Dallo v Team White Bldg. Servs., Ltd.
2017 NY Slip Op 30172(U)
January 17, 2017
Supreme Court, Suffolk County
Docket Number: 7142/12
Judge: Paul J. Baisley, Jr.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JOHN DALLO,

Plaintiff,

-against-

TEAM WHITE BUILDING SERVICES, LTD., RECHLER EQUITY PARTNERS and 225 BROADHOLLOW ASSOCIATES,

Defendants.

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INDEX NO.: 7142/12
CALENDAR NO.: 201501840OT
MOTION DATE: 6/9/16
MOTION SEQ. NO.: 002 MOT D; 003 MD

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 43 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1- 15; 15-26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27-30; 31-33; 34-36; 37-39 ; Replying Affidavits and supporting papers 40-41; 42-43; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the following motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 002) of defendants Rechler Equity Partners, L.L.C., and 225 Broadhollow Associates, L.P. for summary judgment against defendant Team White Building Services Ltd. on their claims for contractual indemnification, and for breach of contract is granted to the extent that the branch of the motion for summary judgment for damages for breach of contract is granted, with damages to be determined at trial, and is otherwise denied; and it is further

ORDERED that the motion (motion sequence no. 003) of defendant Team White Building Services Ltd. for summary judgment in its favor dismissing the complaint and all cross claims against it is denied.

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a slip and fall which occurred on March 5, 2009, at the premises located at 225 Broadhollow Road, Melville, New York. Plaintiff alleges that the fall occurred due to a wet floor outside an elevator, which resulted from the negligence of one or more of the defendants herein.

Defendants Rechler Equity Partners, L.L.C., s/h/a Rechler Equity Partners ("Rechler"), and 225 Broadhollow Associates, L.P., s/h/a Broadhollow Associates ("Broadhollow") now move

for summary judgment on their cross claims for contractual indemnification, and breach of contract for failure to procure insurance. In support of the motion they submit, *inter alia*, a copy of the pleadings, the verified bill of particulars, the deposition transcripts of plaintiff, Myron White, Mark O'Loughlin, Ayorinde Otunla, a copy of the service contract between defendant Team White Building Services, Ltd. ("Team White") and RAM East, Ltd ("RAM"), and a copy of an agreement between Merchants Mutual Insurance Company and Team White. Team White opposes the motion by Rechler and Broadhollow, and moves for summary judgment dismissing the complaint and all cross claims. In support of the motion Team White submits, *inter alia*, a copy of the pleadings, the verified bill of particulars, the deposition transcripts of plaintiff, Myron White, Mark O'Loughlin, Ayorinde Otunla, the affidavit of Jose Gomez, dated January 27, 2016, and a copy of an accident report dated March 13, 2009. Rechler and Broadhollow have submitted papers in opposition to Team White's motion. Plaintiff has submitted affidavits in opposition to each of these motions.

Plaintiff testified that his accident occurred as he was exiting an elevator in the main lobby of the building located at 225 Broadhollow Road, Melville. He testified that on the day of the accident it was either rainy or snowy out, but he could not recall if he saw any caution signs by the elevators that morning. He testified that, since the floors in the lobby are marble, there are carpets that are rolled out in the lobby when it is wet outside so that it will not be slippery. He testified that when they mop the floors in the lobby they usually let them air dry, and usually put up caution signs, one for each door and one for the elevators, with the one for the elevators in the middle of the front of the security booth, so that you can see it when you come off the elevator. Plaintiff testified that the accident occurred three or four feet from the elevator. Plaintiff testified that he had not previously made any complaints about the manner in which the lobby was mopped. Upon being shown the accident report which was prepared by Mark O'Loughlin of Rechler, plaintiff stated the report said there was a "caution wet floor" sign in the lobby at the time of his accident, it must have been there, but he did not see it from inside the elevator.

