

Gebhart v O'Flynn Enters. LLC
2019 NY Slip Op 30180(U)
January 22, 2019
Supreme Court, New York County
Docket Number: 151074/2016
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

INDEX NO. 151074/2016

VILLETTE GEBHART,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 004

- v -

O'FLYNN ENTERPRISES LLC, D/B/A LE GRAINNE CAFÉ,
STEVEN J. SHORE, SANDRA JACOBUS SHORE, DOMINICK
DOE, SAID NAME BEING FICTITIOUS, REAL NAME UNKNOWN,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 182

were read on this motion to/for

JUDGMENT - SUMMARY

The motion for summary judgment by defendants Steven Shore and Sandra Shore is granted only to the extent that they are entitled to conditional summary judgment on their contractual indemnity claim against defendant O'Flynn Enterprises, LLC (the "Restaurant") and denied as to the remaining branches of the motion. The cross-motion by plaintiff for summary judgment is denied.

Background

This action arises out of a slip and fall that occurred on February 23, 2015 as plaintiff was exiting a restaurant known as Le Grainne Café in Manhattan around 11:30 p.m. Plaintiff claims that as she entered the restaurant she noticed that there was snow and ice in front of the restaurant (plaintiff's tr at 15). Plaintiff added that there was ice in the vestibule (a walled-off entrance to the restaurant located on the sidewalk), although plaintiff acknowledged she did not slip on this ice when she entered the restaurant (*id.* at 16).

Plaintiff testified that she slipped on the ice while exiting the restaurant (*id.* at 22).

Plaintiff explained that as she stepped down into the vestibule her left foot slid on the ice and she lost her balance and fell (*id.* at 27-28).

Discussion

“It is well settled that the proponent of a summary judgment motion must make 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Pullman v Silverman*, 28 NY3d 1060, 1062, 43 NYS3d 793 [2016]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

“To be entitled to summary judgment, defendant, as a property owner, was required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property” (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 71, 773 NYS2d 38 [1st Dept 2004]).

“An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to enter in order to inspect or repair, and the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision” (*Ross v Betty G. Reader Revocable*

Trust, 86 AD3d 419, 420, 927 NYS2d 49 [1st Dept 2011] [internal quotations and citation omitted]).

The Shores move for summary judgment dismissing plaintiff's complaint on the ground that they were an out-of-possession landlord. The Court rejects that argument because the Shores live in an apartment above the restaurant. Cases considering whether a landlord is out-of-possession usually concern whether the landlord has a right to re-enter and the extent to which the landlord has ceded control over the property (*see e.g., Ross*, 86 AD3d at 420). But this Court cannot conceive of a situation in which a landlord would be entitled to summary judgment where the landlord lives in the building. That means the landlord is in the premises nearly every day.

The Court also finds that there are triable issues of fact regarding the defendants' constructive notice of the ice. According to plaintiff, she saw the ice in front of the restaurant when she arrived around 8:30 p.m. (around three hours prior to the accident).

Indemnification

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The Shores claim that pursuant to the lease, the Restaurant was required to remove snow and ice on the sidewalk and that the Restaurant would indemnify the Shores for any liability arising out of the Restaurant's obligations under the lease.

In opposition, the Restaurant claims that the where plaintiff fell was not part of the leased premises and, therefore, the Shores are liable if plaintiff is able to prove her case. The

Restaurant argues that the vestibule—where plaintiff fell—was built on top of the sidewalk and the sidewalk was not leased to the Restaurant.

In reply, the Shores point out that the lease requires the Restaurant to clear ice from the front of the Restaurant and that the accident occurred because plaintiff slipped on ice. The Shores also observe that the lease allows the Restaurant to place tables on the sidewalk and serve patrons of the café on the sidewalk. This means, according to the Shores, that the vestibule was part of the “demised premises” of the Restaurant.

The lease between the Restaurant and the Shores provides that the “Owner shall maintain and repair the public portions of the building, both exterior and interior” and “Tenant shall maintain such exterior installations in good appearance . . . and the sidewalks thereto” (NYSCEF Doc. No. 133, ¶ 4). The Lease also requires The Restaurant to “indemnify and save Landlord harmless from and against all damages, liabilities, claims, costs and expenses, including reasonable attorney’s fees, arising out of the use of the Demised Premises or any work or thing done, or any condition created by Tenant or its employees, agents or contractors whether or not caused by negligence or breach of an obligation to Tenant” (*id.* ¶ 50).

