

1875 Lexington, LLC v El Barrio Fed. Credit Union

2018 NY Slip Op 34473(U)

November 1, 2018

Supreme Court, Kings County

Docket Number: Index No. 515580/18

Judge: Edgar G. Walker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of November, 2018.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice.

-----X
1875 LEXINGTON, LLC AND DREYFUS REALTY
MANAGEMENT, LLC,

Plaintiffs,

- against -

Index No. 515580/18

EL BARRIO FEDERAL CREDIT UNION,

Defendant.

-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

| | | |
|---------------------------------------------------------------------------------------------------------------|------------|------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | <u>1-3</u> | <u>4-5</u> |
| Opposing Affidavits (Affirmations) _____ | <u>6</u> | <u>7</u> |
| Reply Affidavits (Affirmations) _____ | <u>7</u> | <u>8</u> |

Upon the foregoing papers, plaintiffs 1875 Lexington, LLC (1875 Lexington) and Dreyfus Realty Management, LLC (Dreyfus) move for an order: (1) granting Dreyfus summary judgment on its complaint against El Barrio Federal Credit Union (El Barrio), pursuant to CPLR 3212; (2) directing the clerk of the court to enter judgment in favor of Dreyfus for reasonable attorneys' fees, costs and disbursements in an amount to be calculated at an inquest, plus statutory interest thereon, pursuant to CPLR 5001; (3) directing El Barrio to pay Dreyfus for the reasonable costs and disbursements it incurred "for the purchase of the insurance coverage El Barrio was required to purchase for the benefit of Dreyfus under its lease, in an amount to be calculated at an inquest . . ." plus statutory interest, pursuant to CPLR 5001; and (4) directing the clerk of the court to schedule an inquest.

El Barrio cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing all claims asserted against it.

Background

The Trip and Fall Accident

On November 15, 2013 at approximately 10:30 a.m., Ilia Deploti (Deploti), a pedestrian, was allegedly injured when he tripped and fell on the sidewalk abutting the mixed use property at 156 East 117th Street in New York, also known as 1875 Lexington Avenue (Property). Deploti allegedly “sustain[ed] severe personal injuries when he was . . . caused to trip and fall due to a dangerous/defective condition of the sidewalk . . . consist[ing] of a protruding oil cap on the sidewalk abutting the [P]roperty . . .” which oil filler cap was not flush with the surrounding sidewalk.

At the time of the accident, 1875 Lexington owned the Property, Dreyfus was the managing agent of the Property and El Barrio leased Store #1 located “east of the main entrance” of the Property, pursuant to a March 16, 2005 lease with 1875 Lexington (Lease).

The Personal Injury Action

On March 27, 2014, Deploti commenced a personal injury action against 1875 Lexington asserting a single cause of action for negligence. Subsequently, on November 13, 2014, Deploti amended his complaint to add Dreyfus as an additional defendant.

The Third-Party Action

On December 5, 2016, 1875 Lexington and Dreyfus commenced a third-party action against El Barrio by filing a third-party summons and third-party complaint. The third-party complaint alleges that Deploti’s injuries “were caused as a result of the acts, conduct or omissions of [El Barrio], without any fault on the part of” 1875 Lexington and Dreyfus. 1875 Lexington and Dreyfus asserted 3 causes of action against El Barrio for: (1) breach of

the Lease by failing to acquire general liability insurance on their behalf; (2) breach of the Lease by failing to defend and indemnify 1875 Lexington and Dreyfus; and (3) contractual indemnification.

On February 23, 2017, El Barrio answered the third-party complaint, denied the material allegations therein and asserted 19 affirmative defenses, including that the Lease did not obligate El Barrio to defend, indemnify or procure insurance for 1875 Lexington and Dreyfus.

After the completion of discovery, Deploti filed a February 16, 2017 note of issue and certificate of readiness, thereby indicating that the action was ready for trial.

Subsequently, by a June 21, 2018 order, Deploti's underlying personal injury action, which settled, was severed from the third-party action. The third-party action proceeded against El Barrio under a new index number reflected on the caption herein.

The Summary Judgment Motion

1875 Lexington and Dreyfus now move for summary judgment in favor of Dreyfus on its claims asserted against El Barrio. They contend that El Barrio is obligated to defend and indemnify Dreyfus, and was obligated to procure liability insurance for Dreyfus, under the terms of the Lease. They further argue that, under the Lease, El Barrio was obligated to repair and maintain the sidewalk (where Deploti fell) abutting El Barrio's leased space.

