

Almonte v Citibank NMTC Corp.
2017 NY Slip Op 32076(U)
October 2, 2017
Supreme Court, New York County
Docket Number: 160230/2014
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIEL ALMONTE,

Index No.: 160230/2014

Plaintiff,

DECISION/ORDER

-against-

Motion Sequence 005

CITIBANK NMTC CORPORATION, CITIGROUP
TECHNOLOGY, INC., 2481 ACP OWNER, LLC,
LOUIS LEFKOWITZ REALTY, INC. AND ABM
JANITORIAL SERVICES-NORTHEAST, INC.,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memo of Law annexed	2-4
Reply Affidavits/Affirmations/Memos of Law annexed	5

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Daniel Almonte ("Plaintiff") brought this action against Defendants Citibank NMTC Corporation, Citigroup Technology, Inc. (collectively "Citibank"), 2481 ACP Owner, LLC's ("2481 ACP"), Louis Lefkowitz Realty, Inc.'s ("LLR") and ABM Janitorial Services-Northeast, Inc. ("ABM") to recover for injuries he sustained when he slipped and fell on snow and ice while walking on the sidewalk abutting Citibank. The accident occurred on February 12, 2014, at 2481 Adam Clayton Powell Boulevard in New York, New York. Plaintiff alleges in substance that Defendants were negligent in their maintenance of the sidewalk and in their snow and ice removal from the sidewalk. It had snowed approximately two or three days before Plaintiff's accident and there was approximately two or three inches of snow along the curb near the corner where Plaintiff slipped and fell. At the time of Plaintiff's accident, 2481 ACP was the out-of-possession owner of the building, LLR was the managing agent, Citibank was the commercial tenant pursuant to a lease assigned to 2481 ACP, and ABM was hired by Citibank to shovel a walking path on the sidewalk and entrances.

Defendants 2481 ACP and LLR move for summary judgment dismissal of Plaintiff's complaint and dismissal of all cross-claims against them, or in the alternative, for an order granting summary judgment in their favor on their cross-claims against Defendants Citibank and ABM. Defendants 2481 ACP's and LLR's cross-claims include contribution, contractual and

common law indemnification and failure to procure insurance. Defendants 2481 ACP and LLR argue in substance that they are not liable for Plaintiff's injuries because they are out-of-possession landlords and managing agents and 2481 ACP contracted its responsibility for maintenance of the sidewalk abutting its premises to Citibank pursuant to their lease and any non-delegable duty imposed by the New York City Administrative Code is inapplicable because Plaintiff failed to allege a violation of this statute.

The Citibank Defendants asserted cross-claims for contribution, indemnification and failure to procure insurance. This court previously granted Citibank summary judgment on its failure to procure insurance cross-claim against ABM and ABM has an appeal pending. ABM asserted cross-claims for contribution and indemnification.

For the reasons set forth herein, the court grants summary judgment in favor of Defendants 2481 ACP and LLR as to all claims and cross-claims against them and the court dismisses Plaintiff's complaint and all cross-claims against them. The court grants Defendants 2481 ACP's and LLR's summary judgment motion in their favor as to their cross-claims against Defendants Citibank and ABM's in part by granting summary judgment in favor of 2481 ACP as to its cross-claims against Citibank only and granting summary judgment in favor of LLR as to its cross-claims for contribution and common law indemnification as against Defendant Citibank only. The court denies summary judgment in favor of Defendants 2481 ACP and LLR against Defendant ABM and denies summary judgment in favor of LLR against Citibank on LLR's cross-claims for contractual indemnification and failure to procure insurance.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were

caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). New York City Administrative Code § 7-210 (a) and (b) imposes a non-delegable duty on property owners to maintain the sidewalk abutting their premises in a reasonably safe condition and such owners shall be liable for any injuries proximately caused by their negligent failure to remove snow and ice and other material from the sidewalk.

An out-of-possession property owner is generally not bound by New York City Administrative Code § 7-210 and is not liable for injuries that occur on the premises unless the owner has a contractual obligation to maintain the premises, or the right to reenter to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision (*Bing v 296 Third Ave. Group*, 94 AD3d 413, 414 [1st Dept 2012]; *Cepeda v KRF Realty*, 148 AD3d 512, 513 [1st Dept 2017]). Snow or ice is not a structural or design defect for which an out-of-possession owner may be held liable (*id.*).

