

Nunez v Kmart Corp.
2016 NY Slip Op 30978(U)
March 25, 2016
Supreme Court, New York County
Docket Number: 109564/09
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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IRIS NUNEZ,

Plaintiff,

Index No. 109564/09

-against-

KMART CORPORATION,

Defendant.

-----X

KMART CORPORATION,

Third-Party Plaintiff,

-against-

UNIVERSAL VENDING MANAGEMENT LLC.,

Third-Party Defendant.

-----X

UNIVERSAL VENDING MANAGEMENT LLC.,

Second Third-Party Plaintiff,

-against-

THE COCA COLA COMPANY,

Second Third-Party Defendant.

-----X

BANNON, J.:

Motion sequence numbers 002, 003 and 004 are consolidated for disposition. In motion sequence number 002, second third-party defendant, Coca-Cola Refreshments USA, Inc., s/h/a The Coca Cola Company (CCR), moves for summary judgment dismissing the

second third-party complaint and all cross claims.

In motion sequence number 003, defendant/third-party plaintiff Kmart Corporation (Kmart) moves for summary judgment dismissing the complaint, and for summary judgment on its third-party complaint.

In motion sequence number 004, third-party defendant Universal Vending Management LLC. (Universal) moves for summary judgment dismissing the third-party complaint and all cross claims.

FACTS

On July 15, 2008, plaintiff Iris Nunez (Nunez) was shopping at Kmart on 34th Street in Manhattan when, after making a purchase, she slipped and fell as she was approaching the exit. After she fell, Nunez saw that the floor was wet, and she was quite wet as a result. She said that the liquid on which she slipped was clear and odorless, but a little cloudy, as if people had been walking through it. She did not see any footprints on the floor. She, and a Kmart employee, saw that there was water leaking from a soda vending machine a couple of feet away from where Nunez fell.

Kmart and Universal had entered into a license agreement, pursuant to which Universal was to provide vending machines and sell beverages, among other items, from Kmart locations (License Agreement). The agreement provided that the licensed business

would be managed solely by Universal's employees, not by independent contractors, subcontractors, sub-licensees, or any other similar arrangement. License Agreement, ¶ 5.5. However, Universal was permitted to engage a subcontractor with the prior written consent of Kmart. *Id.*, ¶ 5.15. Universal would nonetheless remain responsible for the proper performance of all the duties under the License Agreement. *Id.*

Pursuant to the agreement, Universal was required to keep the area of its licensed business clean and neat, and the equipment was required to be kept in good order and repair. Kmart agreed to provide routine janitorial service consistent with that which it provided in the store. *Id.*, ¶ 6.3. No modification of the agreement was binding unless in writing and signed by both Kmart and Universal. *Id.*, ¶ 16.9.

According to Universal's employee, Mr. Marano, the License Agreement was intended to cover a nationwide relationship between Kmart and Universal. According to Universal, the parties never conducted themselves in accordance with the agreement, and, in fact, CCR was servicing the beverage machines before Universal and Kmart entered into the License Agreement. The agreement states that it applies only to Kmart locations included on Schedule 1.1B. License Agreement, ¶ 1.1. There is no Schedule 1.1B included in the agreement. Nonetheless, Mr. Marano testified that the 34th Street location of Kmart was included in

the License Agreement.

Universal agreed with CCR that CCR would supply the vending machines, and maintain them, at the Kmart location. Universal never obtained written consent from Kmart for this agreement, nor was there any modification of the License Agreement. The agreement with CCR was not in writing.

CCR's employee, Carmine Vivolo (Vivolo), was a full-service driver, meaning that he stocked vending machines and reported any issues that he saw indicating the need for maintenance or repairs. On the morning of July 15, 2008, he serviced and inspected the vending machines, and did not see any leak. No one complained of a leak in the vending machine prior to the accident. Vivolo deposition tr at 27, 37, 64.

Universal acknowledged that it did not maintain, repair or inspect the vending machines during the entire time of the License Agreement. Rather, it arranged for CCR to take care of all of those responsibilities.

DISCUSSION

Motion Sequence 002

CCR contends that Universal's claims for contractual indemnification, common-law indemnification, breach of contract, breach of warranty, strict liability and negligence must be dismissed. Universal limits its opposition to its claim for common-law indemnification, thereby conceding that the other

claims must be dismissed. *Genovese v Gambino*, 309 AD2d 832, 833 (2d Dept 2003).

