to a unit, the unit owner would tell the condominium board and ask to have someone fix it. In opposition to Bonnie's motion the condominium argues that Hsieh's statement constitutes an admission by Bonnie that it had a duty to alert 424 Broadway if there was a problem.

No such admission of liability has been shown. No duty of the unit owner arises upon his or her alerting the condominium of anything such owner happens to notice. Nor does such action impose on that owner the duty to conduct regular inspections to make sure there are no defects. Presumably, such duty was carried out by the 424 Broadway through Mr. Chang, whom the condominium employed to take care of the building's stairway and elevator. Bonnie, owner of individual condo units "bore no contractual responsibility for maintaining the stairs, which were

not for its exclusive benefit" (Rothstein v 400 East 54th Street Company, 51 AD3d 431 [1st Dept 2008]). Bonnie "owed no duty to plaintiff inasmuch as the common areas of the condominium, in this instance the [stairway], were solely under the control of the condominium..., and owners of individual units are not liable for injuries sustained as a result of defects in the common elements" (id. at 431-432).

Summary judgment is to be granted only when there are no genuine issues of material fact and the court draws all reasonable inferences in favor of the non-moving party (see Garcia v J.C. Duggan, Inc., 180 AD2d 579 [1st Dept 1992]), and is particularly rare in negligence cases, where the reasonableness of each party's conduct can seldom be decided as a matter of law (see Andre v Pomeroy, 35 NY2d 361 [1974]). This is the rare negligence case where there are no unresolved factual issues barring summary judgment. "The evidence in the record establishes, as a matter of law, that [Bonnie] had neither an exclusive right to possess the common area nor a right or obligation to maintain it" (White v Great Atlantic & Pacific Tea Company, 262 AD2d 636 [2d Dept 1999]). In view of the foregoing, the court finds that Bonnie is entitled to summary judgment against the condominium.

Accordingly, it is

ORDERED and ADJUDGED that motion for summary judgment (seq. no. 003) of defendants CM Rock Corp., Isaac Shih and Joan Shih is granted, and the clerk is directed to enter judgment dismissing the cross-claims of 424 Broadway and its vice president Joan Shih against CM Rock Corp., Isaac Shih and Joan Shih with prejudice, and with costs (see CPLR 8303-a); and it is further

ORDERED and ADJUDGED that the motion for summary judgment (seq. no. 004) of Bonnie Fashions, Inc. is granted, and the clerk is directed to enter judgment dismissing the plaintiff's complaint against Bonnie Fashions, Inc. and dismissing the cross-claims asserted against Bonnie Fashions, Inc. by 424 Broadway and Joan Shih with prejudice; and it is further

ORDERED that this action is SEVERED and continues against the remaining defendants; and it is further

ORDERED that the parties shall appear for a pre-trial conference in IAS Part 59, 71 Thomas Street, New York, New York, on May 19, 2015, 12 noon.

This decision constitutes the order of the court.

Dated: MAR 17 2016

FILED

MAR 24 2016

COUNTY CLERK'S OFFICE
NEW YORK

Debra A. James
DEBRA A. JAMES S.C.
J.S.C