

Quito v PCS Mgt., LLC
2019 NY Slip Op 30775(U)
March 26, 2019
Supreme Court, New York County
Docket Number: 153131/2014
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY
JSC**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X

JORGE QUITO,

Plaintiff,

- v -

PCS MANAGEMENT, LLC,

Defendant.

INDEX NO. 153131/2014

MOTION DATE 11/14/2018

MOTION SEQ. NO. 005

DECISION AND ORDER

-----X

PCS MANAGEMENT, LLC,

Third-Party Plaintiff,

- v -

PAZZIA, LLC,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 228, 229, 230, 231, 232, 233, 234, 235, 240, 241, 242, 243, 244

were read on this motion to/for REARGUMENT/RECONSIDERATION.

HON. KELLY O'NEILL LEVY:

This is a personal injury action arising from a slip and fall accident.

Plaintiff Jorge Quito moves for an order, pursuant to CPLR § 2221(d), granting plaintiff permission to reargue the August 10, 2018 Decision and Order of this court (hereinafter, the Order), which granted the respective motions of defendant PCS Management, LLC (hereinafter, PCS) and third-party defendant Pazzia, LLC (hereinafter, Pazzia) for summary judgment dismissing the complaint, and upon re-argument, denying said motions. PCS and Pazzia oppose.

BACKGROUND

In the Order, this court dismissed the complaint on the grounds that plaintiff's explanation as to how the accident occurred was "pure speculation, as plaintiff was severely intoxicated at the time and did not know why he fell, and as such does not create an issue of fact as to the cause of plaintiff's injuries" [Order (ex. A to the Kleeger aff.) at 8-9]. This court attributed plaintiff's accident to his severe intoxication and rendered it the principal and sole proximate cause of his accident. This court further reasoned that the alleged defect in the staircase, specifically the lack of a handrail, was too remote to constitute a proximate cause of his injuries. It is undisputed that on April 25, 2011, the date of the subject accident, there was no handrail on the stairs leading to the lower level at the subject premises.

DISCUSSION

Motion to Reargue

CPLR § 2221(d)(2) states that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." CPLR § 2221(d)(2).

PCS states that plaintiff has asserted no new evidence or argument in this motion. A motion for re-argument may not in fact be based on new facts or arguments different from those previously asserted. *Independent Chemical Corporation v. Puthanpurayil*, 165 A.D.3d 578, 578 (1st Dep't 2018). However, the standard cited by PCS pertains to motions for renewal, not for re-argument.

Pazzia contends that (1) plaintiff cannot reargue the granting of Pazzia's motion for summary judgment since plaintiff did not previously oppose it and (2) there is no basis for re-argument as to dismissal of the third-party complaint.

Plaintiff asserts that the court misconstrued the facts and misapplied the law in dismissing the case and that the evidence is clear that plaintiff recalled reaching for a handrail, which was not present, to prevent him from falling. Plaintiff highlights his own deposition testimony in which he states that he tried to grab handrails, he did not find anything, his hands were up against the wall, and they eventually went slipping down to the floor [Plaintiff tr. (ex. H to the Kleeger aff. for mot. seq. 003) at 103]. Plaintiff's affidavit submitted in opposition to the previous motion (mot. seq. 003) confirmed that he reached out to try and grab a handrail but there was no railing [Plaintiff Affidavit (ex. A to the Kleeger aff. for mot. seq. 003) at ¶ 6].

Plaintiff asserts that his deposition testimony and affidavit are sufficient to create a question of fact as to whether the absence of handrails was a proximate cause of plaintiff's injuries. In *Gold v. 35 E. Assoc. LLC*, the court found that the expert's opinion along with the plaintiff's deposition testimony that he tried to reach out to grab something when he fell down a staircase raised a triable issue of fact. *Gold v. 35 E. Assoc. LLC*, 136 A.D.3d 453, 453-454 (1st Dep't 2016). In *Sanchez v. Irun*, where the plaintiff fell down a staircase and similarly testified that as she fell, she reached for a handrail, which was not there, the court found that there were issues of fact as to whether the absence of the handrail was a proximate cause of the plaintiff's injuries. *Sanchez v. Irun*, 83 A.D.3d 611, 612 (1st Dep't 2011).

