Madden v Masaryk Towers Corp.
2018 NY Slip Op 32375(U)
September 24, 2018
Supreme Court, New York County
Docket Number: 150727/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ELLENNORA MADDEN,

Plaintiff,

-against-

MASARYK TOWERS CÓRPORATION, METRO MANAGEMENT & DEVELOPMENT, INC., and NTT SELF STORAGE, LLC,

Defendants.

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DECISION/ORDER

Index no. 150727/16

Mot. Seq. Nos. 001 & 002

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. In mot. seq. No. 001, defendant NTT Self Storage, LLC (NTT) moves, pursuant to CPLR 3212, for summary dismissal on the Complaint of plaintiff, Ellennora Madden (Plaintiff) and all cross-claims. In mot. seq. No. 002, defendant Masaryk Towers Corporation (Masaryk) and Metro Management & Development, Inc. (Metro) (collectively, Masaryk defendants), moves pursuant to CPLR 3212 for summary dismissal on the Complaint. Motion sequences 001 and 002 are consolidated for joint disposition.

Factual Background

Plaintiff is a resident of a building located at 85 Columbia Street, New York, New York. Masaryk owns the building and Metro was the building manager at the time of Plaintiff's accident. NTT is a company that builds and leases personal storage units. On April 10, 2013, NTT entered into a Storage Room License Agreement (Storage Room Agreement) with Masaryk, wherein Masaryk granted NTT "an exclusive license . . . to use the vacant space (i) in a designated area of the basement beneath [Masaryk 's] building located at 87 Columbia Street . . . and (ii) in a designated area in the basement corridor running beneath and between

[Masaryk 's] buildings located at 85 and 87 Columbia Street . . . (Harris Aff., Ex. J, ¶1). According to Nhi Tran (Tran), the owner of NTT, in July 2013, NTT installed the storage units in the basement of the premises (Tran Aff., ¶6). On August 1, 2013, NTT entered into a Storage Unit License Agreement (Storage Unit Agreement) with Plaintiff, wherein Plaintiff received a license for the use of two storage units. (Harris Aff., Ex. K, ¶1). Plaintiff alleges that on the date of her accident she slipped on a wet surface in the building's basement, near her storage units. Plaintiff claims that leaking pipes in the basement created the wet condition that caused her to fall.

Discussion

"Summary judgment must be granted if the proponent makes 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Contractual Waiver of Liability

In support of its motion for summary dismissal of the Complaint (motion sequence 001), NTT first argues that Plaintiff waived all claims against NTT under the Storage Unit Agreement, since the Agreement contains a liability waiver releasing NTT from any claims for personal injury for its own negligence (the Liability Waiver).

In support of their motion (mot. seq. 002), the Masaryk defendants argue that they are intended third-party beneficiaries of the Storage Unit Agreement, and that liability against them is waived pursuant to the Liability Waiver.

In opposition to NTT's motion, Plaintiff argues that the Liability Waiver is unenforceable. Plaintiff first contends that under General Obligations Law (GOL) § 5-321, NTT is statutorily prohibited from exempting itself from its own negligence, since a landlord-tenant relationship existed between NTT and Plaintiff. Second, Plaintiff contends that NTT was grossly negligent for failing to maintain the storage locker area in good condition, despite knowledge of the alleged recurring condition that caused Plaintiff's accident—the leaking pipes flooding the storage area in the basement (Kleinman Aff., ¶51), and for deliberately exacerbating the leaking condition by requesting that the Masaryk defendants seal a small hole in the basement wall from which water drained. Third, Plaintiff argues that the Liability Waiver is vague and ambiguous since it does not contain any distinguishing characteristics. In reply to Plaintiff's opposition, NTT contends that the GOL §5-321 is inapplicable because the relationship between NTT and Plaintiff was that of a licensor-licensee.

"In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications" (*Lago v. Krollage*, 78 N.Y.2d 95, 99 [1991]). "[A]n exculpatory provision ordinarily will be enforced when its language 'expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence' " (*Uribe v. Merchants Bank of New York*, 91 N.Y.2d 336, 341 [1998], quoting *Lago v. Krollage*, 78 N.Y.2d 95, 100 [1991]; *Gross v. Sweet*, 49 N.Y.2d 102, 107 [1979] ["unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts"]; *Layden v. Plante*, 101 A.D.3d 1540, 1543 [1st Dept 2012]). However, "public policy forbids a party from attempting to

avoid liability for damages caused by grossly negligent conduct" (*Obremski v. Image Bank, Inc.*, 30 A.D.3d 1141, 1142 [1st Dept 2006]).

