Dyce v 276 W. 135 St. Assoc.
2016 NY Slip Op 31969(U)
October 17, 2016
Supreme Court, New York County
Docket Number: 106930/2011
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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DOUGLAS DYCE,

Plaintiff,

-against-

276 WEST 135 STREET ASSOCIATES, LLP, LEMLE & WOLFF INC., and SEVEN SEAS DELI GROCERY CORP.,

Defendants.

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Index No.: 106930/2011

DECISION AND ORDER

Motion Sequence 003

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, Defendant/landlord 276 West 135 Street Associates, LLP ("276 West") and its managing agent Lemle & Wolff, Inc. ("Lemle"; collectively "the Landlord Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint of Plaintiff Douglas Dyce ("Dyce") and any cross-claims by Defendant Seven Seas Deli Grocery Corp. ("Seven Seas").[1] For the reasons set forth below, the Landlord Defendants' motion is granted in its entirety.

BACKGROUND FACTS[2]

On January 23, 2011, Plaintiff and a friend were at the Seven Seas Deli, located at 2534 8th Avenue/276 West 135th Street in New York, New York (the "Premises"), owned and managed

[1] There is no record of Seven Seas having filed or served an Answer, and thus it is unclear which "cross-claims" the Landlord Defendants wish to be dismissed. After the Court's Order of July 28, 2015 granting the motion of Seven Seas' former counsel to be relieved (*NYSCEF 33*), neither new counsel nor Seven Seas *pro se* have filed any documents, including any opposition to the current motion, or otherwise appeared.

[2] Unless otherwise noted, the essential facts are undisputed.

by 276 West and leased by Seven Seas (*Exh K*; the "Lease").[3] As Plaintiff and his friend exited, Plaintiff allegedly slipped on ice located on a sloped surface immediately outside the Premises' doorway.

The Landlord Defendants now move for summary judgment dismissing the Complaint and cross-claims and summary judgment on their contractual indemnification claims against Seven Seas. In support of their motion, the Landlord Defendants attach the pleadings and Bill of Particulars (*Exhs A-D*), the Court Order relieving Seven Seas' former counsel (*Exh E*), the Note of Issue (*Exh F*), Plaintiff's deposition transcript (*Exh G*),[4] photographs of the accident location (*Exh H*), the affidavit of Lemle employee Jennifer Garrett (*Exh J*) and the Lease (*Exh K*). Defendants argue: first, that 276 West, as an out-of-possession landlord (and Lemle, as 276 West's managing agent), had no duty to Plaintiff, a third party; and second, that the Lease's indemnification clause shifting liability to Seven Seas is valid and enforceable.

Relying on Defendants' exhibits, Plaintiff opposes the motion, arguing: first, that summary judgment should not be granted because Plaintiff sufficiently alleged negligence in the form of a structural defect constituting a statutory violation, *i.e.* an improperly sloped surface at the Premises' exit; and second, that the issue of indemnification of the landlord by the tenant cannot be addressed absent a determination of the landlord's negligence.

In reply, the Landlord Defendants argue that Plaintiff's argument regarding the slope is insufficient to defeat summary judgment because such claim was absent from the bill of

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[3] The Complaint and multiple documents addressed to Seven Seas list the address as "2534 Federick [sic] Douglass Boulevard (emphasis added)," while the Lease references 2532. However, neither party disputes that the Lease pertains to the subject Premises.

[4] Plaintiff waived his right to depose Defendants (*Exh I*).

particulars and unsupported by any deposition or expert testimony.

DISCUSSION

Summary Judgment Generally

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v Park South Tenants Corp.*, 45 Misc3d 1216(A), 2014 WL 5859387 [Sup Ct, NY County 2014], *citing Zuckerman*, 49 NY2d at 562).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his

defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv den*, 24 NY3d 917 [2015] *citing Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Out-of-Possession Landlord

Generally, neither an out-of-possession landlord nor its managing agent may be held liable for a third party's injuries on the premises unless it had actual or constructive notice of the defect and retained the right to inspect the premises and make repairs (*Velazquez v Tyler Graphics*, 214 AD2d 489, 489, 625 NYS.2d 537 [1st Dept 1995]; *Chapman v Silber*; 97 NY2d 9, 21, 734 [2001] [landlord with actual notice of existence of conditions that indicate hazard may be charged with constructive notice of hazard]; *see also Vasquez v RVA Garage, Inc.*, 238 AD2d 407, 656 NYS2d 334 [2d Dept 1997] [notice of dangerous condition can be imputed where land used for fireworks every 4th of July]; *Del Rosario v 114 Fifth Ave. Assoc.*, 266 AD2d 162, 163 [1st Dept 1999] [action against out-of-possession landlord and managing agent was properly dismissed because a leaky toilet did not constitute a substantial structural defect for which the were responsible under the lease]).

Notice can be constructive when the landlord "reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists" (*id.*). However, in such case, "only a significant structural or design

defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord" (*id.*; *Bautista v 85th Columbus Corp.*, 42 Misc 3d 651, 658 [Sup Ct, Bronx County 2013] ["specific" violation of the building code must impose more than merely a general duty of repair to impose liability on an out-of-possession owner], *citing Hinton v City of New York*, 73 AD3d 407, 408, 901 NYS2d 21 [1st Dept 2010]).