CCR maintains that in order to obtain common-law indemnification, Universal must prove that CCR was guilty of some negligence and contributed to the cause of the underlying injury, and that Universal was not at fault. Since Universal was responsible for keeping the area of the vending machines neat and clean, and for keeping the machines in good working order and repair, CCR contends that Universal cannot be excused from responsibility for the accident. Additionally, Universal has not established that CCR was negligent, and has failed to demonstrate that CCR had actual or constructive notice of the leaking condition.

Universal contends that the License Agreement was not controlling as to Universal's relationship with the Kmart on 34th Street. Rather, the License Agreement was an agreement that applied nationwide. Universal points out that no schedule was attached listing the place of business, which demonstrates that it was not intended to cover the specific location where this incident occurred.

In order to recover damages based upon common-law indemnification, a party must demonstrate that there is no actual wrongdoing by the party seeking indemnification. *County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 47 (2d Dept

1984), *affd for reasons stated below* 66 NY2d 642 (1985).

Therefore, CCR can obtain summary judgment by demonstrating that Universal was involved in some wrongdoing that resulted in the accident.

Universal contends that it did not engage in any wrongdoing because it did not create the condition, nor was it negligent in having CCR maintain the vending machines. However, Universal also has failed to demonstrate that it maintained the machines as required under the License Agreement. There is a question regarding whether the License Agreement applies to the Kmart in question, since it was not named on the schedule. However, Universal has conceded that it did apply to that location. On the other hand, Universal maintains that the terms of the agreement that require Universal to maintain and service the machines were not part of the manner in which any of the parties anticipated the business to function. Thus, there is a question as to what parts of the License Agreement may apply, if any, especially considering that the License Agreement could not be modified orally. Under these circumstances, there are too many unknowns to determine what obligations each party had, and accordingly, whether Universal engaged in any wrongdoing. Consequently, CCR's motion for summary judgment is denied.

Motion Sequence Number 003

In motion sequence number 003, Kmart moves for summary

judgment dismissing Nunez's complaint and granting summary judgment on Kmart's third-party complaint against Universal.

Nunez Complaint

Kmart maintains that it did not create the condition, nor did it have actual or constructive notice of the condition prior to the accident. Kmart's loss prevention employee, Sherrod Smith (Smith), testified that he never saw any water dripping from the area of the vending machines before the accident, nor had anyone told him that there was water dripping. There was no evidence as to how long the condition existed before Nunez's accident. Vivolo testified that there was no leak at 7:30 a.m., and Nunez testified that she did not see the water until after she fell.

Nunez opposes Kmart's motion. She points out that Smith could see that the water was coming from the vending machines, and he described the leak as a stream of water, three feet by one foot. He stated that he did not know how long it had been there. Smith dep tr at 30-34. Further, there is no evidence regarding when Kmart's security guard, Melody Shepard (Shepard), first saw water on the floor, other than the hearsay testimony of Smith, who said that Shepard told him that she had not seen the water prior to Nunez's fall. Nunez also points out that there was a service call, a couple of weeks before her accident, with respect to a Coca Cola can machine, which states that there was water leaking. She further avers that Kmart has failed to produce any

evidence that it did not cause or create the condition. It has further failed to produce evidence as to when it last cleaned or inspected the area prior to the fall. She argues that the finder of fact could conclude that it took a significant amount of time for a machine that was "dripping like a faucet" (Movant exhibit K at 51) to cause an area of one foot by three feet to be covered with water "like a stream," and for there to be enough water to make plaintiff's clothing "all wet."

In order to make a prima facie showing of entitlement to summary judgment, Kmart cannot rely on gaps in Nunez's evidence, but must produce evidence to show that it did not have any constructive or actual notice of the spill that caused the accident. *River Ridge Living Ctr., LLC v ADL Data Sys., Inc.*, 98 AD3d 724, 725-726 (2d Dept 2012); see also *Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 35-36 (2011 [Smith, J., concurring]). Here, Kmart has not offered any testimony regarding when it had last inspected the area to determine whether the condition existed for enough time for it to have discovered and rectified the problem. *Jackson v Whitson's Food Corp.*, 130 AD3d 461, 462 (1st Dept 2015). The fact that Nunez has not, at this point, produced evidence as to how long the water was on the floor does not relieve Kmart of its burden of proving that the water was not there long enough for it to have had constructive notice. Thus, Kmart has failed to make a prima

facie showing of entitlement to summary judgment.

Kmart's Complaint Against Universal

Kmart contends that Universal breached its contract with Kmart because Universal never inspected the machines or serviced them. It also never obtained Kmart's consent to engage a subcontractor. Further, even if Universal had obtained consent, it was still responsible for properly performing all of the duties set forth in the contract, which included keeping the area around the machines clean and keeping the machines in good working order. Kmart concludes that Universal breached the agreement, and, as a result, Kmart is entitled to damages. Additionally, Kmart maintains that it is entitled to defense and indemnity under the terms of the agreement. License Agreement, §§ 12.1, 12.2, 6.8.