Under GOL § 5–321, a provision in a rental agreement which purports to exempt a lessor from liability for its own acts of negligence is void against public policy and unenforceable (GOL § 5–321; *Ben Lee Distributors, Inc. v. Halstead Harrison P'ship*, 72 A.D.3d 715, 716 [2d Dept 2010]; *Lennard v. Mendik Realty Corp.*, 43 A.D.3d 279, 279 [1st Dept 2007]).

Here, the Liability Waiver precludes Plaintiff's claims against NTT. NTT makes a *prima facie* showing that it is entitled to summary dismissal of the Complaint by submitting the Liability Waiver, which explicitly bars liability against NTT for personal injuries resulting from its own negligence:

> [NTT] . . . shall not be responsible for any personal injury, death or property damage to [Plaintiff] or [Plaintiff's] property (as applicable), however so caused, including resulting from negligence of [NTT].

(Harris Aff., Ex. K, ¶17).

In opposition, Plaintiff fails to raise an issue of fact. Plaintiff's argument that the liability waiver is statutorily void under GOL § 5-321 is without merit, as NTT and Plaintiff had licensor-licensee relationship, rather than a landlord-tenant relationship.

Moreover, the relationship between NTT and Masaryk was also that of a licensee-licensor. Thus, NTT may not have conveyed a lease to Plaintiff when it was not accorded a lease itself. Accordingly, GOL § 5–321 does not void the Liability Waiver.

"A license is a revocable privilege given to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands" (*Union Square Park Cmty. Coal., Inc. v. New York City Dep't of Parks & Recreation*, 22 N.Y.3d 648, 656 [2014] [internal quotation marks and citations omitted]; *see also Z. Justin Mgmt. Co. v. Metro Outdoor, LLC*, 137

A.D.3d 577, 578 [1st Dept 2016]). On the other hand, for an agreement to constitute a lease creating a landlord-tenant relationship, there must be an indication that, by the terms thereof, plaintiff pays rent "for outright ownership [of a definite space] for the duration of the term" (*Linro Equip. Corp. v. Westage Tower Assocs.*, 233 A.D.2d 824, 826 [3d Dept 1996], citing *Kaypar Corp. v Fosterport Really Corp.*, I Misc 2d 469 [Sup. Ct., Bronx County 1947], *affd* 272 A.D. 878 [1st Dept 1947]). A lease is not created where the essential element of sole and exclusive dominion and control over the designated space is lacking (*see Women's Interart Ctr., Inc. v. New York City Econ. Dev. Corp. (EDC)*, 97 A.D.3d 17, 21 [1st Dept 2012]; *Karp v. Federated Dep't Stores*, Inc., 301 A.D.2d 574, 575 [2d Dept 2003]; *Sebco Laundry Sys., Inc. v. Oakwood Terrace Hous. Corp.*, 277 A.D.2d 303, 304 [2d Dept 2000]).

The Storage Room Agreement granted NTT permission to operate its storage units in Masaryk's basement, but did not give NTT exclusive possession and control over the subject area. It contains no provisions that explicitly convey property rights. Rather, the Storage Room Agreement's stated purpose grants NTT the exclusive license to use two vacant spaces located in Masaryk's basement, "to be used only by [NTT] for the installation, operation, management and licensing of individual storage units . . . . " (Harris Aff., Ex. K, ¶¶1, 2). The Storage Room Agreement neither divests Masaryk of absolute possession and control over the area where the storage units were placed, nor grants such rights exclusively to NTT. Moreover, while not dispositive, the Storage Room Agreement indicates that the "relationship of [NTT] to [Masaryk] is that of a licensor and licensee, and no other relationship whatsoever, and nothing contained herein shall be construed to make [Masaryk] and [NTT] landlord and tenant" (*id.*, ¶24).

Moreover, NTT's operation of the storage units is subject to numerous contractual requirements and restrictions. The Storage Room Agreement limits NTT's licensing of the

storage units by requiring that the units be "limited exclusively to use by the Masaryk Towers Shareholders on a first-come-first serve basis," and required NTT to confirm with it that an individual satisfied this requirement prior to entering into a unit license agreement (*id.*, ¶ 2[a], [c]). Further, the Storage Room Agreement required NTT to obtain Masaryk prior written approval of its Storage Unit License Agreement and required that the Unit License Agreement contain a provision indicating that access to the storage site be limited to the hours of 7:00 a.m. to 10:00 p.m. (*id.*, ¶¶2[d],(f)).

Masaryk retained the right to access "the Storage Site at all times as and when required for [Masaryk] to perform repairs, maintenance and alterations to the Storage Site or. any of [Masaryk]'s buildings and/or property . . . " and to "maintain and install electrical, plumbing, water and other utility lines and conduits in and through the Storage Site for the servicing of the Storage Site or any of [Masaryk's] buildings and/or property" (*id.*, ¶10), Importantly, there is no obligation for NTT to pay a monthly rent to Masaryk. Instead NTT agreed that it would pay Masaryk thirty-five percent of all revenue generated from the storage site each month (*id.*, ¶3[c](i)) (*see Feder v. Caliguira*, 8 N.Y.2d 400, 404 [1960]). Clearly, NTT had Masryk maintained a licensee-licensor relationship Masryk, and, thus, did not have capacity to form a landlord-tenant relationship with Plaintiff.

