

Kosinka v Hoodz Kitchen Exhaust Cleaning
2016 NY Slip Op 30932(U)
May 20, 2016
Supreme Court, New York County
Docket Number: 150312/2013
Judge: Manuel J. Mendez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GRAZYNA KOSINKA

INDEX NO. 150312/13
~~105312/13~~
MOTION DATE 04/06/2016
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

-against- Plaintiff,

HOODZ KITCHEN EXHAUST CLEANING a/k/a
HOODZ OF HELL’S KITCHEN, TONIC BAR AND
RESTAURANT, a/k/a TONIC BAR, a/k/a TONIC, a/k/a
TONIC TIMES SQUARE, 727 7TH AVENUE
ASSOCIATES LLC, AND JOHN DOE

Defendants.

The following papers, numbered 1 to 13 were read on this motion and cross-motion for summary judgment.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1- 3

Answering Affidavits/Cross-Motions – Exhibits _____

4-7, 8-10

Replying Affidavits _____

11-12, 13

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant 727 7th Avenue Associates LLC’s (herein “Defendant 727”) motion for summary judgment dismissing the complaint as against it, is granted. Defendant Tonic Bar and Restaurant, a/k/a Tonic Bar, a/k/a Tonic, a/k/a Tonic Times Square’s (herein collectively “Defendant Tonic) cross-motion for summary judgment dismissing the complaint as against them, is denied.

Plaintiff commenced this action on January 11, 2013, for injuries allegedly sustained in a trip and fall over hoses and/or cables lying across the sidewalk in front of the premises of 727 7th Avenue, New York, New York (herein “the Premises”). The Defendants answered, and the parties engaged in discovery.

Defendant 727 now moves for an Order granting summary judgment in its favor dismissing the complaint and all cross-claims against it. Defendant 727 contends that it is an out of possession landlord of the Premises that is leased to Defendant Tonic, and that it was Defendant Tonic who had a service agreement with Defendant Hoodz Kitchen Exhaust Cleaning a/k/a Hoodz of Hell’s Kitchen (herein collectively “Defendant Hoodz”), for Hoodz to clean the exhaust system at the Premises, and that the hoses and/or cables used during this exhaust cleaning was the cause of Plaintiff’s trip and fall. (Mot. Exh. G).

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

Pursuant to the lease terms, Defendant Tonic "...shall maintain and repair the public portions of the building, both exterior and interior...take good care of the Demised Premises...at Tenant's sole cost and expense, promptly make all needed repairs, restorations and replacements, interior and exterior, structural and nonstructural, ordinary and extraordinary, foreseen and unforeseen, in and to the Demised Premises, equipment and fixtures now or hereafter erected or installed in or on the Demised Premises, including but not limited to, sidewalks, curbs...Tenant shall...maintain the Demised Premises, in a clean and orderly fashion that is consistent with the use and appearance of the Demised Premises, including, but not limited to, the adjacent sidewalk...Tenant agrees to sweep the sidewalk as reasonably necessary...Tenant shall keep the sidewalks and curb in front of said Premises clean and free from ice, snow, etc..." and "Tenant may not obstruct the sidewalk in front of the Demised Premises in any manner whatsoever." (Mot. Exh. F1). Further, Defendant 727 did not retain right of entry onto the premises except in the case of emergencies in which the Owner has to make repairs following the Tenants failure to do so, or for the purpose of complying with laws and regulations. (Id.)

Further, according to the Service Quote between Defendants Tonic and Hoodz, Hoodz was at the Premises on the day of the alleged incident to clean the exhaust system and it was one of the hoses being used in connection with the cleaning that allegedly caused Plaintiff to trip and fall.

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 727 has made a prima facie showing that it was not in possession or control of the Premises, nor the adjacent sidewalk to the Premises where plaintiff is

alleged to have tripped and fallen over hoses and/or cables lying across the sidewalk. Furthermore, the Service Quote for the cleaning names Defendant Tonic as the customer, and Defendant Hoodz as the provider of this service. Defendant 727 was not involved in the hiring of Defendant Hoodz to clean the exhaust system. Further, the laying of a hose across the sidewalk produces a transient condition, and this transient condition does not equate to a structural defect or violation of a specific statutory violation that the Owner-Defendant 727 would be liable for. For all of these reasons, Defendant 727 is entitled to summary judgment in its favor dismissing all claims and cross-claims.

