

Williams v 27 E. 131st St., LLC
2016 NY Slip Op 30617(U)
April 12, 2016
Supreme Court, New York County
Docket Number: 452548/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

<u>NAISHA WILLIAMS,</u>	INDEX NO.	<u>452548/2015</u>
Plaintiff,	MOTION DATE	<u>02-17-2016</u>
- against -	MOTION SEQ. NO.	<u>001</u>
	MOTION CAL. NO.	<u> </u>
27 EAST 131ST STREET, LLC and		
2082 MADISON FOOD CORP.,		
Defendants.		

The following papers, numbered 1 to 7 were read on this motion for change of venue and summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	PAPERS NUMBERED
Answering Affidavits — Exhibits _____	<u>1- 4</u>
Replying Affidavits _____	<u>5-6</u>
	<u>7</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that motion sequence 001 for summary judgment dismissing the complaint and any cross-claims as to Defendant 27 East 131st Street, LLC is granted, and the motion for summary judgment on the cross-claim of Defendant 27 East 131st Street against 2082 Madison Food Corp., for contractual indemnification is conditionally granted.

Plaintiff brought this action against Defendant 27 East 131st Street, LLC (herein "Defendant 27") and Defendant 2082 Madison Food Corp. (herein "Defendant 2082") for injuries she sustained on June 7, 2013, when she slipped and fell on a piece of wet cardboard on the floor of the deli located at 2082 Madison Avenue, New York, New York (herein "The Premises"). (see Complaint attached as Mot. Exh. B). Defendant 27 is the out of possession owner/landlord and Defendant 2082 is the tenant of the premises. (see Lease attached as Mot. Exh. A).

Defendant 27 now moves for an Order granting summary judgment in its favor (1) dismissing the complaint and all cross-claims against it, and (2) for contractual indemnification on its cross claim against Defendant 2082. This motion is unopposed by plaintiff, but opposed by Defendant 2082.

Defendant 27 contends that it is an out of possession landlord of the subject premises that is leased to Defendant 2082. (see Aff. In Supp.) Pursuant to the lease terms, Defendant 2082 is to "take good care of the demised premises...and at its sole cost and expense, make all non structural repairs..." (see Aff. In Supp. and ¶4 of the Lease attached thereto as Exh. A). Mark Irgang, managing member of Defendant 27 and owner of the premises, testified that his visits to the premises were infrequent and "...never for the purpose of conducting an inspection with respect to its operation." (see Aff. In Supp and Irgang deposition transcript PP 14-16 attached thereto as Exh. G). Mr. Irgang also testified that Defendant 27 "was responsible for structural repairs" while Defendant 2082 "was responsible for everything else including utilities,

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

sidewalks and cleaning,” and he “never received complaints regarding the maintenance of the store.” (see Aff. In Supp. and Irgang deposition transcript PP 15-16). Through the deposition testimony of Mr. Garcia, an employee and manager of Defendant 2082, it was also established that Defendant 2082 was responsible for maintenance of the store, as well as clean-ups and repairs. (see Aff. In Supp. and Garcia’s deposition transcript PP 14-20 attached thereto as Exh. H).

In its opposition, Defendant 2082 argues that summary judgment dismissing the action as to Defendant 27 is improper because there is a triable issue of fact as to whether plaintiff fell inside or outside the store. (see Aff. In Opp. to Co-Defendant’s Indemnity Motion on e-file [note: this opposition was uploaded to Mot. Seq. 2, not Mot. Seq. 1]). Defendant 2082’s argument, however, is unavailing. The opposition papers repeatedly cite to Plaintiff’s emergency room records that state Plaintiff indicated “she slipped and fell on a wet metal grating outside of the defendant’s deli.” (Id. at ¶47). Defendant 2082 contends that because those records are in conflict with Plaintiff’s deposition testimony that she fell inside the store on wet cardboard, there are triable issues of fact. However, Defendant 27 being an out of possession landlord was only responsible for structural repairs, while Defendant 2082 was responsible for cleaning inside the store, as well as the sidewalk in front of the store. (see Aff. In Supp.; see also Lease attached as Mot. Exh. A).

