

Deans v Treber Realty, LLC
2018 NY Slip Op 30040(U)
January 10, 2018
Supreme Court, New York County
Docket Number: 155636/14
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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RAMAR DEANS,

DECISION AND ORDER
Index No. 155636/14

Plaintiff,

-against-

TREBER REALTY, LLC and 715-723 SIXTH AVENUE
OWNERS CORP.,

Defendants,

-----X
TREBER REALTY, LLC and 715-723 SIXTH AVENUE
OWNERS CORP.,

Index No. 595454/14

Third-Party Plaintiffs,

-against-

CITIBANK, N.A.,

Third-Party Defendant.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, third-party defendant Citibank, N.A. (Citi) moves for summary judgment dismissing the action against it. Third-party plaintiffs, Treber Realty, LLC (Treber) and 715-723 Sixth Avenue Owner's Corp (the Co-op), oppose Citi's motion. Treber cross moves for conditional summary judgment. The motion is granted in part and the cross motion is denied.

Background

Plaintiff Ramar Deans, a Citi employee, commenced this action against Treber and Co-op seeking recovery for injuries

that he allegedly sustained to his left wrist and hand on July 8, 2013 at 101 West 23rd Street in Manhattan (Building). Treber owns the Building. It leased the residential portion to the Co-op and the commercial portion to Citi (Premises) (Affirmation in Support [Sup], Ex G).

Mr. Deans claims that a day after water leaked into the basement, he slipped on stairs while ascending from the basement level to the main floor of the Premises because his feet got wet. Although Mr. Deans did not observe water, he noticed that the carpet was damp and saw blowers in the basement (Sup, Ex E at 57-60).

For years the Building, and specifically the Premises, suffered from water infiltration stemming from a roof leak and a ground-water leak that caused water to seep into the basement floor (Sup, Ex H Affidavit of Daniel Garley). The exact source of the water infiltration, however, was never discovered. In an effort to address the infiltration, Citi retained a contractor, Dolphin, and Treber agreed to pay \$11,078.04 for the work (Treber Opposition [Opp], Ex 5). The June 20, 2013 agreement between Citi and Treber regarding payment for the work stated in relevant part:

"Tenant is making the repair as an accommodation and the undertaking of such repair and the partial payment by Tenant is

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 3

not an admission of any responsibility of Tenant pursuant to the Lease.

Landlord is making the Payment to Tenant solely as an accommodation to Tenant and the Landlord has stated that it does not have any responsibility under the Lease to make or pay for such repairs and/or to make the Payment and/or to pay any other additional sums in connection with this matter"

(Treber Opp, Ex 5).

The Lease

The lease between Treber and Citi (Treber/Citi Lease) provides:

10. Repairs

(a) Co-op's Obligation to Repair: "Tenant understands that [Co-op] which occupies the residential portion of the building in which the demised premises are located is required under the terms of its lease to make necessary exterior and structural interior repairs to the premises (including cleaning, maintenance and repair of the sidewalks abutting the demised premises) and shall keep in good order, condition and repair all plumbing, heating and electrical equipment . . . the Co-op shall not be obligated to make any repair or rectify any condition necessitated by any act or omission of Tenant . . . their respective employees, agents, invitees, licensees or contractors. . . .

(b) Tenant's Obligation to Repair: . . . Tenant shall keep and maintain in good order, condition and repair the premises and any part thereof . . . except for those matters within the Co-op's obligation to repair . . .

20. **Access by Certain Persons**

Landlord, Co-op and its designee(s) shall have the right to enter upon the premises . . . for the purpose of inspecting the premises, making repairs or alterations to the premises or the building in which the same are located . . .

24. **Non-Liability of Landlord:** Landlord shall not be responsible to Tenant for any loss or damage that may be occasioned by . . . or for any loss or damage resulting to Tenant or its property from water, gas, steam, fire or the bursting, stoppage or leakage of sewer pipes, provided that such loss or damage is not occasioned by the negligence of the Landlord or its agents, contractors, servants or employees.

25. **Indemnity:** Tenant agrees to indemnify, defend and save Landlord harmless from and against any and all claims and demands (except such that result from the negligence of Landlord or its agents, contractors, servants or employees) for or in connection with any accident, injury or damage whatsoever caused by any person or property arising, directly or indirectly, out of the business conducted in the Premises or occurring in or about the Premises or any part thereof, . . . and from any and all costs, expenses and liabilities, incurred in connection with any such claim or proceeding brought thereon.

39. **Tenant's Insurance:** Tenant shall obtain at its own expense and keep in full force and effect during the Term, a policy of commercial general liability insurance . . . , under which Tenant is named as the insured, and Landlord, Landlord's managing agent, the Co-op, . . . are named as additional insureds. . . .

40. **Enforcement of Co-op Obligations:** For purposes of this Lease, the term "Co-op

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 5

Obligations" shall mean the obligations of the Co-op to make certain repairs to the demised premises and/or the building to otherwise provide services and benefits required to be provided by the Co-op and granted to the Tenant pursuant to the Co-op Lease and/or any terms or provisions of this Lease requiring Tenant to look to the Co-op not the Landlord for performance (collectively, the "Co-op Obligations"). Notwithstanding anything to the contrary . . . (A) Landlord shall use reasonable efforts to cause the Co-op to observe and/or perform the Co-op Obligations . . . [If the Co-op does not cure] then, unless Landlord, in its sole discretion and without obligation to do so . . . undertakes to perform the Co-op Obligations of the Co-op, Tenant shall have all the rights granted to Landlord as landlord under the Co-op Lease. . . ."

