SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ESTEBAN MEDINA

INDEX NO. 152846/16

MOT. DATE

- v -

MOT. SEQ. NO. 003 and 004

FISCHER MILLS CONDO ASSOCIATION et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action arising from a slip and fall on ice on a sidewalk. In motion sequence number 003, defendant Unity Environmental Corp ("Unity") moves for summary judgment dismissing plaintiff's complaint and all crossclaims against it. Unity further seeks summary judgment on its cross-claim for either full or conditional contractual indemnification against defendant Wichcraft, LLC ("Wichcraft") as well as an award for reasonable counsel fees and insurance costs. Defendant/third-party plaintiff The Fischer Mills Condo Association and Fischer Mills Management (collectively "Fischer") partially oppose the motion with respect to its crossclaim against Unity. Wichcraft and plaintiff also oppose the motion.

In motion sequence number 004, Fischer moves for summary judgment on its crossclaims against Unity. Unity opposes that motion.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

At the outset, the court will consider both surreplies filed by Wichcraft and Unity in its discretion, since no party will be prejudiced by their consideration as the parties have all had a further opportunity to respond.

The relevant facts are as follows. Plaintiff claims that on February 6, 2014, at approximately 7:15am, he slipped and fell on ice on the sidewalk directly in front of a commercial condominium located at 397 Greenwich Street, New York, New York ("premises" or "condo"). Plaintiff was at the premises because he was in the process of delivering baked goods to Wichcraft, which operates a cafe thereat. In turn, Wichcraft leased the premises from Unity, which owns the condo. Fischer owns the common elements in the building in which the condo is located.

According to plaintiff, about six inches of snow fell the day before his accident, which ended at

Dated: 1/7/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (Mot. Seq. 004) ☐ DENIED ☒ GRANTED IN PART (Mot. Seq. 003) ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

approximately 9pm. No climatological records have been provided to the court. On the date of his accident, plaintiff testified that the subject sidewalk had been shoveled, and snow was piled up on the curb. Before the accident, plaintiff parked his truck directly in front of the premises. He took three steps and slipped on a patch of ice. Plaintiff identified an area directly in front of the premises as the location of his accident. Plaintiff further explained that he was "right underneath the awning that's there" when he slipped and fell. Plaintiff observed icicles on the awning after he fell.

Plaintiff has asserted negligence claims against Fischer, Wichcraft and Unity. In turn, Fischer, Unity and Wichcraft have each asserted counterclaims (and in Fischer's case, direct claims against Unity as well) for contribution as well as both common law and contractual indemnification against each other.

Unity maintains that it is out-of-possession owner entitled to contractual indemnification from Wichcraft based upon the underlying lease, which indisputably obligated Wichcraft to remove snow and ice from the abutting sidewalk and indemnify Unity against any claims arising from Wichcraft's breach of the lease or its negligence. Unity further argues that Admin Code § 7-210 is inapplicable.

Meanwhile, Fischer contends that Unity's motion as to its crossclaims should be denied. Fischer argues that if plaintiff slipped and fell, Fischer is entitled to a conditional order on common law indenfiication because it was not negligent and did not control the sidewalk where the accident occurred. There is no dispute that the condominium declaration obligated Unity to repair and maintain the sidewalk in front of the premises. Further, the condominium bylaws required Unity to keep the sidewalk in front of and adjacent to the premises "free from dirt, snow, ice, rubbish and other obstructions or encumbrances..."

In its opposition, Wichcraft contends that Unity's motions should be denied because Unity had a duty to maintain the awning above the condo and that plaintiff's accident was caused by water which dripped down onto the sidewalk and refroze. Therefore, Wichcraft argues that there is a triable issue of fact as to whether Unity was negligent. Wichcraft further maintains that it didn't breach its lease with Unity and finally that the indemnification provision in the lease violates GOL § 5-321.

In reply and in opposition to Fischer's motion, Unity maintains that Fischer's motion should be denied because it has failed to show that Unity was negligent. Unity further argues that Wichcraft was obligated under the lease "to take good care" of the awning because it is an appurtenance,

Meanwhile, plaintiff has provided an affidavit in opposition to Fischer's motion, wherein he states that:

> I believe that the melting snow and icicles hanging from the overhang dripped to the ground in the area where I fell and turned to ice. This caused ice to form in the area where I fell. I believe this is partly the reason ice was built up on the area where I fell.

