Sorrenti v Bagel Gourmet, Inc.
2017 NY Slip Op 32802(U)
September 20, 2017
Supreme Court, Suffolk County
Docket Number: 602953/15
Judge: Paul J. Baisley, Jr.
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Short Form Order

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

PUBLISH

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

INDEX NO.: 602953/15
CALENDAR NO.: 201700236OT
MOTION DATE:5/11/17
MOTION NO.: 001 MD; 002 MG; 003 XMD

THOMAS SORRENTI,
Plaintiff,

-against-

BAGEL GOURMET, INC. and H.S.L.E. REALTY CO.,
Defendants.

PLAINTIFF'S ATTORNEY:
FABER & TROY, ESQS.
180 Froehlich Farm Blvd.
Woodbury, New York 11791

DEFENDANTS' ATTORNEYS:
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
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New York, New York 10017

McCARTHY & ASSOCIATES
One Huntington Quad., Suite 2C18
Melville, New York 11747

Upon the following papers read on these e-filed motions and cross motion to vacate note of issue and for summary judgment; Notice of Motions/Order to Show Cause and supporting papers dated February 27, 2017 and March 13, 2017; Notice of Cross-Motion and supporting papers dated April 12, 2017; Answering Affidavits and supporting papers dated April 20, 2017 and May 1, 2017; Replying Affidavits and supporting papers dated May 9, 2017; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and the cross motion are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 001) of defendant H.S.L.E. Realty Co. for an order vacating the note of issue and removing this action from the trial calendar and compelling plaintiff to respond to outstanding demands for disclosure is denied; and it is further

ORDERED that the motion (motion sequence no. 002) of defendant Bagel Gourmet, Inc. for summary judgment dismissing the complaint and the cross claims against it is granted; and it is further

ORDERED that the cross motion (motion sequence no. 003) of defendant H.S.L.E. Realty Co. for summary judgment on its cross claim for contractual and/or common law indemnification against Bagel Gourmet, Inc. and granting H.S.L.E. Realty Co. reimbursement of all past defense costs is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 28, 2014, at approximately 10:30 a.m., when he fell over the single step of the side door at the premises located at 151 Main Street in East Rockaway, New York, which is owned by defendant H.S.L.E. Realty Co. ("H.S.L.E."), and leased to and operated by defendant Bagel Gourmet, Inc. ("Bagel"). The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control their property, creating a hazardous condition.

H.S.L.E. moves for an order vacating the note of issue and striking the action from the trial calendar on the ground that plaintiff failed to provide some documentation with regard to collateral sources, including union benefits, social security disability benefits, or personal tax records. H.S.L.E. also seeks an order compelling plaintiff to respond to its outstanding demands for disclosure.

The Uniform Rules for Trial Courts (22 NYCRR §202.7(a)) provide that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7[c]).

Here, the Court initially notes that the affirmation of good faith submitted by H.S.L.E.'s counsel is insufficient, as it failed to demonstrate that it made a diligent effort to resolve this discovery dispute (*see* 22 NYCRR 202.7 [c]; *Vera v New York El. & Elec. Corp.*, 150 AD3d 927, 55 NYS3d 114 [2d Dept 2017]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055, 816 NYS2d 782 [2d Dept 2006]). The Court finds that H.S.L.E.'s counsel sent a letter dated October 22, 2015 asking plaintiff to respond to its July 24, 2015 discovery demands, and that since the October 22, 2015 letter, no good faith effort has been made by H.S.L.E. to resolve the disclosure issue raised in this motion. In any event, even if a proper affirmation of good faith had been included with the moving papers, the defendant failed to demonstrate that the case is not ready for trial or that any factual allegation in the plaintiff's certificate of readiness is erroneous. It is undisputed that, at the January 12, 2017 compliance conference, counsel for the parties represented that the disclosure process was complete and, by their signature, consented to an order certifying that the action was ready for trial. Thus, H.S.L.E.'s motion is denied.

Bagel moves for summary judgment dismissing the complaint and all cross claims against it on the ground that since it did not own or control the single step to the side door where plaintiff fell, it is not liable for plaintiff's accident. Bagel contends that it is not responsible for maintaining and repairing the area of the accident, and that it did not create the alleged dangerous condition. In support, Bagel submits, *inter alia,* the pleadings, the bill of particulars, a lease agreement between H.S.L.E. and Bagel, and the deposition transcripts of the parties.

At his examination before trial, plaintiff testified that at the time of the subject accident, he was employed as a driver by Intercounty Bakers Incorporated, and that his job duties included delivering all products on the truck he was operating. On the morning of the accident, while

delivering two 50-pound bags of flour which he carried on his right shoulder, he fell over the single step of the side door. He testified that as his left foot made contact with the step, he lost balance and fell backward to the ground. When asked what caused him to lose his balance, plaintiff answered, "the height of the step." Prior to the accident, he had been to the subject premises about ten times.

At his deposition, Robert Kreisner testified that he is the co-owner of Bagel. He testified that H.S.L.E. entered the lease agreement with Bagel, which took possession of the subject premises in March 2013. Several months prior to taking possession of the store, while Bagel's application for a building permit was pending before the Town, the architect hired by Bagel submitted the plans where he drew in a pad outside the side door. However, the pad was never installed because the landlord would not permit it, and the Town never issued any instructions to install the pad. The subject step was made out of concrete. He testified that he never received any complaint regarding the side door, and that there was no prior incident involving the door.