Myron White testified that he is part owner and president of Team White, which performs office cleaning and janitorial services. He testified that in March of 2009 Team White worked at 225 Broadhollow Road, pursuant to a written contract. Mr. White testified that his contact person at Rechler was Mark O'Loughlin, whose office was at 225 Broadhollow Road. He testified that the subject building had a bank of four elevators, with one service elevator in the rear of the lobby. He testified that the floor in the lobby was either granite or marble. Mr. White testified that when there was inclement weather mats would be put out over the floor of the main lobby, that the mats were provided by the building, and the decision to put them out was with the building management. He testified that, pursuant to the contract, Team White had one person, Jose Gomez, who was there as the day porter. He testified that Mr. Gomez's duties included cleaning the bathrooms and the lobby and doing other work around the building to keep it clean. Mr. Gomez was also responsible for maintaining the lobby during the day, and when he mopped, he put out a sign to warn people the floor was wet. Mr. White testified that he had not had any complaints about the floors in the lobby being slippery.

Mark O'Loughlin testified he is the director of property operations for Rechler, and, as such, he is responsible for the maintenance and management of a number of properties on Long Island, including the subject property. He testified that the property at 225 Broadhollow Road is

owned by 225 Broadhollow Associates and managed by Rechler. He testified that Team White was the cleaning service for the building, and under the contract Team White had a day porter in the building. He testified that the day porter was there eight hours a day and his duties included maintaining the lobby, keeping it clean and free of dirt and debris during the day, including during inclement weather. He testified that if water was tracked into the building, the day porter would put out runners, provided by Broadhollow, so that people could walk to the elevators without slipping. Mr. O'Loughlin testified that the day porter was also expected to mop, and, if there was water on the floor, it was expected that he would put out the wet floor signs. He testified that he learned of plaintiff's accident from the concierge on duty, Ayorinde Otunla, after which he went to the lobby and inspected it. He testified that no one was mopping at the time, so the floor was dry, and he could not recall if there were signs out. He testified that he was not aware of anyone making any complaints about the floors being slippery prior to plaintiff's accident.

Ayorinde Otunla testified that he was employed by Rechler as a concierge at 225 Broadhollow Road from 2008 until 2010. He testified that in March of 2009 Team White was the cleaning service at the building. He testified that Jose Gomez was assigned by Team White to the building, and as part of his daily routine he would mop the lobby in the morning. Mr. Otunla testified that he was present at the time of plaintiff's accident. He testified that the accident occurred near the elevators. He testified that he saw plaintiff on the floor, but did not know how he got there. He testified that he could not recall if the lobby floor was wet or dry at the time of the accident. Mr. Otunla testified that the floors in the lobby were last mopped that day, but he could not recall when. Mr. Otunla testified that he was certain that there was a "caution wet floor" sign in front of his desk, and that a person exiting the elevator would be able to see that sign. He testified that the distance from his desk to the elevators was 10 to 15 feet. He testified that at the time of the accident Mr. Gomez was in the lobby, but he could not recall what he was doing. Mr. Otunla testified that he had received no complaints regarding mopped floors. He testified that mats, which were owned by Rechler, were placed in the lobby if there was inclement weather. He testified that if there was inclement weather and mats were required, they were put out by Rechler's maintenance man, Ron Simpson. Mr. Simpson made the determination as to whether or not the mats should be placed and when the mats should be removed. He could not recall if the mats were out on the day of the accident.

In his affidavit, Jose Gomez states that as part of his duties he mopped the floor in the lobby. He states that if the mopping was done during normal business hours, it was his custom to put out three caution signs prior to mopping. He states that the signs were placed in front of each entrance and in front of the security desk across from the elevators. Mr. Gomez states that he never received any complaints about wet floors. Mr. Gomez further states that he has no recollection of the accident or what he did on that day.

The accident report, which was prepared by Rechler employee Mark O'Loughlin, based upon his conversation with the plaintiff, states that the plaintiff fell while exiting from the elevator. It states that the floor was wet because the day porter was mopping up some dirt and debris that had been tracked in from the outside. It further states that there was a "caution wet floor" sign in the lobby, which plaintiff said he did not see from inside the elevator.

The proponent of a summary judgment motion 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Defendants Rechler and Broadhollow have failed to establish their entitlement to summary judgment on the issue of contractual indemnification against Team White. The right to contractual indemnification depends upon the specific language of the contract; the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement (*Sovereign Bank v Biagioni*, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]). The indemnity clause of the contract herein states, in relevant part, that the contractor, Team White shall fully protect the manager and owner, their agents, etc. against any and all loss cost damage, injury etc., "arising out of or incident to or in connection with the performance of said work and resulting from the performance of said work and resulting from said work resulting from: (1) any negligent act or omission or willful misconduct of Contractor or its subcontractors or their officers, agents, or employees..." Thus, in order to trigger the indemnification clause, it must be established that Team White was negligent and owed some duty to plaintiff herein.