1875 Lexington and Dreyfus rely on Paragraph 54, Section J, of the Rider to the Lease, entitled "Operation of Business," which provides:

"54. OPERATION OF BUSINESS. Tenant agrees:

* * *

"J. To clean and remove all debris, snow, ice, and litter from the sidewalk in front of the Demised Premises and outward (beyond the width of any sidewalk) for a distance of 18 inches into the street or as may be required by Legal Requirements of commercial property owners or occupants. *Tenant, at its own cost and expense, shall perform all*

sidewalk repairs in front of the Demised Premises and maintain said sidewalk and keep it in good condition and repair throughout the entire term of this Lease. Any violations issued by the city agencies for violations issued in connection with the sidewalk adjacent to the Demised Premises, Tenant will promptly reimburse the Landlord for all costs and expenses associated with such work. All such costs and expenses shall be deemed Additional Rent. The sidewalk adjoining to the Demised Premises shall be used solely for the purpose of pedestrian traffic, and the delivery of merchandise, and Tenant shall not erect or install or permit the erection or installation of any structure, display of any kind upon the sidewalk, nor permit the sidewalk to be used for the purpose of advertising, display or sales of goods or services” (emphasis added).

1875 Lexington and Dreyfus also rely on paragraph 65 (A) and (B) to the Rider to the Lease, entitled “Tenants Indemnity,” which provide:

“A. To the maximum extent permissible by law, Tenant agrees to indemnify and save harmless Landlord and its members, *managers*, agents, contractors and employees from and against all claims of whatever nature arising from (a) the direct conduct or management of the Demised Premises or any business thereon, (b) any work or thing whatsoever done, or any condition created (other than by Landlord, its employees, agents or contractors) in or about the Demised Premises or (c) any negligent or otherwise wrongful act or omission of Tenant or any of its subtenants, licensees or invitees or its or their employees, agents, or contractors, whether resulting in injury or death to persons or damage to property or otherwise.

“B. The foregoing indemnity and hold harmless agreement shall include all costs, expenses and liabilities (including, without limitation, attorneys’ fees and disbursements) incurred by Landlord, its members, *managers*, agents, contractors and employees in or in connection with any such claim or any action or proceeding brought thereon, and the defense thereof. In no event shall Tenant be obligated to indemnify or save harmless Landlord or its members, managers, partners, agents, contractors or employees from or in respect of any claim or matter which results from the negligence or willful act of such party” (emphasis added).

In addition, 1875 Lexington and Dreyfus rely on paragraph 66 (A) of the Rider to the Lease, entitled “Insurance,” pursuant to which:

“Tenant agree[d] to maintain in full force and effect from the date upon which Tenant first enters the Demised Premises . . . throughout the Lease Term and thereafter . . . (i) a policy of Comprehensive

Commercial General Liability with Property Damage Insurance . . . under which Landlord Parties (as defined below) are named as additional insureds and Tenant is named as the insured. . . .”

Paragraph 66 (B) provides that “Landlord Parties” include “Landlord’s managing agent.”

Although the Lease had a 5-year term, which expired in February 2010, 1875 Lexington and Dreyfus assert that, under paragraph 76 of the Rider to the Lease, El Barrio (and El Barrio’s successor, Alliance)¹ became a month-to-month tenant subject to the terms of the Lease, “which included repair and maintenance of the sidewalk where [Deploti] fell.”

El Barrio, in opposition, argues that Dreyfus is not entitled to summary judgment because plaintiffs failed to prove that it was responsible for correcting the type of condition that caused Deploti’s accident. El Barrio asserts that the oil filler cap protruding from the subject sidewalk “was not [a condition] that required sidewalk repair [by El Barrio], but one that required repairs to the subject building’s utility system, specifically its oil pipe.” El Barrio argues that Dreyfus is not entitled to contractual indemnification because the terms of the Lease do not require El Barrio to perform repairs to the building’s utilities. El Barrio claims that 1875 Lexington and Dreyfus “exercised special use of the portion of the sidewalk where [Deploti] fell by utilizing the oil pipe and filler cap to feed oil into the building in order to operat[e] their heating system.” El Barrio contends that, under the law, “the use of an oil filler cap is considered special use and places the burden of repair on the property owner that uses that oil filler cap and/or oil pipe.”

El Barrio’s Summary Judgment Cross Motion

El Barrio cross-moves for summary judgment dismissing the complaint based on the same grounds that it opposed plaintiffs’ summary judgment motion. Essentially, El Barrio

¹. 1875 Lexington and Dreyfus also contend that paragraph 39 of the Rider to the Lease “provides that any agreements within the lease shall bind El Barrio’s successors and assigns.”

argues that it was not responsible for repairing the oil cap protruding from the sidewalk abutting the Property because 1875 Lexington and Dreyfus exercised special use of the oil cap as part of the heating system for the entire Property.