As discussed above, the contract on which Kmart relies is not clear regarding any duty that Universal has with respect to the 34th Street location, since there is no schedule attached to the agreement that specifies that location. Therefore, Kmart has not established prima facie entitlement to summary judgment regarding its right to defense and indemnity under the terms of the License Agreement.

Motion Sequence Number 004

In motion sequence number 004, Universal moves for summary judgment dismissing all claims and cross claims against it.

Universal asserts that it cannot be found responsible for the injuries to Nunez because it did not install the vending machines, it did not operate, inspect, repair or maintain the machines at the subject location, and it did not create the condition that caused Nunez to slip and fall. Universal maintains that its obligations with regard to the vending machines were to collect revenues on behalf of Kmart and report the sales and commissions to Kmart on a monthly basis. Marano dep tr at 46, 74. It was CCR's responsibility to maintain and repair the machines, and it was Kmart's responsibility to provide regular cleaning services around the machines. Further, Universal was never notified that there was any leakage from the vending machines on the day of the accident.

Both Kmart and CCR oppose Universal's motion. Kmart points out that Marano testified that the License Agreement applied to the 34th Street location, and that the agreement was in effect on the date of the accident. Marano dep tr at 15, 17. He further acknowledged that the defense and indemnity sections of the License Agreement applied to the Kmart location. *Id.* at 24. The Licensing Agreement does not provide for Universal to manage the vending machines, but to operate them and maintain them. Additionally, the agreement requires Universal to obtain insurance naming Kmart as an additional insured. Since Universal has not alleged gross negligence or willful misconduct as against

Kmart, Kmart maintains that it is entitled to both contractual and common-law indemnification.

If the License Agreement applies to the 34th Street location, then the terms of the agreement support Kmart's position that it is entitled to contractual indemnification. If, however, the License Agreement does not apply, there is a question as to the terms of the agreement between the parties. Because of the ambiguity of the contract, it cannot be determined on a motion for summary judgment whether the agreement applies. Therefore, Kmart is not entitled to summary judgment on its contractual indemnity claim.

With respect to common-law indemnification, Kmart would be entitled to indemnification if its liability were vicarious, and Universal was responsible for the damage. Here, there is a question as to whether Universal was responsible for maintaining and repairing the vending machines. If the License Agreement governs the parties' relationship, then Universal was contractually liable for servicing the machines, and would, therefore, have common-law liability for the damage. However, if the License Agreement does not govern, there is a question as to the specific terms of the agreement between the parties, and whether Universal was responsible for maintaining the machines in good repair. In view of these factual questions, summary judgment with respect to Kmart's claims against Universal is

inappropriate.

CCR also opposes Universal's motion, arguing that Universal's motion is untimely, in that it was filed 11 days after the court-ordered deadline. On the merits, CCR contends that Universal failed to inspect, maintain and repair the vending machine, in violation of its contract with Kmart.

CCR has not included any order or document that sets forth the date of the court-ordered deadline for filing a summary judgment motion. Thus, its claim that this motion was 11 days after the deadline has no support in the record. In any event, since the other two motions deal with the same issues as those raised in this motion, the court will consider this motion as well. *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 (1st Dept 2006).

With respect to the merits, CCR does not raise any arguments that were not raised by Kmart. Thus, the outcome is the same, and Universal's motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of second third-party defendant Coca-Cola Refreshments USA, Inc. s/h/a Coca Cola Company for summary judgment (motion sequence number 002) is granted to the extent that the claims for contractual indemnification, breach of contract, breach of warranty, strict liability and negligence are

dismissed and the motion is otherwise denied; and it is further

ORDERED that the motion of defendant/third-party plaintiff Kmart Corporation for summary judgment (motion sequence number 003) is denied; and it is further

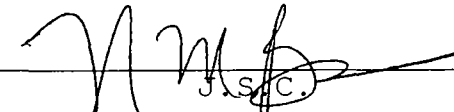
ORDERED that the motion of third-party defendant Universal Vending Management LLC. for summary judgment (motion sequence number 004) is denied; and it is further

ORDERED that counsel are directed to appear for a

~~(preliminary)~~ [status] conference in Room 167B on 7/14/16, 2016, at 2:30 a.m./p.m.

Dated: 3/25/16

ENTER:


J.S.C.

HON. NANCY M. BANNON