Jimenez v Kelly St. Parking
2017 NY Slip Op 32214(U)
September 22, 2017
Supreme Court, Bronx County
Docket Number: 20760/2015E
Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)
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WILFREDO JIMENEZ,

Plaintiff,

-against-

DECISION and ORDER
Index No 20760/2015E

KELLY STREET PARKING AND WESTCHESTER INTERVALE LIMITED PARTNERSHIP AND CAPITAL RETAIL DEVELOPMENT LLC,

Defendants.
----------X
HON. LIZBETH GONZÁLEZ

Plaintiff Jimenez claims that the defendants' negligence caused him to sustain serious injuries. Mr. Jimenez alleges that on 1/6/15 he slipped on snow and ice and fell on the entrance/exit ramp of a parking garage described as 950 Westchester Avenue in Bronx County. The garage is owned by defendant Capital Retail Developers, LLC ("Capital Retail") and leased to defendant Kelly Street Parking ("Kelly St. Parking"). Located above the garage is a building of residential condominium units owned by defendant Westchester Intervale Limited Partnership ("Westchester Intervale").

Procedural History

By summons and complaint dated 2/9/15, plaintiff Jimenez commenced an action against defendants Kelly St. Parking and Westchester Intervale. The defendants respectively filed an answer and served demands for the bill of particulars and discovery and the plaintiff complied. He subsequently moved to amend the complaint adding Capital Retail as a defendant. By Order dated 11/23/15, this Court granted plaintiff's motion. On 1/22/16, defendant Capital Retail filed an answer and served a demand for a verified bill of particulars. By letter dated 3/15/16, counsel for defendants Capital Retail and Westchester Intervale informed plaintiff's counsel that he had not received the bill of particulars. Here, in the instant motion dated 5/18/16, defendants' counsel states that plaintiff has not provided the bill of particulars to date.

Motions

Defendant Capital Retail asserts that it is an out-of-possession landlord and bears no responsibility for snow and ice removal from the garage entrance and sidewalk. Defendant Westchester Intervale asserts that it neither owned, occupied, managed nor controlled the area where the plaintiff slipped and fell. Defendants Capital Retail and Westchester Intervale move pursuant to CPLR 3211[a][7] to dismiss the plaintiff's complaint and amended complaint for failure to state a cause of action; and move pursuant to CPLR 3212 for partial summary judgment against defendant Kelly St. Parking awarding the defendants indemnification and reimbursement of defense costs incurred and the entry of judgment; and staying all discovery pending the resolution of this motion. The defendants' motion is respectively opposed by defendant Kelly St. Parking and plaintiff Jimenez.

Defendants' Motion to Dismiss

Defendants Capital Retail and Westchester Intervale move to dismiss the plaintiff's complaint and amended complaint for failure to state a cause of action.

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action (CPLR 3211[a][7]). "If a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated" (Siegel, NY Prac § 208 [5th ed]).

In order to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendants created the condition that caused the plaintiff to trip and fall or that the defendants had actual or constructive notice of that condition (*Uhlich* v *Canada Dry Bottling Company of New York*, 305 AD2d 107 [1st Dept 2003]). It is well settled that "a landlord is not generally liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Quing Sui Li v 37-65 LLC*, 114 AD3d 538 [1st Dept 2014]; *Howard v Alexandra Restaurant*, 84 AD3d 498 [1st Dept 2011]; *Malloy v Friedland*, 77 AD3d 583 [1st Dept 2010]).

In support of their motion, defendants Westchester Intervale and Capital Retail proffer the affidavit of Alex Arker and a 25-year lease agreement dated 9/4/09 between Capital Retail as owner/landlord and Kelly St. Parking as tenant for premises described as the "Garage Condominium Unit" located at 950 Westchester Avenue, Bronx, New York. The applicable provision regarding the maintenance of the premises is set forth:

> 18. REPAIRS AND COMPLIANCE WITH LAWS:
> (B) Tenant, at no cost to Owner, also shall keep clean and free from dirt, snow, ice, rubbish and obstructions and the ramps, sidewalks, grounds, chutes, sidewalk hoists and curbs comprising, in front of, or adjacent to, the Premises.

By affidavit, Alex Arker self-describes as a member of defendant Capital Retail and a signatory on the aforementioned lease agreement. Mr. Arker references provision 18 above including provision 12 entitled "Access to Premises" to establish that Capital Retail is an out-of-possession landlord. He asserts that Kelly St. Parking bears sole responsibility for snow and ice removal and maintenance of the garage. Mr. Arker states that he is also a member of Westchester Intervale and describes it as "a separate legal entity that owns the residential condominiums at The 950 Westchester Avenue Condominium [that] are above the garage condominium unit and are separate and distinct from the garage condominium unit." He asserts that Westchester Intervale neither owns, occupies, manages or controls the garage condominium unit, the plaintiff's accident location, and is not responsible for its maintenance.

In partial opposition to the defendants' motion, plaintiff Jimenez submits that the defendants' motion is premature due to outstanding discovery.

By affidavit, Mr. Jimenez states that he is a monthly customer and his vehicle is assigned to space #06 at the subject garage. While on the premises, he slipped on ice and fell. The plaintiff states that he looked around to identify the cause of his incident and observed a leak in the ceiling with hanging icicles directly over the spot where he fell followed by a trail of ice down the side of the wall. He describes the ceiling as "discolored," indicative of a leak that has existed "for some time." Mr. Jimenez posits that his wife took the annexed photographs of the ceiling and the icy condition about 15 minutes after the incident. The plaintiff recalls that the temperature was below freezing on 1/6/15 but does not recall snow or rain fall on that day or the day before.