Plaintiff's additional contentions are also without merit. Plaintiff's argument that the liability waiver is vague and ambiguous is unavailing, since the type-written language of the exclusionary language is expressed in unmistakable language and unequivocal terms (*Gross*, 49 N.Y.2d at 107). Moreover, as fully addressed below, NTT could not have been grossly negligent, since it did not owe Plaintiff a duty to maintain the defective condition.

As neither Metro nor Masaryk are intended beneficiaries of the Storage Room Agreement, the Masaryk defendants are not protected from liability by the exculpatory language in that agreement. "The parties' intent to benefit the third party must be apparent from the face of the contract" (*LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108 [1st Dept 2001] [internal citations omitted]). "Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent" (*id.*, citing *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45 [1985]; *see also Girlshop, Inc. v. Abner Properties Co.*, 5 A.D.3d 141, 141 [1st Dept 2004] [dismissing third-party beneficiary claim where there was "no clear indication that the parties to the lease intended to confer upon plaintiff the right to enforce" the relied-upon lease provision]). Here, the Storage Unit Agreement does not expressly name either Masaryk or Metro as an intended third-party beneficiary, nor does it authorize either party to enforce any obligations thereunder.

Negligence

NTT argues that it did not owe Plaintiff a duty of care with respect to the alleged dangerous condition, and that it did not breach any duty of care. Further, NTT argues that it did not create or have notice of the alleged defective condition. Specifically, NTT submits the affidavit Tran, its owner, wherein he states that NTT did not perform any construction, repair, or renovation of the building's plumbing system (¶11). Moreover, Tran affirms that NTT has not received complaints concerning the building's plumbing system of water damage in the area where Plaintiff fell (¶12). Further, NTT contends that not did not have constructive notice of the alleged condition.

In opposition, Plaintiff argues that NTT failed to maintain the storage locker area in a reasonably safe condition. Specifically, Plaintiff contends that under the Storage Room Agreement, NTT had a duty to keep the storage locker area in good condition and repair.

Plaintiff further contends that a question of fact exists as to whether NTT created the condition that caused Plaintiff's accident.

In reply, NTT argues that it did not breach a duty owed to Plaintiff, since it did not own or occupy the premises and that Plaintiff is a non-party to the Storage Room Agreement. Further, NTT argues that it did not create or have notice of the alleged defective condition. Finally, NTT argues that, as a licensee, it did not have the obligation to repair the building's plumbing system.

"In order to establish negligence, [a] plaintiff is required to prove the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]). It is well established that liability for a dangerous condition on or within a property, must be predicated upon occupancy, ownership, control or special use of the premises at issue (*Gibbs v Port Auth. of New York*, 17 AD3d 252 [1st Dept 2005]; *Jackson v Board of Educ. of City of New York*, 30 AD3d 57 [1st Dept 2006]; *Valmon v. 4M&M Corp.*, 291 AD2d 343 [1st Dept 2002]).

As discussed above, NTT has made a *prima facie* showing that it was a licensee, and thus it did not have a possessory interest in the premises. Further, NTT did not have control of the condition that caused Plaintiff's accident, as the Storage Room Agreement indicates that the Masaryk defendants were responsible for maintain the plumbing system (Harris Aff., J ¶¶5,10). Thus, NTT makes a *prima facie* showing that it did not owe a duty to Plaintiff.

In opposition, Plaintiff fails to raise an issue of fact, as she is unable to demonstrate that NTT owed her a duty to remedy the defective condition pursuant to the Storage Room Agreement. Generally "a contractual obligation, standing alone, will ... not give rise to tort liability in favor of a third party" (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136,

138 [2002]; *see also Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 111 [2002] ["Ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor"]). The Court in *Espinal* articulated three exceptions to the rule:

> "[A] party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

(*id.* at 140 [internal quotation marks and citations omitted]).

Here, there is no evidence that NTT launched a force or instrument of harm.[1] Plaintiff argues that an issue of fact exists as to whether NTT caused Plaintiff's accident by requesting that the Metro defendants seal a small hole leading to the only drain in the basement. However, Plaintiff fails to submit any evidence that sealing the hole created the condition that caused Plaintiff's accident or supporting her claim that "once the hole was sealed, the water had nowhere to drain creating an even greater hazard" (Kleinman Aff. ¶¶15, 79).