(Sup, Ex G at ¶¶ 10[a] and [b], 20, 24, 25, 39 and 40).

The Third-Party Action

Treber and the Co-op commenced a third-party action against Citi and asserted causes of action for contribution, common-law indemnification, contractual indemnification and breach of contract based on Citi's alleged failure to procure insurance (Sup, Ex C). Citi moves for summary judgment dismissing all of the third-party plaintiffs' claims against it arguing that Workers Compensation Law § 11 bars common-law contribution and indemnification claims. It urges that it was not negligent in creating any hazardous condition or in making any repairs as the repairs were not its responsibility.

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 6

Lastly, it maintains that it satisfied its obligation to procure insurance.

The Co-op opposes Citi's motion and argues that, pursuant to its lease with Treber, it was not obligated to make repairs to the Premises (Co-op Opp at ¶ 12). It also urges that because the source of the water infiltration was never discovered, issues of fact remain precluding summary judgment (Co-op Opp at ¶ 13).

Treber cross moves for summary judgment based on Citi's breach of its contractual defense obligations, breach of its indemnity obligations and breach of its insurance obligations. Alternatively, Treber seeks an order directing Citi to undertake the legal defense of Treber and to indemnify it (Affirmation in Opposition [Opp] at ¶ 2).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 7

evidence in admissible form demonstrating the absence of any disputed material facts (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013])). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Common-Law Indemnity and Contribution Claims

In an action arising from a workplace injury, a third party may assert a claim against plaintiff's employer sounding in common-law indemnity or contribution only if the plaintiff suffered grave injury (*Ironshore Indem., Inc. v W&W Glass, LLC*, 151 AD3d 511 [1st Dept 2017]; *Aramburu v Midtown West B, LLC*, 126 AD3d 498 [1st Dept 2015]; *Keita v City of New York*, 128 AD3d 409 [1st Dept 2015])). By statute, "grave injury" is defined as "permanent and total loss of use . . . of an arm, leg, hand or foot" (Worker's Compensation Law § 11). Here, plaintiff, who was injured while working for Citi, does not allege a permanent or total loss of use of his hand or wrist

(Sup, Ex F at ¶ 5); thus, the third-party plaintiffs' claims for common-law indemnification and contribution are dismissed.

Contractual Indemnification

Pursuant to the Treber/Citi Lease, Citi agreed to "indemnify, defend and save Landlord harmless from and against any and all claims and demands (except such that result from the negligence of Landlord or its agents, contractors, servants or employees)" (Sup, Ex G at ¶ 25). The Treber/Citi Lease references the lease between the Co-op and Treber in setting forth the parties' obligations to perform repairs (Sup, Ex G at ¶¶ 10 and 40). It also authorizes Citi to look to the Co-op for enforcement of the Co-op's repair obligations for the demised premises under the Co-op's lease with Treber (Sup, Ex G at ¶ 40). The Treber/Co-op lease states that the Co-op shall make all repairs to the Premises, except when Citi is negligent (Treber Opp, Ex 2 Article 9). The landlord, however, remains responsible for certain repairs to the Premises regardless of its contract with the Co-op.* Because,

*Treber is an out-of-possession owner and retained the right to reenter the Premises (Sup, Ex G at ¶ 20). "An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord . . . [has the] right to reenter in order to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision. While a landlord may not delegate its duty to keep its premises in a safe condition with regard to

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 9

among other things, there was no expert evidence attesting to the cause of the water infiltration that was the source of plaintiff's accident, no party established the negligence of any other party, the absence of its own negligence and whether the contractual indemnification clause was triggered. Accordingly, the motion and cross motion for contractual indemnification are denied.

The fourth cause of action for failure to procure insurance is dismissed. Citi submitted proof of self-insurance through Citigroup, Inc. and neither Treber nor the Co-op have come forward with any proof to the contrary (Sup, Ex I). Rather, Treber and the Co-op's insurer commenced a declaratory-judgment action urging that Citi must tender a defense in this action (*Greater New York Mut. Ins. Co. v Citigroup Inc.*, Index No. 154475/2015; Opp at 26). It is clear that Citi obtained insurance pursuant to the lease. It is unclear whether Citi must defend Treber and/or the Co-op in

third parties, a landlord is free to contract with its tenant to maintain and repair the premises, and to allocate the risk of liability to third parties by the procurement of liability insurance for their mutual benefit. If that party violates the contract by failing to maintain the premises, that party may be required to indemnify the landowner, and in such case the landowner's liability would be vicarious" (*Velez v 31 Oliver St. NYC, LLC*, 2014 WL 4063041 [Sup Ct, New York County 2014]).

Deans v Treber Realty, LLC.

Index No. 155636/14

Page 10

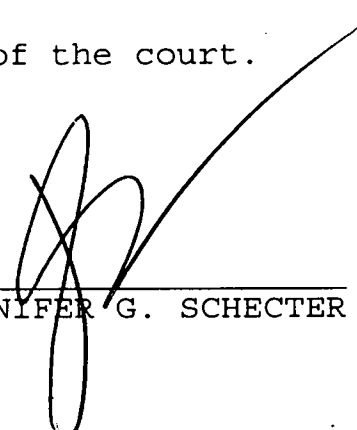
this action as the cause of the water infiltration has not been established.

Accordingly, it is ORDERED that Citi's motion for summary judgment is granted to the extent that the first, second and fourth causes of action in the third-party complaint are dismissed; and it is further

ORDERED that the cross motion for summary judgment is denied in its entirety.

This is the decision and order of the court.

Dated: January 10, 2018



HON. JENNIFER G. SCHECTER