At the time of the accident, Shaif Abushaar ("Abushaar") leased the Premises, which were operated as Seven Seas Deli (*Garrett Aff [Exh J]*, ¶ 3; *Exh K*).[5] The Lease holds the tenant responsible for maintenance and repairs, including removal of snow and ice:

> SECOND.– That throughout the term the Tenant will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in order and condition
>
> ***
>
> TWENTY-SECOND.–If the demised premises or any part thereof consist of a store, or of a first floor, or of any part thereof, the Tenant will keep the sidewalk and curb in front thereof clean at all times and free from snow and ice..." (*Exh K*, pp 2, 4).

Based on these provisions (the relevance of which are not disputed by Plaintiff), the Landlord Defendants have demonstrated that 276 West was an out-of-possession landlord, thereby shifting liability under the Lease to the tenant.

Plaintiff's efforts to identify a duty on behalf of Landlord Defendants are unavailing. First, despite claiming the existence of a Lease provision preserving 276 West's right of re-entry, Plaintiff does not identify it (*Pl Opp*, ¶ 10). Second, even if that provision can be found, the slope

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[5] The Court notes that, as actually written, the lease appears to be between 276 West and "~~Waleed A. Almaoleh~~ Shaif Abushaar"; that is, Almaoleh's name is stricken and replaced by Abushaar's. Elsewhere in the Lease, however, the "tenant" is identified as Almaoleh (*see e.g. Exh K* at pp. 4, 5, 7, 14). To the extent that neither party disputes Abushaar's role as tenant and proprietor of Seven Seas and that the analysis turns on whether 276 West was an out-of-possession landlord (and therefore not liable), the discrepancy does not impact the Court's decision.

now alleged to have caused Plaintiff's fall was not mentioned in the Bill of Particulars, which mentions only "a snow and/or ice laden condition" without mention of the slope (*Exh D*, ¶ 3[a]). Third, though Plaintiff noted the existence of a slope at his deposition (*Exh G*, 31:18-25), he testified only that he slipped on ice (*id.* at *27:15-24*). Fourth, even now, Plaintiff fails to identify, either through counsel or an expert affidavit, precisely what makes the slope "a significant structural or design defect that is contrary to a specific statutory safety provision." Finally, there is no evidence that Lemle had complete and exclusive control of the Premises such that it could be liable as 276 West's managing agent (*see Howard v Alexandra Rest.*, 84 AD3d 498, 499 [1st Dept 2011]).

Accordingly, the Landlord Defendants are entitled to summary judgment dismissing the Complaint.

Indemnification

"Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010], *citing Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777, 521 NYS2d 216, 515 NE2d 902 [1987]). For contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability (*Correia v Professional Data Management, Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]).

Where a commercial lease is the product of arm's-length negotiation between sophisticated parties who use insurance to allocate liability for injuries sustained by third

persons, an indemnification provision holding the tenant liable for the landlord's negligence is enforceable (*Port Parties, Ltd. v Mdse. Mart Properties, Inc.*, 102 AD3d 539, 540 [1st Dept 2013], *citing Great N. Ins. Co. v Interior Const. Corp.*, 7 NY3d 412, 419 [2006]; General Obligations Law § 5-321).

The Lease requires the tenant to indemnify, defend, and hold harmless the Owner and Managing Agent

> "... from and against any claims and all losses, costs, liability, damages and/or expenses, including, but not limited to, reasonable counsel fees, penalties and fines, incurred in connection with or arising from ... (ii) the use or occupancy or manner of use or occupancy of the demised premises by Tenant or any person claiming through or under Tenant, or (iii) any acts, omissions or negligence of Tenant or any such person, or any contractor, agent, servant, employee, visitor, or licensee of Tenant or any such person, in or about the demised premises (*Exh K* at p 10, ¶ 9).

The Lease also requires the tenant to procure comprehensive general liability insurance, including insurance for personal injury claims (*id.*). These provisions work together to indemnify the Landlord Defendants. To the extent that Plaintiff argues that summary judgment is premature based on an issue of fact as to Defendants' negligence, this argument is rejected for the reasons set forth above—in short, the Landlord Defendants established their freedom from negligence in that they had no duty to Plaintiff. Accordingly, the Landlord Defendants are entitled to summary judgment on their indemnification cross-claims against Seven Seas.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of Defendants 276 West 135 Street Associates LLP and Lemle & Wolff Inc. for summary judgment is granted in its entirety; and it is further

ORDERED that the Complaint and any cross-claims are severed and dismissed as against 276 West and Lemle; and it is further

ORDERED that summary judgment is granted in favor of 276 West and Lemle as to their cross-claims for indemnification against Defendant Seven Seas Deli Grocery Corp. ("Seven Seas"); and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that Plaintiff and Seven Seas shall appear before this Court for a status conference on November 29, 2016, at 2:30 p.m.; and it is further

ORDERED that 276 West and Lemle shall, within 20 days of entry, serve a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the Court.

Dated: October 17, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.