

Fifth Ave. Ctr., LLC v Dryland Props., LLC
2017 NY Slip Op 30623(U)
March 31, 2017
Supreme Court, New York County
Docket Number: 652724/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 35

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 FIFTH AVE. CENTER, LLC,

Index No. 652724/2015
 DECISION/ORDER

Plaintiff,

-against-

DRYLAND PROPERTIES, LLC,

Motion Seq. 003

Defendant.

-----X
 DRYLAND PROPERTIES, LLC,

Third-Party Plaintiff,

-against-

RHINOCO FITNESS LLC, REEBOK INTERNATIONAL
 LTD., AND MANHATTAN MEDICAL DEVELOPMENT
 LLC,

Third-Party Defendants.

-----X
 HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for indemnification. Third-Party Defendants, RhinoCo Fitness, LLC (“Rhino”) and Reebok International LTD. (“Reebok”) (collectively “Third-Party Defendants”), now move pursuant to CPLR § 3211(a)(7), to dismiss the Verified Third-Party Complaint (“Third-Party Complaint”) of defendant/third-party plaintiff, Dryland Properties, LLC’s (“Dryland”).

Factual Background

Dryland owns the property located at 420 Fifth Avenue, New York, NY (“building”).

On October 24, 2011, Dryland leased to Manhattan Medical Development LLC (“MMD”) the sub-cellar area of the building (“Sub-Cellar”). MMD operated a medical office thereat.

On January 23, 2012, Dryland leased to Rhino the cellar area of the building (“Cellar”), directly above MMD’s Sub-Cellar office, for a 15-year period (“Cellar Lease”). Reebok guaranteed Rhino’s obligations under the Cellar Lease pursuant to a guaranty dated January 23, 2012 (“Guaranty”). Rhino operated a “cross-fit” gym in the Cellar, which involves the “[r]epeated dropping of free weights and weighted equipment as part of individual and group classes, where participants are encouraged to fling heavy free weights into the air and letting them hit the floor,” allegedly causing “excessive vibrations, massive booms, and adversely affected the hangars and supporting pipes and conduits, and the structural integrity of the building” (Memorandum Decision, February 17, 2016, p.2) (the “February Order”).

On October 31, 2013, MMD assigned its Sub-Cellar lease to primary plaintiff, Fifth Ave. Center LLC (“Fifth Ave”), which also operates a medical office.

Thereafter, Fifth Ave. filed a complaint alleging that Dryland (as the owner) failed to abate the noise and vibrations emitted from Rhino’s gym operation (“Complaint”). The Complaint against Dryland alleges: private nuisance for failing to prevent Rhino from emitting “noxious noise and vibrations” (Compl. at ¶¶70-75); various basis for breach of contract based on Dryland’s alleged failure to prevent Rhino’s actions (¶¶77-100); and constructive eviction due to Dryland’s failure to abate Rhino’s actions. (¶¶ 101-109).

Dryland moved to dismiss Fifth Ave.’s private nuisance claim pursuant to CPLR § 3211(a)(7) on the ground the Complaint failed to allege wrongdoing by Dryland, which interfered with the rights of Fifth Ave. This Court’s February 17, 2016 Memorandum Decision denied Dryland’s motion, holding that Fifth Ave. stated a cause of action for private nuisance against Dryland, as the lease between Dryland and Fifth Ave. permitted Dryland to reenter the Cellar to

make repairs.

Thereafter, Dryland filed the Third-Party Complaint¹ against Rhino and Reebok for (1) a declaration that Rhino and Reebok are responsible for any damages awarded to Fifth Ave. (First Cause of Action); contractual indemnification pursuant to Rhino and Reebok's Cellar Lease for any damages awarded to Fifth Ave. based on Rhino's actions and/or omissions (Second Cause of Action); and costs and legal fees pursuant to the Cellar Lease (Third Cause of Action).