Here, plaintiff testified that he tried to grab a handrail as he fell (Plaintiff tr. at 103). Plaintiff also submitted an affidavit confirming that he reached out to try and grab a handrail but there was no railing (Plaintiff Affidavit at ¶ 6). Moreover, it is undisputed that on April 25, 2011, the date of the accident, there was no handrail on the subject staircase. Thus, the court finds that plaintiff's unambiguous testimony is sufficient to raise a question of fact as to whether

the absence of handrails was a proximate cause of plaintiff's injuries. Accordingly, the court grants plaintiff's motion for re-argument.

PCS previously asserted that as an out of possession landlord, it owed no duty to plaintiff, and it owed no duty to provide a handrail on the subject staircase. Plaintiff also previously asserted that PCS is liable, as it violated Section 153.6 of the 1916 Building Code of the City of New York (hereinafter, the 1916 Building Code). The court will reconsider these arguments below.

PCS's Liability as an Out of Possession Landlord

PCS had previously moved for summary judgment and dismissal of the complaint as an out of possession landlord.

An out of possession landlord is not liable for injuries sustained by third parties unless it retained control of the premises or was contractually obligated to perform repairs or maintain the premises. *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 565 (1987); *Vasquez v. The Rector*, 40 A.D.3d 265, 266 (1st Dep't 2007). An out of possession landlord is not responsible for correcting defective conditions on the premises unless they are structural failures or specific statutory violations. *Thomas v. Fairfield Invs.*, 273 A.D.2d 118, 118 (1st Dep't 2000). To be entitled to summary judgment, an out of possession landlord must establish as a matter of law that the subject defective condition was not a structural defect and the landlord did not retain the right to re-enter. *Brignoni v. 601 W. 162 Assoc., L.P.*, 93 A.D.3d 417, 417-418 (1st Dep't 2012).

The lease agreement between PCS and Pazzia (hereinafter, the Lease Agreement) provides:

“Alteration – 3. Tenant shall make no changes in or to the demised premises of any nature without the owner’s written consent... tenant may make alterations... or improvements which are non-structural.”

The Lease Agreement further provides:

“Access to Premises – 13. Owner or owner’s agents shall have the right to enter the demised premises... at other reasonable times to examine the same and to make repairs, replacements and improvements as the owner deems necessary and reasonable to any portion of the building...”

The rider attached to the Lease Agreement states:

“48. Alterations, Repairs and Right of Entry – Tenant shall make no alterations additions, or improvements of any nature in or to the demised premises without Owner’s prior written consent... Owner, its agents and designees shall have the right to enter the demised premises during regular business hours, upon reasonable notice, for the purpose of making such repairs as the Owner may deem necessary.”

The Lease Agreement forbade Pazzia from making alterations of any nature without PCS’s approval. PCS retained the right to enter the premises to make repairs. Thus, PCS would be liable if it failed to repair a defect that was contrary to a statutory provision.

The affidavit of Scott Silberman, a licensed professional engineer, is instructive as to the building’s construction [Affidavit of Scott Silberman (ex. I to the Kleeger aff. in opp. to mot. seq. 003)]. The subject building was originally constructed in 1920 (*id.* at ¶ 5). The accident occurred on the only accessible stairway from the main floor to the lower floor (*id.* at ¶ 7).

As the building was constructed in 1920, the subject stairs must comply with the 1916 Building Code, which states in pertinent part: “Stairs shall have walls or well secured balustrades or guards on both sides, and shall have handrails on both sides.” 1916 Building Code Section 153.6. The subject staircase was not in compliance with the 1916 Building Code, as it did not have handrails at the time of the accident. Since the subject staircase is in violation of the 1916 Building Code, PCS, as an out of possession landlord, was responsible for correcting that

defective condition. Moreover, pursuant to the Lease Agreement, PCS retained the right to re-enter the premises.

Thus, the court denies PCS's motion for summary judgment and dismissal of this action against it as an out of possession landlord.

While plaintiff did not previously oppose Pazzia's motion for summary judgment, the court had dismissed the third-party complaint for mootness due to the previous dismissal of the complaint. Here, since the court has now granted re-argument of the previous motions and has denied PCS and Pazzia's motions for summary judgment as to dismissal of the complaint, the branch of PCS's motion for summary judgment granting common-law indemnity and contractual indemnity against Pazzia and Pazzia's motion for dismissal of the third-party complaint are no longer moot. Thus, the court will reconsider PCS and Pazzia's motions for summary judgment as to the third-party complaint. In the third-party complaint, PCS makes claims against Pazzia for contribution, common-law indemnification, contractual indemnification, and breach of contract.

Common-Law Indemnity and Contribution Claims

PCS moves for summary judgment granting common-law indemnification and contribution against Pazzia. Pazzia seeks dismissal of same. Pazzia asserts that plaintiff has not sustained a grave injury from his fall, and thus these claims should be dismissed, pursuant to Workers' Compensation Law § 11. Workers' Compensation Law § 11 provides, in pertinent part:

“An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury’ which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot . . . or an acquired

injury to the brain caused by an external physical force resulting in permanent total disability.”

Therefore, “[a]n employer’s liability for an on-the-job injury is generally limited to workers’ compensation benefits, but when an employee suffers a ‘grave injury’ the employer also may be liable to third parties for indemnification or contribution.” *Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408, 412-413 (2004). The burden falls on the party seeking contribution or indemnification against an employer to establish the existence of a “grave injury” under Workers’ Compensation Law § 11. *Ibarra v. Equipment Control, Inc.*, 268 A.D.2d 13, 18 (2d Dep’t 2000). The Court of Appeals has held that a brain injury results in “permanent total disability” under Workers’ Compensation Law § 11 “when the evidence establishes that the injured worker is no longer employable in any capacity.” *Rubeis*, 3 N.Y.3d at 413. In *Cashbamba v. 1056 Bedford LLC*, the court found that since the plaintiff was able to obtain a full-time job after his fall, he did not sustain a “grave injury” from his fall, and thus the claims for common-law indemnification and contribution were not viable. *Cashbamba v. 1056 Bedford LLC*, 168 A.D.3d 638, 639 (1st Dep’t 2019).

Dr. Siddhartha S. Nakdarni, a neurologist and psychologist retained by Pazzia, conducted Independent Medical Examinations of plaintiff on December 3, 2015 and January 11, 2016, and concluded that plaintiff has not sustained significant or lasting brain injuries as a result of his accident and does not have any noticeable neurological or neurocognitive deficits [Affidavit of Siddhartha S. Nakdarni, M.D. (ex. I to the Bermack aff. for mot. seq. 004) at ¶ 16]. Dr. William B. Barr, a neuropsychologist retained by Pazzia, conducted a neuropsychological Independent Medical Examination of plaintiff on May 16, 2016, and concluded that there are no objective indications of any permanent impairment or disability secondary to the effects of ongoing brain dysfunction that would conceivably affect plaintiff’s ability to return to his previous level of

employment or his ability to function effectively in the community [Affidavit of William B. Barr, Ph.D (ex. K to the Bermack aff. for mot. seq. 004) at ¶ 15]. Dr. Charles A. Kincaid, a rehabilitation counselor and vocational expert retained by Pazzia, interviewed plaintiff and conducted vocational testing, and concluded that plaintiff remains employable as a line cook [Affidavit of Charles A. Kincaid, Ph.D (ex. M to the Bermack aff. for mot. seq. 004) at ¶ 15].