A party who enters into a contract to render services may be said to have assumed a duty of care, and thus be potentially liable in tort to third persons, where: (1) the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Gordon v Pitney Bowes Management Services, Inc.*, 94 AD3d 813, 942 NYS2d 155 [2d Dept 2012]; *Sainval-Brice v All Seasons Indus. Servs., Inc.*, 85 AD3d 1004, 926 NYS2d 586 [2d Dept 2011]; *Lawson v OneSource Facilities, Inc.*, 51AD3d 983, 859 NYS2d 249 [2d Dept 2008]). It is argued by Rechler and Broadhollow, as well as by plaintiff, that Team White is liable because it failed to exercise reasonable care and that it had completely displaced the other defendants' duties to maintain the premises in a reasonably safe condition. It is argued that the contract required Team White's employee to lay down and remove lobby runners, and there is also testimony to that effect. However, there is also testimony from a Rechler employee, Mr. Otunla, that, in fact, the decision to place or remove the runners in inclement weather was made by Rechler's maintenance employee, Ronald Simpson. Thus there is an issue of fact as to whether or not Team White entirely displaced Rechler's duty to maintain the premises safely.

Furthermore, there is an issue of fact as to whetherTeam White's employee acted reasonably. Upon discovery that dirt and debris had been tracked into the lobby, Mr. Gomez mopped the floor to remove it, and, as per his normal procedure, placed warnings signs on the lobby floor, including one directly across from the elevator, which plaintiff failed to observe. Whether these actions were reasonable under these circumstances is an issue of fact, which a jury must decide.

Rechler and Broadhollow have, however, established their entitlement to summary judgment on their breach of contract claim with regard to Team White's failure to name them as additional insureds on its liability insurance policy. The service contract between Team White and RAM requires that Team White provide $2,000,000 in commercial liability insurance, per occurrence, for bodily injury, and that certificates of insurance would be provided and name the manager (Rechler) and the owner (Broadhollow) of the building as additional insureds. Because the insurance procurement clause is entirely independent of the indemnification provisions in the contract (*see Kinney v Lisk Co.*, 76 NY2d 215, 219, 557 NYS2d 283 [1990]), a final determination of liability for the failure to procure insurance "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445, 688 NYS2d 584 [2d Dept 1999]). Having failed to secure insurance naming the Rechler and Broadhollow as additional insureds, Team White is liable to them for all out-of-pocket damages caused by the breach (*see Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 955 NYS2d 302 [1st Dept 2012]; *Taylor v Doral Inn*, 293 AD2d 524, 739 NYS2d 748 [2d Dept 2003]; *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 725 NYS2d 627 [2001]). However, since the record fails to establish whether Rechler and Broadhollow had their own liability insurance covering any potential damages owed to the these defendants, any such damages will have to be determined at the trial of this matter (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, *supra*; *Cucinotta v City of New York*, 68 AD3d 682, 892 NYS2d 352 [1st Dept 2009] [Landlord's damages were limited to contract damages, equivalent to its costs of procuring own insurance policy, on its claim that tenant restaurant violated insurance provision of lease rider by failing to obtain insurance naming landlord as additional insured]; *see also Bleich v Metropolitan Mgt., LLC,* 132 AD3d 933, 19 NYS3d 527 [2d Dept 2015]).

Team White's motion for summary judgment must be denied, because, as noted above, there are issues of fact as to their potential liability which must be decided by a jury.

Accordingly, that branch of the motion by defendants Rechler and 225 Broadhollow for summary judgment against defendant White Team on their claims for contractual indemnification is denied. The branch of the motion for summary judgment for damages for breach of contract, based upon Team White's failure to procure insurance naming Rechler and 225 Broadhollow as additional insureds, is granted, with the extent of such damage to be determined at trial. The motion by White Team for summary judgment in its favor dismissing the complaint and all cross claims is denied.

Dated: January 17, 2017

HON. PAUL J. BAISLEY, JR.
J.S.C.