

Saunders v 2400 Ryer Ave. Realty, LLC

2018 NY Slip Op 31509(U)

June 13, 2018

Supreme Court, Bronx County

Docket Number: 22704-2013

Judge: Fernando Tapia

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13**

DENISE SAUNDERS

Plaintiff,

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- against -

2400 RYER AVENUE REALTY, LLC, RETTNER
BUILDING MANAGEMENT CORPORATION,
VALENTINE PARKING, LLC and CITY OF NEW
YORK

Defendants.

DECISION

Court grants defendants' 2400 RYER AVENUE REALTY, LLC (Ryer) RETTNER BUILDING MANAGEMENT CORPORATION (Rettner) motion for summary judgment for a defense and contractual indemnification as against defendant VALENTINE PARKING, LLC (Valentine) but denies movants motion for summary judgment as to plaintiff. Co-defendant Valentine's cross-motions for summary judgment is denied in its entirety as being untimely submitted.

Addressing defendants Ryer and Rettner motion brought against co-defendant Valentine, movants contend that Valentine, pursuant to lease agreement entered into between Lessor defendant Ryer and co-defendant Lessee Valentine on July 19, 2001 along with the appended Rider, the agreement obligated Valentine to maintain and repair "the structural and non-structural portions of the demised premises the entranceways and ramps, walls, dividers, poles, supports, drives, parking areas, sidewalks, directly abutting or adjacent to the demised premises...".¹

Lessor and Lessee were fully apprised pursuant to Riders opening paragraph that "In the event of any conflict between provisions of the rider and the provisions of the printed form lease,

¹ Defendant Ryer's Exhibit I.

the provisions of this Riders shall govern.”² Both the rider and printed lease form were duly signed and executed by Ronald Rettner, President of Ryer and Lawrence Lipman, managing member of Valentine. It is uncontested by the co-defendants that the lease agreement and appended rider were agreed to in an arms length transaction by sophisticated signatories and reviewed by their respective attorneys prior to signing. A literal reading of paragraph 6 of the rider, clearly imposes upon Valentine the responsibility for the maintenance and structural repairs to the directly abutting or adjacent sidewalk. Likewise, with respect to the right of indemnification paragraph 14 of the rider clearly imposed not only a duty on Valentine to indemnify Ryer and Rettner, but its triggered by “any accident, injury to or claimed to have occurred, on or about the demised premises or any part thereof...”. Additionally any argument regarding the unenforceability of the indemnification agreement because it does not contemplate Ryer/Rettner’s own negligence in violation of GOL 5-321 must fail, given the fact that here Rettner and Valentine have addressed Rettner’s potential liability by both agreeing pursuant to paragraph 13 of the rider to “allocating the risk of liability to third parties between themselves, essentially through the employment of insurance”.³ As in *Hogeland*, Rettner and Valentine as two sophisticated parties drew up an arm’s length commercial lease agreement which included a broad indemnification provision⁴ with an insurance procurement requirement.⁵ This court, therefore, finds that defendant Ryer and Rettner have met their burden of showing their right to a defense and indemnification as to co-defendant Valentine.

² *Id.*

³ *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 160 (1977); *See also Great Northern Ins. Co. v. Interior Constr. Corp.* 7 N.Y.3d 412 (2006).

⁴ Paragraph 14 of Rider.

⁵ Paragraph 13 of Rider.

As to Valentine's cross-motion, it is denied as untimely pursuant to *Brill v City of New York*; ⁶ CPLR 3212(a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." In its cross-motion for summary judgment, Valentine concedes the fact that its cross motion is untimely ⁷ and more importantly offers no "good cause" for why this court should accept its cross-motions untimely submission. To argue good cause on nothing other than a bald assertion that a "timely summary judgment motion was made on nearly identical grounds" is woefully insufficient to establish "good cause". Defendant Valentine's cross-motion is denied as untimely. ⁸

Co-defendants Ryer and Rettner additionally move for summary judgment against plaintiff on the grounds that plaintiff could neither identify the hole that caused her accident nor describe it in any way from a photograph of the alleged accident scene. Defendants thus would have this court deem the cause of her accident as more speculation. To obtain summary judgment movant must meet her burden of showing that there are no triable issues of fact warranting a trial. ⁹ Once the party moving for summary judgment tenders sufficient evidence to demonstrate the absence of any material issue of fact, the burden shifts to the non-moving party to produce evidence in admissible form sufficient to establish the existence of material facts in dispute warranting a trial. ¹⁰ In the instant matter, plaintiff has made a sufficient showing of material facts in dispute that requires a trial. The fact plaintiff fell as a result of a defect in the sidewalk abutting defendant Valentine's demised premises is supported by her deposition testimony that

⁶ 2 NY3d 648 (2004).

⁷ See Valentine's Cross Motion, Pg. 3 ("while the instant motion is made beyond the deadline...").

⁸ *Brill v City of New York*, 2 NY3d 648 (2004).

⁹ See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

¹⁰ See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988).

she “was walking and all of a sudden I just stepped right into a hole ... in front of the parking garage.”¹¹ Plaintiff further testified that the sidewalk “was broken up so it had a lot of holes and cracks.”¹² Although plaintiff was unable to identify the specific hole that caused her to fall, she attributes this to her having been disoriented as the result of the fall. Nevertheless, plaintiff’s inability to identify the specific hole that caused her fall is not fatal to her demonstrating a “causal nexus between the defect and her fall.”¹³ The plaintiff’s inability to pinpoint the exact location of her fall in photographs...does not render her testimony speculative.”¹⁴

This court finds, construing the evidence in light most favorable to the non-moving party,¹⁵ that material issues of fact exist requiring this case go before the trier of fact.

This constitutes the decision of the court.

Dated: June 13, 2018

Bronx, New York



Hon. Fernando Tapia J.S.C.

¹¹ See Ryer and Rettner Exhibit D, Pg. 28 LL 6 to 11.

¹² *Id.* Pg. 39, LL 15-20.

¹³ *Kovach v PJA, LLC*, 128 AD3d 445 (1st Dept. 2015).

¹⁴ *Figueroa v City of New York*, 126 AD3d 438, 440 (1st Dept 2015).

¹⁵ See *Weiss v. Garfield*, 21 A.D.2d 156 (3d Dept. 1964).