The other indemnification provision of the lease, paragraph 8, provides that “Owner or its agents shall not be liable for any damage to property of Tenant . . . nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees” (*id.* ¶ 8).

With respect to ice removal, the lease states:

“As a material obligation hereunder Tenant shall clean, sweep and maintain the sidewalks in front of the House daily (both on Ninth Avenue and on 21st Street) and shall keep *the same free of litter, snow, ice* and other debris at all times. For purposes of this Article 64, the term “sidewalks” shall include the curbs and eighteen (18”) inches of street abutting the curbs in running parallel to any portion of the House. Tenant shall be solely responsible for any violations relating to the

repair or cleanliness of the sidewalks during the term hereof, and Tenant shall pay any fines levied in connection therewith upon demand, and the same shall constitute additional rent hereunder. Tenant shall remove the snow from Landlord's driveway area, clearing a path wide enough for a car from the gate to the street including any snow that accumulates at the foot of the driveway in the street area. Tenant shall also clean the tree pit in front of 183/185 Ninth Avenue and water the time" (*id.* ¶ 64 [emphasis added]).

The House is defined as "the two structures located at premises 301 West 21st Street (a/k/a 183 Ninth Avenue) and 185 Ninth Avenue, New York, New York" (*id.* ¶ 77[19]). The Demised Premises are "the space leased to Tenant hereunder, which is described at the beginning of the Lease" (*id.* ¶ 77[18]). The lease concerns the first floor of the building at 183 Ninth Avenue (a/k/a 401 West 21st Street) (*id.* at 1).

This maze of lease provisions establishes that the Restaurant was obligated to clear ice from 183 Ninth Avenue (where the Restaurant was located on the first floor and also where the Shores lived) and that the Restaurant must indemnify the Shores for personal injuries arising out of the failure to remove the ice. Therefore, the Shores are entitled to contractual liability arising from plaintiff's alleged accident (*see Collado v Cruz*, 81 AD3d 542, 917 NYS2d 178 [1st Dept 2011] [holding that a tenant could still be required to indemnify an owner pursuant to the terms of a lease despite an owner's non-delegable duty to maintain the sidewalk under Administrative Code § 7-210]).

Even if the Court were to accept the Restaurant's argument that the accident had to occur in the Demised Premises in order for contractual indemnity to apply, the Court finds that the vestibule was part of the Demised Premises. There is no dispute that the Restaurant put up the vestibule and the vestibule was the entrance to the Restaurant. A tenant cannot put up a temporary structure and then claim that a landlord is responsible for an injury that occurs within that structure. Put another way, the Restaurant claimed part of the sidewalk to keep customers

warm in the winter. That makes that portion of the sidewalk part of the premises leased to the Restaurant.

The Shores are not entitled to common-law indemnification against the Restaurant because there has not been a finding that the Restaurant is liable. “[I]n the case of 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 for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law” (*Correia*, 259 AD2d at 65). As will be discussed below, a jury might find for defendants if they discredit plaintiff’s account of the accident.

Plaintiff’s Cross-Motion

Plaintiff cross-moves for summary judgment on the issue of liability and to dismiss defendants’ affirmative defenses of plaintiff’s culpable conduct. Plaintiff claims that she is entitled to summary judgment because there was ice in front of the Restaurant and all defendants failed to keep the premises in a reasonably safe condition.

In opposition, the Restaurant claims that there is a material issue of fact regarding whether there was ice or snow in the vestibule. The Restaurant points to the deposition testimony of Ms. Maggio (a waitress working at the Restaurant). She claims that after the incident “I definitely came out into the vestibule and looked around. It was clear” (Maggio tr at 33). This is a material issue of fact because plaintiff’s theory is that she landed on ice as she was stepping down and her left foot slid. The ice was a proximate cause of plaintiff’s fall according

to her deposition testimony and the fact that another witness claims there was no ice compels the Court to deny plaintiff's cross-motion.

Plaintiff's reliance on purported code violations, including the lack of a handrail or improper lighting, is beside the point. A jury might credit Ms. Maggio's testimony, disregard plaintiff's account as not credible and find for defendants. Simply because plaintiff fell does not mean that defendants were negligent.

Accordingly, it is hereby

ORDERED that the motion by Steven J. Shore and Sandra Jacobus Shore for summary judgment is granted only to the extent that they are entitled to conditional summary judgment against O'Flynn Enterprises, LLC on contractual indemnity grounds (including attorneys' fees) and denied as to the remaining branches of the motion; and it is further

ORDERED that the cross-motion by plaintiff for summary judgment is denied.

1-22-19

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE