Genza v 424 E. 9th LLC
2016 NY Slip Op 31018(U)
June 3, 2016
Supreme Court, New York County
Docket Number: 152025/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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DARKA GENZA,

Index No. 152025/12
Motion Sequence: 002

Plaintiff,

-against-

424 E. 9th LLC,

DECISION & ORDER
ARLENE P. BLUTH, JSC

Defendant.

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424 E. 9th LLC,

Third-Party Plaintiff

-against-

CASUR CORP.,

Third-Party Defendant.

---X

The motion by third-party defendant Casur Corp., (Casur) for summary judgment dismissing the third-party complaint is denied in part and granted in part.

This action arises out of personal injuries sustained by plaintiff on March 18, 2010 in unit 6 at 424 East 9th Street, a building owned by defendant/third-party plaintiff 424 E. 9th LLC (424). Plaintiff Darka Genza alleges that she grew up in units 4, 5, and 6, which are located on the second floor of the building. All three units used to be connected and plaintiff's family considered them to be one apartment. Plaintiff claims that units 4, 5, and 6 were converted into

three separate apartments. On the date of the accident, plaintiff was helping her mother pack items as they moved out of unit 6. Eventually, plaintiff and her mother lived in only unit 5.

During March 2010, renovations were being performed on certain apartments in the building, ***but not*** in units 4, 5, or 6. On March 18, 2010, plaintiff was in unit 6 when she took a step toward a fireplace, where books were normally stored. Plaintiff alleges that she was injured when her right foot went through the linoleum floor while bending down to grab books. Plaintiff claims that the hole created was 10-15 inches wide and jagged.

Plaintiff claims that a piano had previously covered the area where plaintiff's foot went through the floor but that the piano was moved by workers for 424 several days before the accident.

Plaintiff claims that she could see into the apartment underneath (unit 1) after the hole was created. Plaintiff alleges that she went to unit 1 directly after the accident and saw that the apartment was completely gutted. Plaintiff claims that she took photos of the ceiling of unit 1 and claims that it appeared that work had been done to the ceiling.

Unit 1 was located directly underneath unit 6 and Casur was performing gut renovations of unit 1 in March 2010. Ceiling work was involved in this renovation. Casur claims that the typical layers between the ceiling of an apartment and the unit above would consist of the sheetrock ceiling, insulation above that, beams above that, and then the subfloor of the unit above.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). "[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" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999].

CPLR 1401 codified common law contribution and provides that "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

In support of its motion, Casur claims that 424 is not entitled to contribution or indemnification because Casur did not create the hole that caused plaintiff to fall. Casur claims that its work in unit 1 could not have caused or created the hole or a weakening of the subfloor of unit 6. Casur claims that its work in unit 1 would not have involved any work on the ceiling beams or the removal of the sheetrock of unit 1.

Casur claims that 424 is not entitled to recover against Casur based on a theory of common law indemnification because there are allegations of active negligence rather than claims based on vicarious liability.

Casur further claims that it cannot be liable for contractual indemnification, contractual contribution, breach of contract, or to defend 424 because there was never a contract between Casur and 424.

In opposition, 424 argues that there are issues of fact regarding whether Casur's gut renovation caused the hole that plaintiff's foot allegedly went through or weakened the floor of unit 6. 424 claims that Christine Bermudez, senior property manager for Croman Real Estate (the management company for 424), searched for construction contracts between Croman and Casur and only found contracts for two nearby buildings. Bermudez was unable to find a contract involving Casur for work to be performed at 424 East 9th Street.

On the date of the accident, Bermudez claims that she went into unit 1 and looked up at the ceiling and saw that everything was exposed, including the beams. Bermudez also claims that she could see through to the subfloor of the unit 6. Bermudez notes that she did not receive any complaints from plaintiff or her family about the floor in unit 6 prior to the accident.

424 further argues that Casur's motion is insufficient because it relies on the self-serving testimony of Sean Sullivan, the president of Casur. 424 maintains that Casur fails to offer an affidavit from an engineer stating that Casur could not have caused the hole in the subfloor of unit 6.

Casur's motion is denied with respect to 424's claims for common law contribution and indemnification because Casur has failed to make its prima facie showing that there are no material issues of fact.

The testimony of Sean Sullivan, president of Casur, demonstrates that Casur has not met its prima facie burden on a motion for summary judgment. Sullivan testified that during a gut renovation "We remove all of the contents, and we remove all the walls and ceilings, and then we put it back in the new" (Sullivan tr at 12, lines 18-20). Sullivan further testified that "You would have a plaster ceiling, which would be on the wood rock, that was removed and then the ceiling would be framed down and leveled and prepared for a new sheetrock" (*id.* at 16, lines 5-8). During the renovation, "the wooden beams were exposed" (*id.* at 17, lines 11-12).

This testimony, combined with the absence of any expert's report suggesting that Casur's renovation would have had no effect on the floor of unit 6, indicates that there are material issues of fact regarding Casur's role in plaintiff's alleged injury. It is clear that Casur's work required it

to remove certain layers between the ceiling of unit 1 and the floor of unit 6. The renovation resulted in the exposure of wooden beams which were right under the linoleum floor of unit 6.

Even if Casur had met its burden, 424 has raised issues of fact requiring the Court to deny Casur's summary judgment motion. Bermudez received no prior complaints about the floor of unit 6 and claims that she could see through to the subfloor of unit 6 while she was in unit 1 immediately after the accident. Further, plaintiff claims that when she visited unit 1 after the accident, it appeared that work had been done on the ceiling. Casur does not deny that it had been doing work on the ceiling of unit 1.

Finally, plaintiff testified that there was a piano that was partially over the spot where the hole formed (plaintiff tr [exh K] at 48, lines 11-17). Clearly, if a piano was located in the spot where plaintiff's foot went through the linoleum floor and a hole had not formed previously, then there is an issue of fact regarding whether a gut renovation of the ceiling of the apartment directly below it might have contributed to the weakening of the floor.

Contractual Indemnification and Contribution

However, 424's claims based on contractual indemnity, contractual contribution, and breach of contract are dismissed. 424 has not produced a contract that could form the basis for contractual indemnification or contractual contribution against Casur. Without a contract and an indemnification or contribution provision to consider, the Court must dismiss the claims that rely on these theories of liability. In its opposition, 424 acknowledges that Bermudez was unable to locate a contract for Casur to perform work at 424 East 9th Street. Further, 424 does not affirmatively claim that there was a contract or identify the relevant indemnification or contribution provision.

Therefore, 424's second, third and fourth causes of action are severed and dismissed.

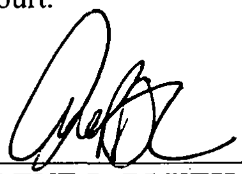
Accordingly, it is hereby

ORDERED that Casur's motion for summary judgment is denied to the extent that 424's first cause of action remains; and it is further

ORDERED that the second, third, and fourth causes of action in 424's third-party complaint are severed and dismissed.

This constitutes the Decision and Order of the Court.

Dated: June 3, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC