Bacik v JEP Rest. Corp.
2016 NY Slip Op 31641(U)
August 25, 2016
Supreme Court, New York County
Docket Number: 150929/13
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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KRSTYNA BACIK,

Plaintiff,

INDEX NO. 150929/13

-against-

JEP RESTAURANT CORP, 9 EAST 45TH STREET, L.P.,
and EAMONN'S IRISH BAR & GRILL,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendants JEP Restaurant ("JEP") and Eamonn's Irish Bar & Grill ("the restaurant") (together "the JEP defendants") move for summary judgment dismissing the complaint or, in the alternative, vacating the note of issue and striking the matter from the trial calendar. Defendant 9 East 45th Street, L.P. ("9 East") cross moves, for summary judgment dismissing the complaint and all cross claims, and granting it summary judgment on its cross claim for contractual indemnification against the JEP defendants, including attorneys' fees, or, in the alternative, vacating the note of issue and striking the matter from the trial calendar. Plaintiff opposes the JEP defendants' motion but does not oppose 9 East's cross motion for summary judgment. The JEP defendants oppose the cross motion to the extent it seeks summary judgment on 9 East's cross claim asserted against them for contractual indemnification.

Background

Plaintiff alleges that she was injured on September 22, 2012, when she slipped and fell on a clear, watery substance as she was leaving the restaurant, operated by the JEP defendants, located at 9 East 45th Street in Manhattan ("the Building"). Defendant 9 East owns the Building

where the restaurant is located. The Building's prior owner had entered into a lease agreement with the JEP defendants.

Plaintiff testified that on the accident date, she went to the restaurant on a Saturday between 3:00 and 4:00 pm for a sandwich and a beer, and was there approximately 40 minutes before the accident happened (Plaintiff dep at 29-30). After she ate, plaintiff got up and walked toward the same entrance she used to enter the restaurant, took six or seven steps, and was almost at the hostess station, which is three to four steps from the entrance, when according to plaintiff, "[her] left foot slid forward, [her] right foot went underneath [her], and [her] elbow slammed on the floor" (Id. at 33-35, 45). Plaintiff "was disoriented for a few minutes" (Id. at 35). Plaintiff also testified that she slipped on a liquid that was clear with no carbonation, and took up a small area on the un-carpeted wood floor; she believes that it was either water or soda water (Id. at 32, 37-38, 39). According to plaintiff, her jacket and pants were stained as a result of the fall, and that soaked up much of the liquid (Id. at 39-41). Plaintiff further testified that she did not notice any wet spot before her accident, nor did she see any wet spot when she walked through the same area, although not identical path, when she walked toward her table approximately forty minutes earlier (Id. at 32-33).

Noel Donovan ("Donovan"), the general manager of the restaurant, testified as to the procedures followed at the restaurant for cleaning spills. Donovan testified that the busboys are responsible for cleaning all public areas of the restaurant, including the floors; that the immediate job of the busboy is to clean any spills, but if a busboy is not available any member of the staff could clean a spill (Donovon dep, at 18). He also testified that it is routine for the porter to clean the floors each day at 7 am, then the floors are cleaned throughout the day on an *ad hoc* basis depending on the level of customers and level of traffic; there is no cleaning log and no

custom that cleaning has to be done at a specific time (Id. at 22-23, 25). Donovan also testified that he does not recall becoming aware of an accident on the accident date, and that he has no personal knowledge of the accident (Id. at 35-36, 46). He also testified that he would expect an employee to report any accident to him, as the employees are all trained to do so (Id.at 46-47).

The JEP defendants argue that they are entitled to summary judgment as there is no evidence that they affirmatively created the condition on which plaintiff alleges she fell, or that they had actual or constructive notice of such condition. Specifically, the JEP defendants argue that with respect to the notice issue, the record shows they had no notice of the condition based on evidence that the condition existed for no longer than forty minutes, the manager never received any complaints regarding the condition of the floor, and that plaintiff did not see anything being spilled or any cleaning activity while at the restaurant. The JEP defendants further argue they had a clear protocol which establishes lack of constructive notice of the condition and that no written protocol is necessary.[1] Alternatively, the JEP defendants move to vacate the note of issue, arguing, *inter alia*, that the certificate of readiness is incorrect, as the JEP defendants did not waive plaintiff's independent medical examination.

In opposition, plaintiff argues that the JEP defendants' motion must be denied as they failed to meet their burden of showing that they lacked constructive notice of the liquid on which plaintiff fell. In this connection, plaintiff argues that evidence of the JEP defendants' general cleaning procedures is insufficient to establish lack of constructive notice. Plaintiff further argues that even if the JEP defendant made a prima facie showing, the record raises issues of fact as to constructive notice based on evidence that plaintiff fell close to both the hostess station and

[1] The JEP defendants also contend that as there is no evidence that the incident occurred in a "center of activity" at the restaurant, they cannot be held liable to plaintiff, citing Kesselman v. Lever House Rest., 29 A.D.3d 302, 305 (1st Dept 2006) Their reliance on Kesselman is misplaced as that case concerns a defendant restaurant's potential liability based on evidence that its employees created the condition on which plaintiff fell and not the issue of notice.

the bar, a location used by many of the restaurant's employees, and that the accident occurred when the restaurant is not crowded, so that the condition could have been easily discovered.

As for the JEP defendants' request to vacate the note of issue, plaintiff argues that this request is without merit since all discovery demands have been responded to, and plaintiff is ready and willing to appear for an independent medical examination.

9 East cross moves for summary judgment, arguing that as an out-of-possession landlord it cannot be held liable to plaintiff, and none of the exceptions to this non-liability rule apply here since it did not retain control over the premises, is not responsible for repair and maintenance, did not have notice of the defect, and the accident was not caused by a structural or design defect or the violation of a specific statutory provision. 9 East also seeks summary judgment on its claim for contractual indemnification against the restaurant based on indemnification provision in the lease for the restaurant, dated June 5, 2012 ("the Lease"), entered into between JEP Restaurant Corp. and the prior owner Kabushiki Kaisha Daito ("Kabushiki").

Plaintiff does not oppose 9 East's cross motion seeking to dismiss the complaint against it based on its status as an out-of-possession landlord.

The JEP defendants oppose 9 East's cross motion to the extent it seeks summary judgment on its cross claim for contractual indemnification, arguing that there has been no attempt to authenticate the Lease, that 9 East is not a party to the Lease, and that there is no documentation showing that 9 East agreed to assume the rights and responsibility of Kabushiki, including with respect to the indemnification clause. The JEP defendants also argue that the indemnity provision is unenforceable as it seeks to indemnify without regard to the indemnitee's negligence, and is thus against public policy and violates General Obligation Law (GOL) § 5-

321. They further argue that even if the indemnity provision is valid, the indemnity provision does not require them to indemnify 9 East for attorneys' fees.

In its reply, 9 East counters that Lease was in full force and effect at the time of the accident, including the indemnification provision.[2] In support of its position that it has a right to enforce the indemnification provision in the Lease, 9 East points to the deposition testimony of Jeffery Pikus ("Pikus"), the managing partner of 9 East 45th Street, LLC, which is the general partner of 9 East, and submits Pikus's affidavit. At his deposition, Pikus testified that 9 East was the owner of the Building at the time of the accident, and that Kabushiki, which entered into the Lease was with the JEP defendants, was the previous owner of the Building. (Pikus Dep at 13). Pikus testified that he was not aware of any new lease agreement with 9 East, but testified that "I would assume that there's documents transferring this lease from the previous owner to us." (Id. at 15-16).

In his affidavit, Pikus states that following his deposition, he performed a search to determine if there was any documentation "transferring or assigning the lease from (Kabushiki) (the prior owner) to 9 East (the current owner)[and that] [f]ollowing a comprehensive search I was unable to locate any such transfer and/or assignment documents." (Pikus aff ¶ 8). Pikus also states that when 9 East purchased the property "there was no new lease prepared for 9 East..., the new owner... and [the JEP defendants]."(Id, ¶ 5). He states that the Lease "remains on file and was in full force and effect on [the accident date] and is the only agreement pertaining to the subject property." 9 East also argues that the existence of the Lease is irrelevant since the law

[2] While the JEP defendants argue that the reply to the cross motion was untimely submitted, upon consideration of the circumstances here, including that the motion and cross motion were adjourned numerous times on consent of the parties, the court will accept and consider 9 East's reply to the JEP defendants' opposition to its cross motion.

holds that even in the absence of a lease, a holdover tenancy continues under the same terms and covenants created by the expired lease.

Next, 9 East argues that indemnification provision in the Lease is enforceable since there is no evidence that it was negligent, and the Lease contains an insurance provision. Furthermore, 9 East argues that the indemnification provision unambiguously requires the JEP defendants to pay the attorneys' fees it incurred in defending this action.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case . . ." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

"It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk. [citations omitted]" O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106, 106 (1st Dept 1996). However, an "owner cannot be liable for injuries caused to a person as a result of a defective condition on the premises unless it can be shown that the owner either created the hazardous condition or had actual or constructive notice of the condition for a reasonable amount of time that in the exercise of reasonable care, the owner should have corrected it." Trujillo v. Riverbay Corp., 153 AD2d 793, 794 (1st Dept 1989).

As proponents of summary judgment, defendants have the burden on demonstrating "the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." Giuffrida v. Metro North Commuter R.R. Co., 279 AD2d 403, 404 (1st Dept 2001). To meet this burden defendant must submit evidence regarding when the area in which plaintiff fell was last cleaned or inspected. See eg. Birnbaum v. New York Racing Assn.,Inc., 57 AD3d 598, 599 (2d Dept 2008)(to show lack of a constructive notice a defendant must provide "some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell"); Gauteir v. 941 Intervale Realty, Inc., 108 AD3d 481,482 (1st Dept 2013) (defendant's submission of evidence that area was regularly inspected based on building's janitorial schedule was insufficient to meet defendant's burden of showing it lacked constructive notice of condition); Porco v Marshalls Department Stores, 30 AD3d 284, 285 (1st Dept 2006)(evidence that a store is "cleaned daily," and inspections made "on a regular basis" not proof of cleaning and inspections conducted on the date in question).

Here, the JEP defendants have failed to provide any evidence, written or otherwise, regarding the length of time the alleged condition was on the floor prior to plaintiff's fall, or how often, or even whether, the floor was checked and cleaned on the day of the incident. Instead, they rely solely on the general practice that the floors are cleaned each morning, and that bus boys and other staff members are supposed to keep the floors clean throughout the day, which is insufficient to establish the condition of premises at the time of the incident. See Lorenzo v. Plitt Theaters, Inc., 267 AD2d 54 (1st Dept 1999) (holding that general cleaning routines were insufficient, as a matter of law, to meet the summary judgment burden); Deluna-Cole v. Tonali, Inc., 303 AD2d 186 (1st Dept 2003) (denying summary judgment where defendant's witness

submitted evidence regarding the general practice of cleaning the restaurant because it did not address "when the passageway where the plaintiff fell on . . . was last checked for spills"); compare Tkach v. Golub Corp., 265 AD2d 632 (3d Dept 1999) (granting a summary judgment motion when defendant submitted evidence that the store's policy was to have its employee check the floor every ten to fifteen minutes for spills, and that an employee checked the floor of the area in question five minutes before the plaintiff's accident). As such, the JEP defendants failed to establish, as a matter of law, "that the condition had not existed for a sufficient length of time before plaintiff's accident to permit employees of [defendant] to discover and remedy it." Perrone v. Ilion Main St. Corp., 254 AD2d 784, 785 (4th Dept 1998).

Moreover, contrary to the JEP defendants' argument, it cannot be said that the forty minutes that elapsed between the time plaintiff entered the restaurant and was injured is insufficient as a matter of law to provide constructive notice of the condition. Furthermore, the cases cited by the JEP defendants, including Gordon v American Museum of Natural History, 67 NY2d 836 (1986) are not controlling here. In Gordon, the court found the defendant museum could not be held liable to plaintiff since it had no actual or constructive notice of paper on its steps that caused plaintiff to fall, noting that there was no evidence that anyone observed the paper before the accident or that the paper was dirty or worn. While the court in Gordon noted that general awareness of liter on the steps was insufficient to give rise to notice, the factual circumstances here are distinguishable, as the spill occurred in a restaurant where the JEP defendants were present, which raises factual issues as whether they had constructive notice of the specific condition on which plaintiff fell.

Accordingly, the JEP defendants have not met their burden of proof, and their motion for summary judgment must be denied.

The court will next address 9 East's cross motion for summary judgment on its cross claim for contractual indemnification against the JEP defendants. The cross claim is based on paragraph 8.1 of the Lease, which provides in relevant part: "Tenant agrees at Tenant's sole cost and expense to maintain general public liability insurance in standard form in favor of Tenant and Owner against claims for bodily injury ... occurring on or upon the demised premises...Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance,[3] including reasonable attorney's fees, paid suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors employees, invitees or licensees, of any covenant on the condition of this lease, or the carelessness, negligence or improper conduct of the Tenant..."

As a preliminary matter, while not a party to the Lease, 9 East, as the grantee of real property, which was encumbered by the Lease, is entitled to all the rights which the previous owner, as grantor, had in the premises and in the Lease. See 507 Madison Avenue Realty Co. v. Martin, 200 AD 146 (1st Dept), aff'd 233 NY 683 (1922);see also Real Property Law § 223 (providing, in relevant part that "[t]he grantee of leased real property... has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor ... had, or would have had, if the reversion had remained in him). Moreover, as the Building was "conveyed without reservation, a formal assignment of the lease was not necessary to transfer all of the grantor's rights in and under the lease." Clemente Bros., Inc. v. Peterson-

[3]According to 9 East, insurance was procured by the restaurant for the benefit of 9 East. The JEP defendants do not deny that such insurance was obtained but argue that 9 East did not provide documentation to substantiate this claim and that they were not obligated to obtain insurance.

Ashton Fuels, Inc., 29 AD2d 908 (3d Dept 1968), appeal denied, 24 NY2d 737 (1969); see also Reltron Corp. v. Voxakis Enterprises, Inc., 57 AD2d 134 (4th Dept 1977).

This conclusion is further supported by the terms of the Lease which evidence an intent to bind and benefit not only the parties but, *inter alia*, their successors. Specifically, paragraph 39 of the Lease provides, without limitation, that "[t]he covenants, conditions and agreements contained in this lease shall bind and inure to the benefit of Owner and Tenant and their respective heirs, distributes, executors, administrators, successors, and except as otherwise provided in this lease, their assigns." See Hart v. Socony-Vacuum Oil Co., 291 NY 13 (1943). In addition, it cannot be said that the tenant's obligation to indemnify is personal to the original owner since it arises out of the tenant's use and possession of the Building and thus runs with the land. See Clemente Bros., Inc. v. Peterson-Ashton Fuels, Inc., 29 AD2d 908 (covenant in lease requiring lessee to remove buildings, structures and fixtures is a covenant running with the land) Bank of New York, Albany v. Hirschfield, 76 Misc2d 415 (Sup Ct Albany Co. 1973)(covenant to provide parking spaces runs with the land); See generally Rasch's N.Y. Landlord & Tenant Incl. Summary Proc. § 23:6 (4th ed June 2016).

Moreover, Tonking v. Port Authority of New York and New Jersey, 2 AD3d 213, 214 (1st Dept 2003), aff'd 3 NY3d 486 (2004), cited by the JEP defendants in opposition does not require a contrary result. In Tonking, the First Department held that Bovis was not entitled to indemnification from a contractor based on an agreement between the Port Authority, as owner of the site, and the contractor, under which the contractor agreed to indemnify the Port Authority as well as the Port Authority's "Commissioners, officers, agents, and employees." Bovis, the construction manager on the project at the time of the accident, argued that it was entitled to be indemnified as an agent of the Port Authority; however, the First Department rejected this

argument writing that "the contracting parties did not, by using the term "agent" clearly manifest an intention to impose on [the contractor] an obligation to indemnify Bovis, a subsequently retained construction manager." 2 AD3d at 214. Here, however, subject indemnification provision provides for indemnification of the owner of the Building, and there is no dispute that 9 East falls within the definition of an owner. Furthermore, while 9 East was not the owner when the Lease was entered into, for the reasons above, including that the Lease provided, without limitation, that the rights and obligations thereunder were applicable not only to the parties but to their successors, the JEP defendants clearly assumed an obligation to indemnify 9 East as the purchaser of the Building.