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

As an out-of-possession landlord a defendant is entitled to summary judgment dismissing the complaint as against them when the lease specifically places responsibility for everyday maintenance and repairs on the tenant. Thomas, et al., v. Fairfield Investors, et al., 273 A.D.2d 118, 709 N.Y.S.2d 180 (1st Dept. 2000). “Generally, an out-of-possession landlord is not responsible for correcting defective conditions unless they are significant structural failures or specific statutory violations.” Id., citing Quinones v. 27 Third City King Rest., et al., 198 A.D.2d 23, 603 N.Y.S.2d 130 (1st Dept. 1993). “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...” Babich v. R.G.T. Restaurant Corp., 75 A.D.3d 439, 906 N.Y.S.2d 528 (1st Dept. 2010), citing Johnson v. Urena Serv. Ctr., 227 A.D.2d 325, 326, 642 N.Y.S.2d 897 (1st Dept. 1996).

Here, Defendant 27 has made a prima facie showing that it was not in possession or control of the subject premises, nor the interior area of the demised premises where plaintiff is alleged to have slipped and fell. Defendant 27 did not retain any responsibility to maintain or repair the interior of the premises, nor the cleaning of the sidewalk in front of the premises, and was only contractually obligated, via the lease, to make structural repairs. Therefore, Defendant 27 owed no duty to the plaintiff, and summary judgment dismissing the complaint as to Defendant 27 is proper.

Defendant 27 also moves for summary judgment on its cross-claim against Defendant 2082 for contractual indemnification because pursuant to the lease Defendant 2082 "...agreed to hold harmless and indemnify the landlord against all claims.." (see Aff. In Supp. and ¶8 of the lease and 10a of Rider to the lease attached as Mot. Exh. A). Specifically, the Rider to the lease provides that the tenant agrees "...to indemnify and save landlord harmless from and against any and all claims, suits, actions, damages, and causes of action...arising during the term of this lease, for all personal injury... sustained in or about or in connection with the demised premises..." (see 10a of Rider to lease attached as Mot. Exh. A)

Defendant 2082's remaining argument that Defendant 27 is not entitled to summary judgment on the cross-claim for indemnity is equally unavailing for the same reasons stated above. Defendant 2082 makes the argument that because it has raised a question of fact as to where plaintiff actually fell, Defendant 27 cannot be indemnified by Defendant 2082 without proving a total lack of fault. (see Aff. In Opp. P 19). Whether plaintiff fell inside the store on wet cardboard or outside the store on a wet metal grating, neither of these theories raises a question of fact as to whether Defendant 27 failed to make structural repairs. Therefore, per the terms of the lease agreement, Defendant 27 is entitled to a conditional order of summary judgment for contractual indemnification pending a final decision that Defendant 2082 is liable for Plaintiff's injury.

Further in its opposition, Defendant 2082 contends that the indemnity clause exempting Defendant 27 from "any and all claims..." is in violation of GOL §5-321 because "it shifts the entire responsibility for any damages to the tenant, regardless of the landlord's own negligence." (Id. PP 20-21). This argument is misguided however. The GOL does not apply in the instant action because when reviewing the evidence provided there is nothing to "...support a conclusion that defendants were actually negligent..." and therefore "...enforcement of the indemnification provision does not run afoul of General Obligations Law § 5-321." *Guzman v. 170 West End Avenue Associates, et al.*, 115 A.D.3d 462, 981 N.Y.S.2d 678 (1st Dept. 2014), citing *Dwyer v. Central Park Studios, Inc., et al.*, 98 A.D.3d 882, 951 N.Y.S.2d 16 (1st Dept. 2012).

Accordingly, it is hereby ORDERED that the motion for summary judgment dismissing the action as to Defendant 27 East 131st Street, LLC is granted, and the motion for contractual indemnification against Defendant 2082 Madison Food Corp. is conditionally granted pending a final decision finding Defendant 2082 Madison Food Corp. liable for Plaintiff's injuries, and it is further,

ORDERED, that the cause of action in the Complaint asserted against Defendant 27 East 131st Street, LLC is hereby severed and dismissed, and it is further,

ORDERED, that Defendant 27 East 131st Street, LLC is granted conditional contractual indemnification against Defendant 2082 Madison Food Corp., and it is further,

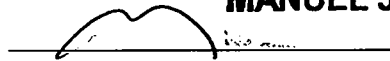
ORDERED, that the action shall continue to trial as to the remaining defendant 2082 Madison Food Corp., and it is further,

ORDERED, that Defendant 27 East 131st Street, LLC shall serve a copy of this Order with Notice of Entry within 30 days from the date of entry of this Order upon all parties, the County Clerk and the General Clerk's Office Trial Support Clerk, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

Dated: April 12, 2016

ENTER:

MANUEL J. MENDEZ

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE