

Yamchow v 32-42 Broadway Owner, LLC

2018 NY Slip Op 30403(U)

March 8, 2018

Supreme Court, New York County

Docket Number: 155409/2012

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
CHI-WEN WENDY YAMCHOW,

Plaintiff

Index No. 155409/2012

v

DECISION AND ORDER

32-42 BROADWAY OWNER, LLC, CAMMEBY'S
REALTY CORP., CAMMEBY'S MANAGEMENT
COMPANY, LLC, and EAGLE ALUMINUM WINDOWS,
INC.

MOT SEQ 004, 005, 006

Defendants.

(and third-party actions)

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries, the defendant third-party defendant Eagle Aluminum Windows, Inc. (Eagle), moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint, third-party complaint, and all cross claims against it (SEQ 004).

The defendants third-party plaintiffs/second third-party plaintiffs 32-42 Broadway Owner, LLC, Cammeby's Realty Corp., and Cammeby's Management Company, LLC (collectively the Broadway defendants), move for summary judgment dismissing the amended complaint and all cross claims against them and on their cause of action for contractual indemnification against the second

third-party defendant Isabella Geriatric Center, Inc. (IGC) (SEQ 005).

IGC moves for summary judgment dismissing the second third-party complaint (SEQ 006).

II. BACKGROUND

The plaintiff, an employee of IGC, was allegedly injured on April 16, 2012, when, as she attempted to open a double-hung window in IGC's 12th-floor offices, the top of the window sash became unmoored from the frame, tilted into the office, and struck her on the head.

The plaintiff commenced this action against the Broadway defendants, as owner and managing agents of the building in which IGC's offices were located. The Broadway defendants impleaded Eagle, which they had retained several months earlier to inspect the windows on the 12th floor, replace balances in 10 of those windows, and replace a window that was not the subject of this accident. The plaintiff then interposed a direct claim against Eagle, and the Broadway defendants thereafter impleaded IGC, seeking contractual indemnification pursuant to their lease, common-law indemnification, contribution, and damages for IGC's failure to secure insurance naming them as additional insureds.

The plaintiff, in essence, alleges that the window that struck her was compromised by a latent defect that caused it to

tilt into the interior of the room in which it was installed, and even fall from the window frame, when certain tilt latches on the top of the window sash were not secured. She avers that those latches could become unknowingly unsecured prior to pushing the window up or down, and that the latches could even be unwittingly undone by a person who intended only to open the window but not to tilt the top of the window sash into the interior of the room for cleaning. She further asserts that the Broadway defendants and Eagle had actual and constructive notice of the condition, and had a duty to warn of the latent condition, since they had knowledge of the problems inherent in the window's design and the consequences of opening it when the latches were not secured.

III. DISCUSSION

A. Causes of Action Against Eagle

Eagle established its prima facie entitlement to judgment as a matter of law dismissing the amended complaint against it by submitting transcripts of the parties' deposition testimony and testimony of nonparty witnesses, as well as the contract between it and the Broadway defendants. Eagle demonstrates that, as a contractor retained for a limited purpose, it owed no duty of care to the plaintiff since it did not completely displace the Broadway defendants' obligation to maintain the premises in a safe condition, the plaintiff did not detrimentally rely on its

continued performance of its contractual obligations, and it did not launch a force or instrument of harm. See Espinal v Melville Snow Contrs., 98 NY2d 136 (2002).

In opposition, the plaintiff, who relies on the same submissions as Eagle, as well as the affidavit of her retained expert professional engineer, fails to raise a triable issue of fact challenging Eagle's contentions in this regard, particularly its proof that it neither installed the subject window, replaced any parts that thereafter malfunctioned, unlatched the latches shortly prior to the accident, or failed to observe and replace any part that was broken or nonfunctional. See Grant v Caprice Mgt. Corp., 43 AD3d 708 (1st Dept. 2007).

Although Eagle owed a contractual duty to the Broadway defendants, the same evidence described above establishes its prima facie entitlement to judgment as a matter of law dismissing the third-party complaint and cross claims for contribution and indemnification that they asserted against it. In opposition, the Broadway defendants fail to raise a triable issue of fact as to whether Eagle breached its contract with them or failed to exercise due care in discharging its obligations under the contract. Hence, all claims, third-party claims, and cross claims must be dismissed against Eagle, and, upon searching the record, the court dismisses Eagle's own cross claims as academic.

B. Causes of Action Against The Broadway Defendants

A landowner and its managing agent have a duty to maintain premises in a reasonably safe condition. See Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners and their agents may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017). Although landowners and their agents have no obligation to warn of a risk of harm that is open and obvious (see Tagle v Jakob, 97 NY2d 165 [2001]), where the risk was known to them, but hidden and latent to others, liability for failure to warn of the condition may arise. See Piluso v Bell Atlantic Corp., 305 AD2d 68 (1st Dept. 2003).