In the bill of particulars served upon Capital Retail on 6/1/16, plaintiff alleges a causal relationship between the ceiling and/or roof and his slip and fall for the first time.

Plaintiff Jimenez contends that defendant Capital Retail failed to establish that it is an out-of-possession landlord. The plaintiff references provision 12 of the lease agreement where the defendant retained its right and the right of representatives of The Condominium to re-enter the premises without notice in emergency situations and with notice to inspect the premises and make necessary repairs. Mr. Jimenez references provision 18(A) of the lease agreement that outlines the landlord's repair obligations and states in pertinent part:

> 18. REPAIRS AND COMPLIANCE WITH LAWS:
> (A)Landlord shall, at Landlord's sole cost and expense, maintain, repair, and replace (as reasonably necessary) the roof, structure, foundation, footings and exterior of the Building, unless the Condominium is required to take any such action, in which event, Landlord will take all actions necessary, at its sole cost and expense, to cause the condominium to do so...Tenant shall not be obligated to repair any damage (whether structural or non-structural) which arises out of or in connection with the negligence or willful misconduct of Landlord.

In reply, defendants Westchester Intervale and Capital Retail submit that the plaintiff made no mention of a ceiling in the bill of particulars served on 6/9/15 upon Westchester Intervale and his affidavit is self-serving and feigned. The defendants challenge the photos allegedly taken by plaintiff's wife since her affidavit is absent.

Defendants' Motion for Summary Judgment

Defendants Westchester Intervale and Capital Retail move for partial summary judgment against defendant Kelly St. Parking awarding the defendants indemnification and reimbursement of defense costs incurred and the entry of judgment; and staying all discovery pending the resolution of this motion.

Summary judgment is a drastic remedy which a court should employ only when there is no doubt as to the absence of triable issues of fact (*Andre v Pomeroy,* 35 NY2d 361 [1974]; *Gibson v American Export Isbrandtsen Lines, Inc.*, 125 AD2d 65 [1st Dept 1987]).

The lease agreement delineates the indemnification terms. The hold harmless clause states in pertinent part:

> 35. INDEMNIFICATION:
> Tenant shall indemnify, defend and save harmless each holder of a Mortgage, the Condominium Board, Owner, any legal representative, heir, successor and assign thereof, whether disclosed or undisclosed, (collectively, the "Indemnified Parties") from any and all liabilities, claims, damages, losses, costs and expenses...incurred or claimed against Owner or any of the other Indemnified Parties by reason of any of the following occurring during the Term hereof...(ii) any use, occupancy, condition or operation of the Premises allegedly arising out of any act or omission of Tenant, its employees, servants, agents, invitees, contractors or licensees; (iii) any accident, injury, death or damage, regardless of the cause thereof, to any person or property occurring in, at, upon or about the Premises or any part thereof or on any street, alley, sidewalk, curb, vault or space adjacent thereto allegedly arising out of any act or omission of Tenant, its employees, servants, agents, invitees, contractors or licensees.

Defendants Westchester Intervale and Capital Retail maintain that Kelly St. Parking was obligated to indemnify and hold harmless Capital Retail from claims arising from injuries sustained on the premises. The defendants reference Mr. Arker's affidavit which references lease provision 35, cited above.

In opposition, defendant Kelly St. Parking asserts that it entered into a contractual agreement with Capital Retail and thus has no obligation to indemnify Westchester Intervale. Notwithstanding its argument, Kelly St. Parking maintains that defendants Capital Retail and Westchester Intervale's cross-claim for contractual indemnification must be denied because they have not established their absolution of liability. Defendant Kelly St. Parking, like plaintiff Jimenez, relies upon the aforementioned provision 18(A) of the lease regarding the landlord's obligations. The defendant posits that depositions have not been held and questions remain as to whether the icy condition was caused by a defective roof or building structure thereby rendering its co-defendants' motion premature.

In reply, defendants Westchester Intervale and Capital Retail maintain that although Kelly St. Parking breached the lease agreement by failing to list either of them on the excess/umbrella policy, they are both listed as additional insureds on the primary policy.

Accordingly, defendant Kelly St. Parking should defend, indemnify and reimburse Westchester Intervale and Capital Retail for all their incurred expenses.

CONCLUSION

Defendants Westchester Intervale and Capital Retail move to dismiss pursuant to CPLR 3211[a][7]. The Court's role in deciding such a motion is to determine whether the complaint states a valid cause of action on its face (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2007]). The defendants also move for summary judgment pursuant to CPLR 3212. When deciding a motion for summary judgment, the Court's function is issue finding rather than issue determination (*Sanchez v National Railroad Passenger Corp.*, 92 AD3d 600 [1st Dept 2012]).

After careful consideration of both the alleged and unchallenged facts, the Court finds that both the plaintiff and the defendants have met their respective burdens. The plaintiff states a valid cause of action. Undisputably, the plaintiff's service of the bill of particulars upon defendant Capital Retail was tardy but the defendants make no argument that they have been prejudiced. The Court also finds that there are issues of fact relative to notice, causation and liability and further discovery is necessary warranting the denial of summary judgment.

Based on the foregoing, the defendants' motion is DENIED in its entirety. Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: September 22, 2017

So ordered,

Hon. Lizbeth González, JSC