

Selby v 247 Deli, LLC
2016 NY Slip Op 30550(U)
March 31, 2016
Supreme Court, New York County
Docket Number: 159209/13
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JULIE SELBY,

Plaintiff,

-against-

247 DELI, LLC, d/b/a DELICATESSEN MACCBAR,
247 DELICATESSEN MANAGEMENT GROUP, LLC,
LAFAYETTE STREET REALITY ASSOCIATIONS,
LLC, 265 LAFAYETTE RISTORANTE, LLC, and
GILMAN MANAGEMENT CORPORATION,

Defendants.

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SHERRY KLEIN HEITLER, J.:

Index No. 159209/13
Motion Seq. 001

DECISION & ORDER

In this personal injury action, defendants Lafayette Street Reality Associates, LLC and Gilman Management Corporation (collectively, "Lafayette") move pursuant to CPLR 3212 for summary judgment dismissing the complaint against them and for summary judgment on their contractual indemnity claims against co-defendants 247 Deli, LLC d/b/a Delicatessen Macccbar and 247 Delicatessen Management Group, LLC (collectively, "247 Deli"). Lafayette further moves for a conditional order requiring 247 Deli to defend, indemnify, and hold it harmless against plaintiff's claims herein and for its litigation costs to date. Lafayette's motion is unopposed both by the plaintiff and by the 247 Deli defendants. For the reasons set forth below, the motion is granted.

This action arises out of an accident which took place on or about May 24, 2013 when a glass door located at the entrance to the restaurant known as "Delicatessen" allegedly snapped back upon and caused injury to plaintiff's middle finger. The building which houses Delicatessen is located at 265 Lafayette Street in Manhattan ("Building"). It is owned by Lafayette Street Reality Associates, LLC and managed by Gilman Management Corporation. By lease agreement dated

January 11, 2006, 247 Deli leased space in the Building from Lafayette for the purpose of operating Delicatessen. Paragraph 45 of the rider to the lease agreement¹, entitled “INDEMNIFICATION AND INSURANCE”, provides in relevant part as follows:

Tenant expressly agrees that he will hold harmless and indemnify the Landlord for and against any and all liabilities, obligations, damages, penalties, expenses, suits and judgments, including reasonable attorneys’ fees arising from any injury or damage during said term to any person or property of any nature occasional [sic] wholly or in part by act, omission or commission of the Tenant or of the employees, customers, patrons, servants, agents or visitors of the Tenant. Tenant agrees at all times during the term, at its own expense, to carry comprehensive general liability insurance for the benefit of the Tenant and Landlord, indemnifying the Landlord against loss and liability in connection with personal injury or death from any accident in or about the Demised Premises, the appurtenances and the Sidewalk and ways adjacent thereto. . . .

“[A] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant’s expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.” *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 (1st Dept 2010); *see also Wenzel v 16302 Jamaica Ave., LLC*, 115 AD3d 852, 852 (2d Dept 2014) (“An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct.”); *Thompson v Town of Brookhaven*, 34 AD3d 448, 450 (2d Dept 2006) (quoting *Abrams v Berelson*, 283 AD2d 597, 598 [2d Dept 2001]) (“An out-of-possession landlord who has retained sufficient control over the premises may be liable for injuries caused by a dangerous condition on the property if he or she has

¹ A copy of the lease agreement is submitted as Exhibit I (“Lease Agreement”).

‘actual or constructive notice of the [dangerous] condition for such a period of time that, in the exercise of reasonable care, he or she could have corrected it.’”).

Lafayette has established its status as an out-of-possession landlord under the terms of the Lease Agreement. There is no dispute that the glass door at issue was installed in 2008 by a contractor retained by 247 Deli and that its maintenance has always been 247 Deli’s sole responsibility.² Lafayette did not retain access to and was in no way responsible for maintaining or inspecting the leased space. It therefore bears no liability for plaintiff’s injuries and its motion for summary judgment dismissing the complaint against it is granted. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

As for Lafayette’s indemnity request, a “party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. . . .” *Muevecela v 117 Kent Ave., LLC*, 129 AD3d 797, 798 (2d Dept 2015) (internal citations omitted). Based on the Lease Agreement 247 Deli’s insurance company has already agreed to defend and indemnify Lafayette, but only under a reservation of rights.³ But, inasmuch as the court is now awarding Lafayette summary judgment, it has been determined that Lafayette cannot be held responsible for plaintiff’s injuries. There is also no dispute on this motion that plaintiff’s injury arose out of 247 Deli’s use and occupation of the leased premises, that the Lease Agreement clearly requires 247 Deli to indemnify Lafayette for any

² Exhibit H, pp. 20, 36, 57-58; Exhibit F, pp. 18, 24, 26-28; Exhibit G, pp. 14-16, 33-34.

³ See Exhibit K, p. 4 (“Please be advised that NOVA will accept the defense and indemnification on behalf of Lafayette Street Realty Associates LLC / Gilman Management Corporation in accordance with the terms and conditions of the policy, specifically up to the primary policy limit of \$1,000,000.00, but only under a full Reservation of Rights as there is subsequent discovery that needs to be obtained. Please be advised that if said discovery reveals any negligence on the part of Lafayette Street Realty Associates LLC / Gilman Management Corporation, NOVA reserves the right to withdraw from the defense of your clients.”)

personal injury action arising out of the leased premises, and that 247 Deli obtained liability insurance which names both Lafayette Street Reality Associates, LLC and Gilman Management Corporation as additional insureds.⁴ In light of the foregoing, Lafayette's motion for contractual indemnification is granted.

Accordingly, it is hereby

ORDERED that the branch of the motion by Lafayette Street Reality Associates, LLC and Gilman Management Corporation which seeks summary judgment dismissing plaintiff's complaint as against them is granted; and it is further

ORDERED that all claims and cross-claims against Lafayette Street Reality Associates, LLC and Gilman Management Corporation are hereby severed and dismissed in their entirety; and it is further

ORDERED that the branch of the motion by Lafayette Street Reality Associates, LLC and Gilman Management Corporation which seeks summary judgment on their contractual indemnification claims against defendants 247 Deli, LLC d/b/a Delicatessen Macbar and 247 Delicatessen Management Group, LLC is also granted; and it is further

ORDERED that 247 Deli, LLC d/b/a Delicatessen Macbar and 247 Delicatessen Management Group, LLC shall defend and indemnify Lafayette Street Reality Associates, LLC and Gilman Management Corporation in connection with this action; and it is further

ORDERED that 247 Deli, LLC d/b/a Delicatessen Macbar and 247 Delicatessen Management Group, LLC shall reimburse Lafayette Street Reality Associates, LLC and Gilman Management Corporation for their reasonable costs and attorneys' fees incurred in defending against

⁴ Exhibit J.

this action to date.

Should the parties be unable to agree on a reasonable amount of Lafayette's costs and attorneys' fees owed by 247 Deli within 45 days from the date hereof, the court shall, upon notice thereof, refer the issue to a Special Referee to hear and report with recommendations, or to hear and determine should the parties so stipulate.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED:

3.31.14



SHERRY KLEIN HEITLER, J.S.C.