On the cross-motion, Defendant Tonic moves for summary judgment (1) against Plaintiff, dismissing the complaint and all cross-claims against it, and (2) against Defendant Hoodz on its cross-claim for common law indemnification, and; (3) for an Order setting the matter for immediate trial on damages on its cross-claim for attorney fees and disbursements incurred in defending this action.

Defendant Tonic contends that it hired Defendant Hoodz as an independent contractor to clean its kitchen grease because such work requires a licensed expert, and that it did not control the manner or methods used by Hoodz to perform this cleaning, nor did Tonic provide the equipment used by or supervise the work of Hoodz. Tonic also contends that Hoodz created the transient condition, i.e. the hose across the sidewalk, that is alleged to be the sole cause of Plaintiff's fall. Tonic argues that (1) it did not have notice of or reason to anticipate this condition because it is not foreseeable that the cleaning of kitchen grease would cause harm to a pedestrian outside of the restaurant and it was closed at the time this cleaning took place, (2) it did not have a legal duty to maintain or protect the sidewalk from transient conditions created by Hoodz, and (3) that it was not negligent in hiring Hoodz as an independent contractor.

Plaintiff opposes both motions arguing that summary judgment is improper because not enough discovery has taken place, and that (1) it is not clear whether or not Defendant 727 was in fact an out of possession landlord, (2) that Defendant Tonic was negligent in hiring Defendant Hoodz and negligent in knowingly allowing a dangerous condition to exist on its sidewalk, and (3) if Defendant 727 was not an out of possession landlord it had a non-delegable duty to keep the sidewalk safe for the public, or if it was an out of possession landlord, then Defendant Tonic had a non-delegable duty to maintain the sidewalk in a safe condition for the public.

"As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work." (Saini v. Tonju Associates, 299 A.D.2d 244, 750 N.Y.S.2d 55 [1st Dept. 2002], citing Chainani v. Board of Educ. Of the City of NY, 87 N.Y.2d 370, 639 N.Y.S.2d 791 [1995]). The exceptions to this rule, mostly derived from public policy concerns, fall into three basic categories: "(1) where the employer is negligent in selecting, instructing or supervising the independent contractor; (2) where the independent contractor is hired to do work which is 'inherently dangerous', and; (3) where the employer bears a specific, nondelegable duty." (Saini, Supra, citing Kleeman v. Rheingold, 81 N.Y.2d 270, 598 N.Y.S.2d 149 [1993]).

Defendant 727 is not liable in the instant action as it was an out of possession landlord which, through the lease, delegated the duty of maintaining the sidewalk in a safe

condition to Defendant Tonic. Defendant Tonic argues that it is not liable because Defendant Hoodz was hired as an independent contractor, and that because it had no control nor supervised the manner in which Hoodz conducted its work, Tonic is not liable. However, this argument is unavailing. The lease specifically delegates the duty of the sidewalk to Tonic, this duty is nondelegable, and Tonic is not relieved of its responsibility by hiring Hoodz to clean its exhaust system, even as an independent contractor.

Accordingly, it is ORDERED that Defendant 727 7th Avenue Associates LLC's motion for summary judgment dismissing the complaint and cross-claims against it, is granted, and it is further,

ORDERED, that the Complaint and cross-claims against 727 7th Avenue Associates LLC are hereby severed and dismissed, and it is further,

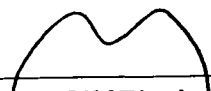
ORDERED, that Defendant Tonic Bar and Restaurant, a/k/a Tonic Bar, a/k/a Tonic, a/k/a Tonic Times Square's cross-motion for summary judgment is denied, and it is further,

ORDERED, that the remaining parties appear for a Status Conference at IAS Part 13, New York Supreme Court, New York County, 71 Thomas Street, New York, New York 10013, on July 13, 2016, at 9:30 a.m., and it is further,

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

Enter:

Dated: May 20, 2016



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

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