

Erez v Partnership 92 W., L.P.
2017 NY Slip Op 30064(U)
January 11, 2017
Supreme Court, New York County
Docket Number: 153754/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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DINA EREZ,

Plaintiff,

DECISION/ORDER
Index No. 153754/2013

-against-

PARTNERSHIP 92 WEST, L.P., BLDG MANAGEMENT
CO., INC., 53 WEST 72ND STREET CAFE LLC,
individually and d/b/a THE DAKOTA BAR and "THE
DAKOTA BAR,"

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Dina Erez commenced the instant action against defendants Partnership 92 West, L.P. ("Partnership"), BLDG Management Co., Inc. ("BLDG") and 53 West 72nd Street Café LLC, individually and d/b/a The Dakota Bar and "The Dakota Bar" ("Dakota") to recover for injuries she allegedly sustained when she tripped and fell on a sidewalk in front of a building located at 53 West 72nd Street, New York, New York (the "premises"). Partnership and BLDG now move for an Order pursuant to CPLR § 2221 granting them leave to renew and reargue the court's prior decision on their motion for summary judgment, which held that Partnership was not entitled to summary judgment on its cross-claims for contractual and common law indemnification and breach of contract for failure to procure insurance against Dakota, and, upon renewal and reargument, for an Order pursuant to CPLR § 3212 granting them summary judgment on their cross-claims. For the reasons set forth below, Partnership and BLDG's motion for leave to renew is denied, their motion for leave to reargue is granted and, upon reargument, their motion for summary judgment on their cross-claims is denied.

The relevant facts and procedural history of this case are as follows. On or about August 13, 2012, plaintiff allegedly tripped and fell on a height differential between two sidewalk flags on the sidewalk in front of the premises (the "accident"). Partnership and BLDG own the premises, BLDG also manages the premises and Dakota leases the premises and operates a bar and restaurant therein, which had not yet been

opened for business at the time of the accident. Pursuant to paragraph 30 of the commercial lease agreement (the “lease”) between Partnership and BLDG, as landlord, and Dakota, as tenant, Dakota “shall, at [its] own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish and maintain said sidewalks in a reasonably safe condition in compliance with requirements of law.” Paragraph 8 of the lease also requires Dakota to “indemnify and save harmless Owner against and from all liabilities...incurred as a result of any breach by Tenant...of any covenant or condition of this lease.” Paragraph 44 of the lease requires Dakota to “defend, indemnify and hold Landlord harmless from and against any and all claims, losses, liability or expense...arising out of Tenant’s use of the demised premises and/or arising in or about the demised premises or any part thereof or from any other causes due to the negligence, carelessness or otherwise improper conduct (including illegal activities) of Tenant, its servants, agents, employees, visitors, licensees during the Term of this Lease.” Further, paragraph 45 of the lease required Dakota to procure liability insurance on or before the commencement of the lease term in the amount of three million dollars protecting Dakota, Partnership and BLDG against any liability “occasioned by accident on or about the demised premises or any appurtenances thereto.”

On or about August 31, 2016, Partnership and BLDG moved for summary judgment on their cross-claims for contractual and common law indemnification and breach of contract for failure to procure insurance against Dakota. Although the notice of motion only requested that the court grant Partnership summary judgment on the cross-claims asserted in Partnership and BLDG’s answer, their counsel’s affirmation requested that the court grant summary judgment in favor of both Partnership and BLDG. In a decision dated October 20, 2016 (the “prior decision”) that treated the motion as one made by Partnership only and denied the motion in its entirety, the court found that Partnership was not entitled to summary judgment on its cross-claim for contractual indemnification on the ground that Dakota was only required to indemnify Partnership if the accident was caused by Dakota’s breach of the lease in failing to maintain and repair the sidewalk or its negligence and the court had not yet determined whether the accident occurred due to Dakota’s alleged breach of the lease or negligence. The court also found that Partnership was not entitled

to summary judgment on its cross-claim for common law indemnification on the ground that the court had not yet determined whether the accident occurred due to the negligence of any party. Further, the court found that Partnership was not entitled to summary judgment on its cross-claim for breach of contract for failure to procure insurance on the ground that Partnership had failed to make a *prima facie* showing that Dakota did not procure insurance as required by paragraph 45 of the lease.

The court first considers Partnership and BLDG's motion for an Order pursuant to CPLR § 2221(e) granting them leave to renew the court's prior decision. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and...shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)-(3). In the present case, Partnership and BLDG have failed to offer any new facts or demonstrate that there has been a change in the law that would change the prior determination and thus their motion to renew the prior decision is denied.

The court next considers Partnership and BLDG's motion for an Order pursuant to CPLR § 2221(d) granting them leave to reargue the court's prior decision. On a motion for leave to reargue, the movant must show that the court overlooked or misapprehended matters of fact or law. *See* CPLR § 2221(d)(2). As an initial matter, although Partnership and BLDG do not raise the issue in their motion papers, the court finds that it erred in treating the summary judgment motion as one made by Partnership only based upon the limited relief requested in the notice of motion. In the prior decision, the court should have determined whether BLDG was entitled to summary judgment on its cross-claims.