Rhino and Reebok's Motion

In support of their instant motion, Third-Party Defendants initially argue that Fifth Ave. does not have standing and waived its right to assert claims against Dryland because Fifth Ave. was on notice of Rhino's operation, and took possession of the Sub-Cellar "as is." Rhino entered into possession of the Cellar and began operating as a "cross-fit" gym on January 23, 2012. MMD assigned the Sub-Cellar to Fifth Ave. on or about October 31, 2013, and the assignment was made by MMD, and accepted by Fifth Ave., "AS IS, WHERE IS, without any representations or warranties of whatsoever nature, express or implied" (Friedman Aff. at ¶5). Since Rhino began its operation more than a year before Fifth Ave. accepted the assignment, Fifth Ave. was on notice of the conditions that give rise to its claims, but still assented to the assignment. Alternatively, if consideration of the Assignment is not appropriate under CPLR § 3211(a)(7), the Court should convert this motion into one for summary judgment pursuant to CPLR § 3211(c) so that this document can be considered.²

¹ The Third-Party Complaint also names MMD as a third-party defendant. The fourth and fifth causes of action are directed toward MMD.

² The Court declines to convert the motion to one for summary judgment under the circumstances (*Wadiak v. Pond Management, LLC*, 101 A.D.3d 474, 955 N.Y.S.2d 51 [1st Dept 2012]). Caselaw interpreting relief pursuant to CPLR § 3211(a)(7) permits the consideration of the Assignment under the circumstances.

Next, Dryland's Third-Party claims should be dismissed against Rhino and Reebok because Dryland, and not Third-Party Defendants, caused Fifth Ave.'s damages. The February Order denying Dryland's motion to dismiss Fifth Ave.'s private nuisance claim establishes the law of the case: that Dryland retained the right of reentry to the Cellar, and therefore, was required to cure any disruption of enjoyment caused by Rhino. Since, as a matter of law, Dryland had the right to reenter the Cellar to make repairs, it has a continuing duty to fulfill that obligation. And, according to Fifth Ave.'s Complaint, Dryland breached that duty when it failed to abate the noxious noise and vibrations. Since Fifth Ave. makes no allegations of wrongdoing as to Rhino, Dryland has no right of indemnification from Rhino. And there is no ground for liability against Reebok, whose only obligation was to indemnify Rhino's wrongdoing.

Finally, Dryland had been on notice of the Sub-Cellar's use as a medical office by MMD when it leased the Cellar to Rhino and thus aware of the noise and vibrations that would interfere with the medical office. Therefore, Dryland is liable to Fifth Ave. as a subsequent occupant of the medical office in the Sub-Cellar.

Dryland's Opposition

Initially, Dryland agrees that Fifth Ave. is precluded from asserting claims against Dryland for allegedly failing to prevent Rhino from causing noise and vibrations, since Fifth Ave. took possession of the Cellar in "AS IS" condition and "with full knowledge of the matter in which Rhino used" the Cellar (Shaw Aff. at ¶18). Further, Dryland requests that in the event the Court dismisses the Third-Party Complaint on the basis that Fifth Ave.'s "[f]irst through fifth causes of actions against Dryland do not state a claim, the Court should also sua sponte dismiss Fifth Ave's first through fifth Causes of Action" (*id.*).

Furthermore, Dryland has alleged facts sufficient to demonstrate a claim for contractual indemnification (Second Cause of Action). The Lease includes an indemnification clause wherein Rhino, by way of the Lease, and Reebok, by way of the Guaranty, agreed to indemnify Dryland for “[a]ny and all claims of any nature resulting from Rhino’s breach of the lease, act, omission, or negligence” (“Indemnification Clause”) (Opp. at 3; Lease at ¶12.1[a]).

Further, the February Order did not make a substantive ruling determining liability. Rather, the February Order decided that Dryland had the “option to make repairs and, . . . ability to cure Rhino’s nuisance. . . .” (Opp. at 10 [internal quotation marks omitted]), and that Fifth Ave. alleged facts sufficient to state a cause of action for private nuisance. Moreover, even if the February Order made a substantive ruling, it is limited to the cause of action for private nuisance. Finally, Third-Party Defendants’ argument that Dryland is liable to Fifth Ave. because it was aware that Rhino’s operation of the cross-fit gym would interfere with Fifth Ave.’s lease is an issue of fact and not proper to be heard on a motion to dismiss.

Fifth Ave.’s Response

Fifth Ave. points out that the Third-Party Defendants do not seek to dismiss the Complaint. Nevertheless, while Fifth Ave. does not take a position as to the dismissal of the Third-Party Complaint, Fifth Ave. opposes Dryland’s indirect, collateral attack of the merits of the Complaint and to Fifth Ave.’s standing to assert claims in the Complaint.