Although the Broadway defendants established their prima facie entitlement to judgment as a matter of law dismissing the amended complaint against them by showing that they did not create a dangerous condition or have actual or constructive notice thereof, the plaintiff raises triable issues of fact as to their potential liability with her own testimony, nonparty witness testimony, and her expert's affidavit.

In his affidavit, professional engineer Herbert Weinstein explains that the subject window is equipped with two tilt

latches on the top of the sash perimeter which, when pressed sideways, become unlatched and permit the top of the sash to be tilted into the interior of the room in which it is installed for the purpose of cleaning. Weinstein measured the distance from the floor to the top of the sash in which the latches are embedded, reporting the distance as six feet, and opined that most office workers at IGC were too short to readily observe whether the latches were secured and intact, let alone the existence of the latches in the first instance.

Weinstein was of the further opinion that the latches can frequently become unsecured, so that when a person opens the unlatched window by pushing the sash up from the bottom, the top of the sash tilts into the room and is likely to fall out of the frame, thus striking the user. Weinstein suggested that good practice in connection with the subject window and others of its kind requires periodic inspection to assure that the tilt latches are secured and intact, and warnings to potential users to make sure that the latches are secured. The plaintiff's and nonparty witness testimony shows that, prior to the accident, such warnings were indeed posted on other floors in the Broadway defendants' building, showing both the feasibility and reasonableness of providing such warnings.

Hence, the plaintiff raises a triable issue of fact as to whether the design of all of the windows installed in the

Broadway defendants' building presented a danger, whether the Broadway defendants had actual or constructive notice thereof, and whether they failed to correct the condition and/or breached their duty to warn of the hazardous nature of the windows that were installed and the precautions that users should take before opening them.

C. Second Third-Party Complaint Against IGC

1. Contractual Indemnification

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973). The lease clause relied upon here by the Broadway defendants provides that IGC must indemnify them for claims and losses arising out of or in connection with the possession and use of the premises, "provided, however, that nothing contained [herein] shall obligate Tenant to indemnify Landlord from any claim, loss, damage, liability or expense to the extent resulting from the negligence or willful misconduct of Landlord or Landlord's

agents." Since triable issues of fact exist as to whether the Broadway defendants were negligent, there is no basis at this juncture to grant either that branch of IGC's motion which is for summary judgment dismissing the contractual indemnification cause of action in the second third-party complaint or that branch of the Broadway defendants' motion which is for summary judgment on that cause of action.

2. Common-Law Indemnification and Contribution

Common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing a plaintiff's injuries. See Hawthorne v South Bronx Community Corp., 78 NY2d 433 (1991); Structure Tone, Inc. v Universal Servs. Group, Ltd., 87 AD3d 909 (1st Dept. 2011); Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc., 59 AD3d 311 (1st Dept. 2009). IGC has established, prima facie, that any liability that might be imposed upon it will not be imposed upon it vicariously, but only, if at all, by virtue of a contractual obligation. The Broadway defendants do not raise a triable issue of fact in opposition to that showing.

In any event, since there is no proof that the plaintiff sustained a "grave injury" within the meaning of Workers' Compensation Law § 11, no cause of action for common-law indemnification or contribution lies against IGC, since it is the plaintiff's employer. See Isabella v Hallock, 22 NY3d 788

(2014). Hence, the third and fourth causes of action in the second third-party complaint, which are respectively for common-law indemnification and contribution, must be dismissed.

3. Failure to Procure Insurance

Since IGC does not address the third-party cause of action alleging that it failed to secure insurance naming the Broadway defendants as additional insureds, neither does the court.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of the defendant third-party defendant Eagle Aluminum Windows, Inc., for summary judgment dismissing the amended complaint, the third-party complaint, and all cross claims against it (SEQ 004) is granted, and the amended complaint, third-party complaint, and all cross claims asserted against Eagle Aluminum Windows, Inc., are dismissed; and it is further,

ORDERED that, upon searching the record, the cross claims asserted by the defendant third-party defendant Eagle Aluminum Windows, Inc., against the defendants third-party plaintiffs/ second third-party plaintiffs 32-42 Broadway Owner, LLC, Cammeby's Realty Corp., and Cammeby's Management Company, LLC, are dismissed as academic; and it is further,

ORDERED that the motion of the defendants third-party

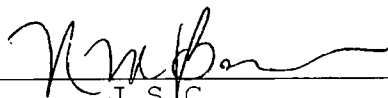
plaintiffs/second third-party plaintiffs 32-42 Broadway Owner, LLC, Cammeby's Realty Corp., and Cammeby's Management Company, LLC, for summary judgment dismissing the amended complaint and all cross claims asserted against it, and on the first cause of action in the second third-party complaint against the second third-party defendant, Isabella Geriatric Center, Inc. (SEQ 005), is denied; and it is further,

ORDERED that the motion of the second third-party defendant, Isabella Geriatric Center, Inc., for summary judgment dismissing the second third-party complaint (SEQ 006) is granted to the extent that the third and fourth causes of action in the second third-party complaint are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: March 8, 2018

ENTER:



J.S.C.

HON. NANCY M. BANNON