At his deposition, Harvey Levine testified that he is the co-partner of H.S.L.E., which was the owner of the property where the subject accident occurred at the time of the accident. He testified that when Bagel asked to put a pad outside the side door, he did not permit it because it would be a tripping hazard. He testified that the side door was installed in 1994 with village approval for easier access for deliveries. He testified that there were no prior accidents involving the side door prior to the accident. He testified that while interior maintenance is the tenant's responsibility, H.S.L.E. was responsible for exterior maintenance, including the concrete underneath the side door.

Paragraph four of the subject lease agreement provides, in relevant part, that "Owner shall maintain and repair the public portions of the building, both exterior and interior." Paragraph eight of the lease agreement provides that "Tenant shall indemnify and save harmless Owner against and from all liabilities ... as a result of any breach by Tenant ... of any covenant on condition of this lease, or the carelessness, negligence, or improper conduct of the Tenant."

Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*see Seaman v Three Vil. Garden Club*, 67 AD3d 889, 889 NYS2d 231 [2d Dept 2009]; *Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she did not create the defective condition (*see Noia v Maselli*, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2d Dept 2005]).

Here, while plaintiff testified that the height of the subject step might have caused him to lose his balance, Bagel has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it had no contractual obligation to maintain and repair the concrete step where plaintiff fell, although it occupied the premises as a tenant under the lease (*see Hernandez v*

Dunkin Brands Acquisition, Inc., 136 AD3d 980, 25 NYS3d 355 [2d Dept 2016]; *Casale v Brookdale Med. Assoc.*, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; *Franks v G & H Real Estate Holding Corp.*, *supra*).

In opposition, plaintiff contends that Bagel had actual notice of the dangerous condition which caused the subject accident, and that it did not warn him or take any measure to mitigate the condition. Plaintiff submits only a photo showing the subject step was approximately 10 inches from the ground. Plaintiff alleges that the height of the step was in violation of the building code, which requires the height of the step be no more than 7 ¾ inches. However, plaintiff has failed to raise a triable issue of fact as to whether Bagel was obligated to maintain and repair the subject step (*see Futter v Hewlett Station Yogurt, Inc.*, 149 AD3d 912, 52 NYS2d 432 [2d Dept 2017]; *Hernandez v Dunkin Brands Acquisition, Inc.*, *supra*).

In opposition, H.S.L.E. contends that Bagel had actual and constructive notice of the dangerous condition which caused the subject accident. H.S.L.E. contends that although Bagel was informed by its architect that a pad should be installed in front of the side door, Bagel continued to require that all deliveries be made using the side door. As discussed above, H.S.L.E. has failed to raise a triable issue of fact as to whether Bagel was obligated to maintain and repair the subject step. Moreover, Levine conceded that he did not permit the installation of a pad outside the side door, and that H.S.L.E. was responsible for the step by the side door. Accordingly, the branch of Bagel's motion for summary judgment dismissing the complaint against it is granted.

H.S.L.E. cross-moves for summary judgment on its cross claim for contractual and/or common law indemnification against Bagel and granting H.S.L.E. reimbursement of all past defense costs. H.S.L.E. alleges that according to the lease agreement, Bagel is obligated to indemnify H.S.L.E. for damages, including legal fees, as a result of the subject accident. Here, the Court finds that H.S.L.E. has failed to raise a triable issue of fact, proffering only speculative assertions, unsupported by the record, that Bagel is obligated to indemnify H.S.L.E. When interpreting a contract, the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (*see Pellot v Pellot*, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; *Gonzalez v Norrito*, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; *Joseph v Creek & Pines*, 217 AD2d 534, 629 NYS2d 75 [2d Dept 1995]).

The Court finds that a fair and reasonable interpretation of the agreement is that the indemnification applies to any liability based on Bagel's own negligence. The clear purpose of the indemnification clause is to provide for indemnification of H.S.L.E. where, as here, it incurs expenses for claims arising out of the performance of its work provided such claims are attributable to bodily injury caused in whole or part by any negligent act or omission of Bagel (*see Estate of Nasser v Port Auth. of New York*, 155 AD2d 250, 546 NYS2d 626 [1st Dept 1989]). Based on the indemnification language, there is no basis to infer that the parties had intended that Bagel remain liable to H.S.L.E. for full indemnification under any circumstances (*see Martinez v Benau*, 103 AD3d 545, 962 NYS2d 57 [1st Dept 2013]). A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language

and purposes of the entire agreement and the surrounding facts and circumstances (*see Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 521 NYS2d 216 [1987]; *Blank Rome, LLP v Parrish*, 92 AD3d 444, 938 NYS2d 284 [1st Dept 2012]).

In view of the foregoing, the branch of Bagel's motion for summary judgment dismissing the cross claims against it is granted, and the instant action is severed and shall continue as against the remaining defendant. H.S.L.E.'s cross motion for summary judgment on its cross claim for indemnification, including legal fees, against Bagel is denied.

Dated: September 20, 2017

J.S.C.

HON. PAUL J. BAISLEY JR.