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms [internal quotation marks and citations omitted]" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary [internal quotation marks and citations omitted]" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted]" (*id.* at 367). The shifting of loss under common law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

In applying these legal principles to the facts of this case and considering the facts in the light most favorable to the non-movants, the court determines that Defendants 2481 ACP and LLR demonstrated their entitlement to summary judgment dismissal of Plaintiff's complaint and all cross-claims against them as a matter of law. Additionally, Defendant 2481 ACP demonstrated its entitlement to summary judgment in its favor as to its cross-claims asserted against Defendant Citibank, but not ABM. Defendant LLR demonstrated its entitlement to summary judgment in its favor as to its cross-claims for contribution and common law indemnification as against Defendant Citibank, but not for its remaining cross-claims against Citibank, or any of this cross-claims against LLR. Additionally, the non-movants failed to raise any issues of material fact to preclude summary judgment.

Here, Defendant 2481 ACP was an out-of-possession landlord and, pursuant to the terms of the lease, Citibank agreed to be responsible for maintenance of the sidewalk abutting the premises, including the removal of snow and ice, and it agreed to indemnify, defend and hold harmless 2481 ACP for the type of claims asserted by Plaintiff. Therefore, 2481 ACP is not liable for Plaintiff's injuries because it relinquished its possession and control of the premises to Citibank and contracted out his maintenance responsibilities, including snow and ice removal from the sidewalk. Additionally, Plaintiff failed to assert any Administrative Code violations which could have imposed a non-delegable duty on Defendant 2481 ACP as the owner of the premises, unless 2481 ACP demonstrated certain circumstances. Furthermore, the non-movants failed to present any evidence that Defendants 2481 ACP or LLR were negligent in failing to properly remove snow and ice from the sidewalk, that they breached any duty toward Plaintiff or that they caused or created the alleged dangerous and hazardous condition.

Additionally, the terms of the lease between 2481 ACP and Citibank require Citibank to indemnify and hold harmless 2481 ACP from these types of claims and, since there is no evidence of any negligence on the part of 2481 ACP or LLR, Citibank is obligated to indemnify them based on common law indemnification. However, as ABM correctly noted, it is not a party to the lease between 2481 ACP and Citibank, so it is not bound by its provisions. Additionally, the terms of its agreement with Citibank only require it to shovel snow from the sidewalk and entranceways to provide a walking path, not to clear the sidewalk completely, which is required by Citibank's lease. Thus, ABM did not assume Citibank's full maintenance responsibilities required by the lease and Defendants 2481 ACP and LLR are not entitled to indemnification as third-party beneficiaries of the agreement between Citibank and ABM.

Therefore, the court dismisses Plaintiff's complaint and all cross-claims against Defendants 2481 ACP and LLR, grants summary judgment in 2481 ACP's favor as to its cross-claims against Defendant Citibank and grants summary judgment in LLR's favor as to its cross-claims for contribution and common law indemnification as against Defendant Citibank. The remainder of the relief requested not expressly granted herein has been considered and is denied.

As such, it is hereby

ORDERED that the court grants Defendants 2481 ACP Owner, LLC's and Louis Lefkowitz Realty, Inc.'s summary judgment motion to dismiss Plaintiff Daniel Almonte's complaint and all cross-claims against them, Plaintiff's complaint is dismissed as against Defendants 2481 ACP Owner, LLC and Louis Lefkowitz Realty, Inc., the Clerk is directed to enter judgment in favor of Defendants 2481 ACP Owner, LLC and Louis Lefkowitz Realty, Inc. as against Plaintiff and the other Defendants on the other Defendants' cross-claims without costs; and it is further

ORDERED that the action against the remaining Defendants is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a cop of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (Room 148), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the court grants in part Defendants 2481 ACP Owner, LLC's and Louis Lefkowitz Realty, Inc.'s motion for summary judgment in their favor on their cross-claims against Defendants Citibank NMTC Corporation, Citigroup Technology, Inc. and ABM Janitorial Services-Northeast, Inc. to the extent that the court grants summary judgment in favor of Defendant 2481 ACP Owner, LLC as against Defendants Citibank NMTC Corporation and Citigroup Technology, Inc. and grants summary judgment in favor of Defendant Louis Lefkowitz Realty, Inc. as to its cross-claims for contribution and common law indemnification against Defendants Citibank NMTC Corporation and Citigroup Technology, Inc., but denies Defendants 2481 ACP Owner, LLC's and Louis Lefkowitz Realty, Inc.'s motion for summary judgment in their favor on their cross-claims against Defendant ABM Janitorial Services-Northeast, Inc. and Defendant Louis Lefkowitz Realty, Inc.'s cross-claims for contractual indemnification and failure to procure insurance against Defendants Citibank NMTC Corporation and Citigroup Technology, Inc.

Date: October 2, 2017


HON. ERIKA M. EDWARDS