Discussion

“Though not ordinarily liable for the repair and maintenance of the sidewalk abutting his premises, an owner is liable if he creates the condition which causes injury or if the injury is caused by a defect in that portion of the sidewalk *which confers a benefit to him as a special use*” (*Santorelli v City of New York*, 77 AD2d 825, 826 [1980] [emphasis added]). “It has long been the rule that where a condition in a sidewalk is so constructed as to accommodate a special use of the adjoining landowner, that special use imposes upon the landowner the stringent duty to the general public of maintaining that area of the sidewalk in a safe condition” (*Schechtman v Lappin*, 161 AD2d 118, 120 [1990]). “Special use cases generally involve the installation of an object in the street or on the sidewalk, *such as an oil cap* or a runway, for the benefit of a private landowner” (*Minott v City of New York*, 230 AD2d 719, 720 [1996] [emphasis added]).

New York appellate courts have repeatedly held that the use of an oil filler cap embedded in a sidewalk and leading to the boiler used to heat a building constitutes a special use of the sidewalk (*see Espinosa v JMG Realty Corp.*, 53 AD3d 408, 409 [2008] [holding that “[s]ummary judgment was properly denied to JMG, whose special use of the sidewalk imposed on it a duty to maintain the area around the fuel cap in a safe condition]; *Schechtman v Lappin*, 161 AD2d at 121 [holding that “oil filler cap here is such a ‘special use’ . . . since it is used to facilitate the delivery of fuel oil to defendants’ building”]; *Santorelli*, 77 AD2d at 826 [holding that oil filler cap in sidewalk and leading to boiler is special use of sidewalk by owner of building]; *see also McGee by McGee v City of New York*,

252 AD2d 483, 484 [1998] [holding that “[a]lthough the *oil cap constitutes a special use*, the injured plaintiff did not say that he tripped over the oil cap, but only pointed to a general area of the sidewalk where he tripped”] [emphasis added]).

While the oil filler cap constituted a special use of the sidewalk, El Barrio has failed to demonstrate that 1875 Lexington and/or Dreyfus were under a duty to maintain and repair that special use area. “The doctrine of special use imposes an obligation on the abutting landowner *or occupier* to maintain a public sidewalk in a reasonably safe condition to avoid injury to others, where it puts part of the sidewalk to a special use for its own benefit *and that part of the sidewalk is subject to its control* (*Beda v City of New York*, 4 AD3d 317, 318 [2004] [emphasis added]). “An out of possession owner cannot be held liable unless she exercised some control over the sidewalk *or was contractually obligated to repair the unsafe condition*” (*Rocco v Marder*, 42 AD3d 516, 517 [2007] [emphasis added]; *see also Flores v Baroudos*, 27 AD3d 517, 518 [2006] [same]).

Here, paragraph 54 (J) of the Rider to the Lease between 1875 Lexington and El Barrio specifically and unambiguously provides that “[t]enant, at its own cost and expense, *shall perform all sidewalk repairs* in front of the Demised Premises *and maintain said sidewalk* and keep it in good condition and repair throughout the entire term of this Lease” (emphasis added). Thus, El Barrio, as lessee, had a contractual duty to maintain and repair the sidewalk (including the special use area at issue) under the express terms of the Lease.² In addition, paragraph 65 to the Rider to the Lease required El Barrio to indemnify Dreyfus, the managing agent of the Property, for “any negligent or otherwise wrongful act or omission of Tenant” and for any reasonable attorneys’ fees and disbursements incurred by Dreyfus.

² Although the 5-year term of the Lease expired in 2010, under paragraph 76 of the Rider to the Lease, El Barrio became a month-to-month tenant *subject to the terms of the Lease*.

Under paragraph 66 (A) of the Lease, El Barrio was also required to purchase general liability insurance naming Dreyfus as an additional insured. Consequently, Dreyfus is entitled to the reasonable cost that it may have incurred to purchase such liability insurance (*see Inchaustegui v 666 5th Ave. Ltd. P'ship*, 268 AD2d 121 [2000], *affd*, 96 NY2d 111 [2001]). Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in favor of Dreyfus for breach of the Lease and contractual indemnification is granted; and it is further

ORDERED that the parties shall appear before the court on _____, 2018 for an inquest to determine the reasonable attorneys' fees and disbursements incurred by Dreyfus in connection with Deploti's personal injury action and the reasonable cost that Dreyfus incurred to purchase liability insurance; and it is further

ORDERED that El Barrios's summary judgment cross motion seeking to dismiss the complaint is denied.

This constitutes the decision and order of the court.

ENTER,



J. S. C

HON. EDGAR G. WALKER

2018 NOV 16 AM 9:06
FILED
KINGS COUNTY CLERK
8