Rhino and Reebok’s Reply

Dryland fails to cite to caselaw addressing whether a landlord who retains a right to reenter the premises for the purpose of making repairs or curing defects may seek indemnification from a third party. And, the caselaw Dryland cites for the proposition that it is

not liable for a private nuisance that was created by one of its tenants, is likewise inapposite. Third-Party Defendants' cited cases establish that Dryland may not seek indemnification against them, since Dryland retained the right of reentry to the Cellar. And, Dryland fails to address the cases cited indicating that where a landlord leases property to a tenant with knowledge that the new tenant's use would interfere with the rights of an existing tenant, the landlord is liable for any resulting damage to the existing tenant.

*Fifth Ave. 's Supplemental Response*³

Dryland's purported request to dismiss Fifth Ave.'s First through Fifth Causes of Action, *sua sponte*, is not properly before the court since Dryland failed to file a cross-motion on notice to Fifth Ave, which would have been barred by CPLR § 3211(e)'s single-motion rule in any event. Third-Party Defendants also failed to indicate the procedural basis to challenge the Third-Party Complaint on the basis of the Complaint herein.

Further, Fifth Ave. argues that Third-Party Defendants' motion to dismiss Dryland's Third-Party Complaint should be denied as premature, without prejudice, since it is based on unresolved legal challenges to Fifth Ave.'s claims.

Discussion

Motion to Dismiss for Failure to State a Claim

The sole criterion for deciding a motion to dismiss pursuant to CPLR § 3211(a)(7) is whether a pleading states a cause of action (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]). A pleading states a cause of action if factual allegations are discerned from its four corners which, taken together, manifest

³ The parties filed a January 11, 2017 Stipulation permitting Fifth Ave. to file a supplemental response.

any cause of action cognizable at law (*id.*). If a cognizable cause of action is found, a motion to dismiss pursuant to CPLR § 3211(a) (7) will fail (*id.*).

In performing this analysis, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401 [1st Dept 2013]; *Nonnon v. City of N.Y.*, 9 N.Y.3d 825 [2007]; *Leon v Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]).

However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]).

*Indemnification*⁴

“A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Campos v. 68 East 86th Street Owners Corp.*, 117 A.D.3d 593, 595, 988 N.Y.S.2d 1 [1st Dept 2014], quoting *Drzewinski v. Atl. Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777, 515 N.E.2d 902, 904 [1987]; *Torres v. 63 Perry Realty, LLC*, 2014 WL 7180935 [2d Dept 2014]). Dryland alleges sufficient facts to state a cause of action for contractual indemnification against Third-Party Defendants.

The Indemnification Clause at issue provides as follows:

Tenant [Rhino] shall save Landlord [Dryland] harmless from, and indemnify Landlord against, any and all injury, loss or damage, or claims for injury, loss or damage, of whatever nature, to any person or property caused by or resulting from any breach of a covenant of this [Cellar] Lease by Tenant, any act, omission or negligence of tenant or any subtenant or concessionaire of Tenant.
(Lease at ¶12.1[a]).

The Indemnification Clause indicates that Rhino agreed to indemnify Dryland for any loss or damage resulting from Rhino’s breach of the lease or “any act omission or negligence” by Rhino. Fifth Ave.’s Amended Complaint alleges in the first through fifth causes of action, that Dryland failed to cure the “noxious noise and vibrations” *caused by Rhino* (Amended Compl.

⁴ As to the First Cause of Action, it is noted that “The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed” (*Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 826 N.Y.S.2d 55 [1st Dept 2006] citing CPLR § 3001). A declaratory judgment action thus “requires an actual controversy between genuine disputants with a stake in the outcome” (*id.*). While Dryland alleges that Rhino (and thus Reebok) are responsible for any damages awarded to Fifth Ave., and Rhino and Reebok insist that Dryland is the party responsible for Fifth Ave.’s damages, there is no specific argument that the First Cause of Action fails to state a justiciable controversy. Nor do the Third-Party Defendants address Dryland’s Third Cause of Action against them for costs and legal fees.