Moreover, even if NTT owed Plaintiff a duty to clear the water in the basement, failing to do so does not rise to the level of "gross negligence" (*see e.g. Obremski v. Image Bank, Inc.*, 30 A.D.3d 1141, 1142 [1st Dept 2006] [finding no gross negligence where defendant's conduct did not demonstrate a reckless disregard for the rights of others as to constitute intentional wrongdoing]). Since NTT did not have a duty to Plaintiff to remedy the defective condition, Plaintiff's argument that NTT had notice of the defective condition is rendered academic.

[1] Plaintiff does not contend that the second or third *Espinal* exceptions apply.

Open and Obvious

In support of their motion for summary judgment, the Masaryk defendants argue that the defective condition was open and obvious. The "open and obvious nature of an obstacle or defect simply negates the property owner's duty to warn of it; it does not eliminate the property owner's duty to ensure that its property is reasonably safe" (*Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [1st Dept 2009] [internal quotation marks omitted]).

However, Plaintiff is not arguing that the Masaryk defendants failed to warn her of a dangerous condition. Instead, Plaintiff argues that Masaryk had notice of a dangerous recurring water condition in the storage locker area, and that Masaryk and Metro exacerbated the condition by sealing the only drain in the subject area. Thus, the Masaryk defendants fail to make a *prima facie* showing of entitlement to judgment by arguing that the water condition was open and obvious.

Even if the Masaryk defendants had made a *prima facie* showing, Plaintiff raises an issues of fact as to whether Masaryk maintained the premises in a reasonably safe condition. That is there is ample evidence that a dangerous condition existed and that the Masaryk defendants had notice of it. According to Maximo Vazquez (Vazquez) Metro's Maintenance Supervisor, custodial personnel swept and mopped the basement area daily and they mopped or vacuumed the area if there was any water present in the basement (Kleinman Aff., Ex. B, 35:2-23; 83:5-84:6; 43:23-46:21). Vazquez specifically testified that leaks in the basement were identified and repaired (*id.* at 61:9-65:25).

Plaintiff testified that immediately before her accident she observed "a lot of water" on the floor in front of multiple storage units, including her own (*id.* Ex. A, 32:24-33:5), and that she was walking four feet from her locker when she slipped on a "slimy" and "slippery" floor

surface. (*id.*, 42:6-12). Additionally, Alvarez testified that he observed water on the floor in the storage unit area on multiple occasions prior to Plaintiffs accident (*id.* Ex. C, 29:7-30:10).

While Metro, as property manager, could have argued that it had no duty to plaintiff based on the *Espinal* exceptions, it makes no such argument and submits arguments as to its liability that are coextensive to those offered as to Masaryk's liability. That is, Metro does not specifically address Plaintiff's claim that it exacerbated the subject condition by sealing the only drain in the area, and whether such conduct is sufficient to meet the *Espinal* exception for launching an instrument of harm. Thus, as the Masaryk defendants fail to make a *prima facie* showing, their motion for summary judgment dismissing the Complaint must be denied.

Cross-Claims

The Masaryk defendants bring cross claims against NTT for common-law and contractual indemnification, as well as contribution (Masaryk defendants Answer, ¶¶16-34). The cross claims for common-law indemnification and contribution are dismissed, as the court has determined that NTT was not negligent. As for contractual indemnification, the agreement between NTT and Masaryk provides:

> "Licensee shall indemnify, defend and hold ... Licensor ... from all claims, actions, demands, damages, costs and expenses (including reasonable legal fees and disbursements), judgment and settlement of any nature whatsoever arising out of (i) a breach of this License Agreement by Licensee or any of Licensee's Group; (ii) the use of the Storage Site by Licensee or any of Licensee's Group; or (iii) the acts, omissions, negligence and/or willful misconduct of Licensee or any of Licensee's Group."

NTT argues that it does not owe Masaryk contractual indemnification, as it did not breach its license agreement, and because the accident did not arise out of its negligence, or its use of the storage site. As to negligence, of course, the court has already determined that the accident did not arise through NTT's negligence. As to the other two

circumstances in which contractual indemnification would be appropriate, the Masaryk defendants make no arguments. Thus, NTT is entitled to dismissal of the cross claim for contractual indemnification against it.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant NTT Self Storage, LLC (NTT) for summary judgment dismissing the Complaint and all cross-claims as against it (mot. seq. No. 001) is granted. It is further

ORDERED that the motion of defendants Masaryk Towers Corporation and Metro Management & Development, Inc. (mot. seq. 002) for summary judgment dismissing the Complaint is denied. It is further

ORDERED that the Clerk enter judgment accordingly. It is further

ORDERED that the case is severed and shall proceed against the remaining defendants. It is further

ORDERED that defendants NTT shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: September 24, 2018

Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.