The court grants Partnership and BLDG's motion for leave to reargue the portion of the prior decision denying the motion for summary judgment on their cross-claim for contractual indemnification as they have shown that the court overlooked or misapprehended matters of fact or law by incorrectly interpreting the indemnification provision of paragraph 44 of the lease as applying only where Dakota's negligence caused the accident. The court now finds that the indemnification provision clearly contains three separate clauses requiring Dakota to indemnify Partnership and BLDG from claims "arising out of

Tenant's [Dakota's] use of the demised premises," "arising in or about the demised premises or any part thereof" or arising "from any other causes due to the negligence, carelessness or otherwise improper conduct (including illegal activities) of Tenant, its servants, agents, employees, visitors, [or] licensees." However, upon reargument, the court denies Partnership and BLDG's motion for summary judgment on their cross-claim for contractual indemnification. A party is entitled to contractual indemnification only when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2d Dept 2008).

In the present case, Partnership and BLDG have failed to make a *prima facie* showing of their entitlement to summary judgment on their cross-claim for contractual indemnification based upon any of the three clauses of paragraph 44 of the lease. First, Partnership and BLDG have failed to establish as a matter of law that plaintiff's claim arose out of Dakota's use of the premises as the accident allegedly occurred when plaintiff, who was not Dakota's customer, tripped and fell on uneven sidewalk flags as she was walking past the premises. Second, Partnership and BLDG have failed to establish as a matter of law that the claim arose in or about the premises as the accident allegedly occurred when plaintiff, who was merely a passerby rather than Dakota's customer, tripped and fell on the sidewalk in front of the premises. Third, Partnership and BLDG are not entitled to summary judgment based upon the clause requiring Dakota to indemnify Partnership and BLDG from claims arising "from any other causes due to the negligence, carelessness or otherwise improper conduct" of Dakota or the other listed entities as the court has not yet made a determination as to whether the accident occurred due to the negligence of Dakota or any other entity.

Moreover, although Partnership and BLDG do not move to reargue the portion of the court's prior decision denying Partnership and BLDG's motion for summary judgment on their cross-claim for contractual indemnification based upon Dakota's alleged breach of the provision of the lease requiring it to maintain and repair the sidewalk, the court adheres to its previous holding as no determination has yet been

made as to whether the accident occurred due to Dakota's alleged breach of the lease in failing to maintain and repair the sidewalk.

The court also grants Partnership and BLDG's motion for leave to reargue the portion of the prior decision denying the motion for summary judgment on their cross-claim for breach of contract for failure to procure insurance as Partnership and BLDG have shown that the court overlooked matters of fact. Specifically, Partnership and BLDG have shown that the court failed to consider the deposition testimony of Phuman Singh ("Singh"), Dakota's principal, that Dakota did not procure insurance until it opened the bar and restaurant in February 2013, although the lease was executed in June 2011. However, upon reargument, the court denies Partnership and BLDG's motion for summary judgment on their cross-claim for breach of contract for failure to procure insurance. To sufficiently state a cause of action for breach of contract, a complaint must allege (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010).

In the present case, although Singh's deposition testimony is evidence that Dakota did not have insurance when the accident occurred, Partnership and BLDG have failed to make a *prima facie* showing that they have sustained damages as a result of this failure to procure insurance. The lease only required Dakota to procure insurance protecting Partnership and BLDG against any liability "occasioned by accident on or about the demised premises or any appurtenances thereto." As Partnership and BLDG have failed to establish as a matter of law that the accident occurred on or about the demised premises or any appurtenances thereto, as discussed above, they have also failed to establish that plaintiff's claim would have been covered by the insurance policy required by the lease. Thus, Partnership and BLDG's motion for summary judgment on their cross-claim for breach of contract for failure to procure insurance is denied.

The court also grants Partnership and BLDG's motion to reargue the portion of the prior decision denying Partnership summary judgment on the cross-claim for common law indemnification insofar as the court previously failed to determine whether BLDG is entitled to summary judgment on its cross-claim for common law indemnification. However, upon reargument, the court denies Partnership and BLDG

summary judgment on their cross-claim for common law indemnification. A party seeking common law indemnity must prove both that it was not guilty of any negligence beyond statutory liability and that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999). Here, the court has yet to make a determination as to whether the accident was caused by the negligence of any party.

Accordingly, Partnership and BLDG's motion for leave to renew is denied but their motion for leave to reargue is granted. Upon reargument, Partnership and BLDG's motion for summary judgment on their third-party cross-claims against Dakota is denied in its entirety. This constitutes the decision and order of the court.

DATE:

11/11/17

KERN, CYNTHIA S., JSCHON. CYNTHIA S. KERN
J.S.C.