¶¶20-24, 27, 73, 880, *et. al.* (emphasis added)). The Third-Party Complaint, in turn, alleges that Rhino was operating the gym in the Cellar, encouraged its customers to lift and then drop the weights to the unprotected and uninsulated flooring, which caused vibrations and sounds to the detriment of the Sub-Cellar tenant Fifth Ave. below (Third-Party Complaint, ¶¶ 26-30). The Third-Party Complaint alleges that Rhino breached the Lease by creating noise that exceeded the legally permitted levels. Articles 22.1(b) and (d) of the Lease prohibit Rhino from violating any law on the Cellar. Dryland alleges that Rhino violated the New York City Administrative Code §§ 24-202, 24-203(62), and 24-218 (Third Party Complaint ¶¶ 32-40), which address the level of legally permitted noise, by emitting noises above the legally permissible levels. Further, pursuant to the Cellar Lease, Rhino is liable for and is required to hold Dryland harmless from damages claimed by Fifth Ave. (Third-Party Complaint, ¶60).

Third-Party Defendants' argument that Dryland "has no right of indemnification for damages caused by its own conduct" (Memorandum of Law, p. 7) is insufficient to warrant dismissal of the Third-Party Complaint at this juncture. Third-Party Defendants fail to establish that the Indemnification Clause is unenforceable. And, Third-Party Defendants fail to establish that they are not negligent for Fifth's Ave.'s alleged damages, as a matter of law, or that Dryland is solely liable for Fifth Ave.'s damages.

Contrary to Third-Party Defendants' contention, the Court's February Order did not establish Dryland's liability as a matter of law, and the contention that said Order established the law of the case is misplaced. In pertinent part, the February Order did not make a substantive determination, but rather only addressed the issue of whether Fifth Ave. has stated a claim of private nuisance against Dryland (*Baldasano v. Bank of N.Y.*, 199 A.D.2d 184, 185, 605

N.Y.S.2d 293, 294 [1st Dept 1993] (“[t]he doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision”); *see Wapnick v. Seven Park Ave. Corp.*, 240 A.D.2d 245, 658 N.Y.S.2d 604 [1st Dept 1997] (decision on motion to dismiss was not the law of the case since it was not decided on the merits)).

For the reasons noted above, Third-Party Defendants’ contention that Dryland was aware that leasing to Rhino’s operations would interfere with MMD’s medical office, and therefore, was aware that Rhino’s operations would interfere Fifth Ave.’s medical office, is likewise insufficient to merit dismissal of the Complaint at this juncture. Dismissal on this ground is inappropriate for resolution on this motion pursuant to CPLR § 3211(a)(7).

Third-Party Defendants cite to the following cases in support of its argument that Dryland may not shift its “responsibility to repair” to another party: *Wolfe v. Long Island Power Auth.*, 34 A.D.3d 575, 576, 824 N.Y.S.2d 390, 391-92 [2d Dept 2006]; *Gibson v. Bally Total Fitness Corp.*, 1 A.D.3d 477, 478-79, 767 N.Y.S.2d 135, 136 [2d Dept 2003]; *Langston v. Gonzalez*, 39 Misc.3d 371, 378, 958 N.Y.S.2d 888, 895 [Sup. Ct. Kings County 2013]; *Radius, Ltd. v. Newhouse*, 213 A.D.2d 614, 615-16, 624 N.Y.S.2d 227, 228 [2d Dept 1995]). However, the aforementioned cases address instances where the indemnification provision in dispute improperly sought to shift all liability to a tenant *regardless of a landlord’s own negligence*. The indemnification provision herein only shifts liability to Rhino for Rhino’s acts, omission or negligence (or of that of Rhino’s subtenant), and does not purport to shift all liability to Rhino regardless of any negligence by Dryland.

Accordingly, Third-Party Defendants’ motion to dismiss Dryland’s Verified Third Party

Complaint pursuant to CPLR § 3211(a)(7), is denied.

CONCLUSION

Accordingly, it is

ORDERED that third-party defendants, RhinoCo Fitness LLC, and Reebok International LTD.'s motion to dismiss the Verified Third-Party Complaint of Third-Party Plaintiff Dryland Properties, LLC, pursuant to CPLR § 3211(a)(7), is denied; and it is further

ORDERED that third-party defendants, RhinoCo Fitness LLC and Reebok International LTD. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 31, 2017



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

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