Plaintiff argues that there is a triable issue of fact as to whether the defective condition was caused by snow or ice on the awning which precludes Fischer's motion. Unity contends that plaintiff's affidavit contradicts his prior deposition testimony and should be rejected.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regard-

less of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider the only viable claim for contractual indemnification, which is by Unity against Wichcraft based upon the underlying lease. Paragraph 36 of the lease (Exhibit H), contained on pages 8 and 9 of the lease Rider, is entitled, "Tenant Covenants.", Subsection "viii" states the following as to Wichcraft's obligation:

> ... [I]ndemnify, defend and hold harmless [Unity] against and from any and all claims arising from any breach or default on the part of [Wichcraft] in the performance of any covenant or agreement on the Part of [Wichcraft] to be performed pursuant to the terms of this Lease, or arising from any negligence of [Wichcraft] ...

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). As the Court of Appeals held, a party may be indemnified for its own negligence "only where the contractual language evinces an 'unmistakable intent' to indemnify" (*Great N. Ins. Co. v. Interior Constr. Corp.*, 7 NY3d 412 [2006]).

To support a claim for attorneys' fees incurred in litigation between the parties to a contract, an indemnification clause must be "exclusively or unequivocally referable to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]).

Here, the court finds that Unity is entitled to contractual indemnification from Wichcraft based upon the clear terms of the lease, since plaintiff's claims indisputably arise out of Wichcraft's alleged failure to keep the adjacent sidewalk free from snow and ice. The court rejects Wichcraft and plaintiff's arguments regarding the awning, since it is speculative. Plaintiff's deposition testimony was only that he observed "icicles" hanging from the awning after he fell. Plaintiff's affidavit is not based upon facts, but only supposition. Neither plaintiff nor Wichcraft have come forward with evidence from which a reasonable fact-finder could conclude that the icy condition which cause plaintiff's accident was caused by water dripping from the awning which refroze. Relatedly, both Unity and Fischer are entitled to summary judgment dismissing the cross-claims against them (*infra*).

As for Wichcraft's argument premised upon GOL § 5-321, that argument is also unavailing. While GOL § 5-321 expressly applies to leases, Wichcraft has not demonstrated that plaintiff's accident was caused solely by the Unity's negligence, such that GOL § 5-321 would apply.

Unity, however, is not entitled to reimbursement for costs and attorney's fees, since the indemnification provision does not unequivocally provide for same. Instead, the agreement only provides that Wichcraft would defend and hold Unity harmless against and from any and all claims (*cf. Klock v. Grosodonia*, 251 AD2d 1050 [4th Dept 1998] [reasonable attorney's fees recoverable where agreement provided for indemnification against "any and all injury, loss or damage of whatever nature"...]. Therefore, that branch of Unity's motion is denied.

Next, the court considers Fischer's and Unity's remaining crossclaims. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of

any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]).

An out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair the subject defective condition (*Bing v. 296 Third Ave. Group, L.P.*, 94 AD3d 413 [1st Dept 2012]; see also *Scott v. Bergstol*, 11 AD3d 525 [2d Dept 2004] [owner established entitlement to summary judgment by demonstrating that it was an out-of-possession landlord with no duty to remove snow and ice from the premises]).

There is no dispute on this record that based upon the condominium's Declaration and Bylaws, Unity was responsible for snow and ice removal operations in the first instance. Therefore, Fischer's duty under Admin Code § 7-210[b] to maintain the sidewalk adjacent to the building was shifted to Unity pursuant to the condo's operative documents. Accordingly, Fischer's motion for summary judgment on its claim for common law indemnification against Unity is granted.

Unity has also demonstrated that it is an out-of-possession owner/lessor and while it had the right to re-enter, it did not exercise that right nor was the condition which caused plaintiff's accident "a significant structural or design defect" (see *Ross v. Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Instead, it was just ice that Wichcraft was obligated to remove pursuant to the lease.

A party may seek a conditional indemnification order prior to resolving the main action, so long as there are no issues of fact as to that party's active negligence (*Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]. Since Unity has demonstrated that it was not actively negligent, it is entitled to conditional common-law indemnification against Wichcraft.

Unity's motion is therefore granted to the extent that it is entitled to dismissal of plaintiff's claims against it and conditional contractual and common law indemnification against Wichcraft, since Unity has not established as a matter of law that Wichcraft breached the lease or that it was negligent. Unity's motion is otherwise denied.

CONCLUSION

In accordance herewith, it is hereby **ORDERED** that Unity's motion is granted only to the extent that Unity is entitled to dismissal of plaintiff's claims against it and conditional contractual and common law indemnification against Wichcraft; and it is further

ORDERED that Unity's motion is otherwise denied; and it is further

ORDERED that Fischer's motion is granted and it is entitled to summary judgment on its claim and cross-claim against Unity for common law indemnification against Unity.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/7/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.