The next issue is whether the indemnity provision is enforceable. Contrary to the JEP defendants' position, the provision does not seek to indemnify the Owner for its own negligence in violation of GOL § 5-321.[4] Instead, it indemnifies 9 East for damages or losses resulting from "...any breach by Tenant, Tenant's agents...of any covenant on the condition of this lease, or the carelessness, negligence or improper conduct of the Tenant." Here, as there is no evidence that 9 East was negligent and the parties permissibly allocated the risk to insurance, the indemnity provision is valid under GOL § 5-321. See Podel v. Glimmer Five, LLC, 117 AD3d 579, 580 (1st Dept 2014) (holding that although the indemnification clause purports to indemnify the landlord for its own negligence, the clause does not violate GOL § 5-321 since the parties allocated the risk to insurance, and there was no evidence that the landlord's was negligent); see

[4]General Obligations Law § 5-321 provides that: "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

also, K.L.M.N.I., Inc. v. 483 Broadway Realty Corp., 117 AD3d 654, 655 (1st Dept 2014) (holding that defendant landlord was entitled to be indemnified based on "broad indemnification provision [in the parties' lease] coupled with a requirement that plaintiff obtain insurance coverage"); Correa v. 100 West 32nd Realty Corp., 290 AD2d 306, 306-307 (1st Dept 2002)(provision in lease which provided that tenant would indemnify landlord for any liability arising from carelessness, negligence or improper conduct of tenant's contractors was not barred by GOL§ 5-321 where there is no evidence of any negligence by landlord).

As for whether the provision entitles 9 East to recover attorneys' fees, the court notes that "[i]t is not uncommon... for parties to a contract to include a promise by one party to hold the other harmless for a particular loss or damage and counsel fees are but another form of damage which may be indemnified in this way." Hooper Associates, Ltd. v. AGS Computers, Inc., 74 NY2d 487, 491 (1989). At the same time, however, attorneys' fees provisions have been "strictly construed to avoid inferring duties that the parties did not intend to create." Oscar Gruss & Sons, Inc. v. Hollander, 337 F3d 186, 199 (2d Cir 2003), citing Hooper Associates, Ltd. v. AGS Computers, Inc., supra; see also, Sci. Components Corp. v. Isis Surface Mounting, Inc., 539 F Supp 2d 653, 663 (ED NY 2008) (citations omitted) (in general, a court should not infer a party's intention to provide counsel fees as damages for breach of contract unless the intention to do so is unmistakably clear from the language of the contract). In the instant case, the subject indemnification clause clearly and unambiguously requires the tenant to indemnify the owner for "reasonable attorney's fees, paid suffered or incurred as a result of any breach by Tenant, Tenant's agents...of any covenant on the condition of this lease, or the carelessness, negligence or improper conduct of the Tenant." See Espinal v. City of New York, 107 AD3d

411, 412 (1st Dept 2013)(holding the phrase "reasonable attorneys' fees" as clear and unambiguous, and awarded attorneys' fees). .

However, 9 East's right to be indemnified is not triggered absent a showing that the JEP defendants breached the Lease or were careless, negligent or engaged in improper conduct. Here, there is no evidence that the JEP defendants breached the Lease, and the court rejects 9 East's argument that their failure to indemnify it constitutes poof of such breach. In addition, there are factual issues as to whether the JEP defendants were careless, negligent or otherwise engaged in improper conduct. Accordingly, 9 East is entitled to summary judgment on its cross claim for contractual indemnification only to the extent of granting such relief conditioned upon a finding that the attorneys' fees they incurred in defending this action were the result of careless, negligent or improper conduct on the part of the JEP defendants.

Finally, the requests to vacate the note of issue are granted only to the extent that plaintiff shall submit to an independent medical examination within thirty days of the e-filing of this decision and order, or on a date agreed to by the parties for such examination.

Conclusion

In view of the above, it is

ORDERED that the JEP defendants' motion for summary judgment is denied; and it is further

ORDERED that 9 East's cross motion for summary judgment dismissing the complaint and all cross claims against it is granted, and the complaint and all cross claims against 9 East are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that 9 East's cross claim for contractual indemnification against the JEP defendants is granted conditioned on a finding of careless, negligent or improper conduct by the JEP defendants; and it is further

ORDERED that the motion and cross motion to vacate plaintiff's note of issue is granted only to the extent that plaintiff shall submit to an independent medical examination within thirty days of the e-filing of this decision and order, or on a date agreed to by the parties for such examination.

DATED: August 25, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.