PCS opposed dismissal of the common-law indemnity claim, asserting that Dr. Ramkumar Panhani's October 18, 2013 testimony at the workers' compensation board hearing, where he stated that he felt that plaintiff was totally disabled and should not return to work in any capacity based on Dr. Panhani's July 29, 2011 physical examination of plaintiff [Deposition of Dr. Ramkumar Panhani (ex. A to the Mcspedon aff. for mot. seq. 004) at 9-11], creates an issue of fact as to whether plaintiff suffered a grave injury within the meaning of Workers' Compensation Law § 11.

Notably, Dr. Panhani's expert opinion pre-dates plaintiff's examinations by Pazzia's experts by more than two years. Dr. Panhani's testimony is silent on the issue of the permanency of plaintiff's injuries and his opinion was expressly limited to the time of the hearing. Pazzia's experts' opinions address plaintiff's subsequent level of functioning and demonstrate that plaintiff has not suffered from a permanent brain injury and that he is still employable as a line cook, among other vocations. Thus, PCS's opposition is insufficient to refute Pazzia's prima facie showing that plaintiff has not suffered a grave injury within the meaning of Workers' Compensation Law § 11, and it does not create an issue of fact as to the permanency of plaintiff's injuries. Dr. Siddhartha S. Nakdarni, Dr. William B. Barr, and Dr. Charles A. Kincaid's expert affidavits demonstrate that plaintiff's injuries are not permanent and that plaintiff remains employable in his previous vocation. Plaintiff has not suffered a grave injury

within the meaning of Workers' Compensation Law § 11, and thus PCS is not entitled to common-law indemnification or contribution.

Therefore, the court denies the branch of PCS's motion for summary judgment and grants the branch of Pazzia's motion for summary judgment as to the common-law indemnity and contribution claims and dismisses same.

Contractual Indemnity Claim

PCS also moves for summary judgment granting contractual indemnity in its favor against Pazzia. Pazzia seeks dismissal of same.

"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 N.Y.2d 774, 777 (1987), quoting *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 153 (1973); see *Tonking v. Port Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004); *Torres v. Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 403 (1st Dep't 2005). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant." *De La Rosa v. Philip Morris Mgt. Corp.*, 303 A.D.2d 190, 193 (1st Dep't 2003) (citation omitted); *Keena v. Gucci Shops*, 300 A.D.2d 82, 82 (1st Dep't 2002).

Paragraph 47 of the lease agreement between PCS and Pazzia (hereinafter, the Lease Agreement) provides:

Owner shall not be responsible or liable for any damage or injury ... to any person or persons ... including any damages or injury to Tenant or any of Tenant's servants, employees, agents, licensees, invites or visitors, unless said damage was caused by the direct result of Landlord's actions, and Tenant hereby

expressly covenants and agrees that Tenant will forever indemnify and hold Owner harmless from and against any such damage or injury [Lease Agreement (ex. Q to the Bermack aff. for mot. seq. 004) at ¶ 47].

The same paragraph of the Lease Agreement provides:

Tenant shall indemnify Owner against and save Owner harmless from any liability or claims by or on behalf of any person, firm, governmental authority for injury, death or damage arising from the use by Tenant of the demised premises, the sidewalk or, from any work, or thing whatsoever done or omitted to be done by Tenant, its agents, contractors, servants, employees, licensees, invitees, or customers, and from any breach or default by Tenant under any of the terms or provisions of this Lease (*id.*).

Pazzia asserts that PCS cannot be indemnified for its active negligence. PCS argues that Pazzia has not established as a matter of law that the indemnity language of the Lease Agreement is inapplicable or not triggered, and PCS requests conditional contractual indemnity, absent a finding at trial that plaintiff's injury was caused by the direct result of PCS's actions. PCS concedes that the Lease Agreement does not require Pazzia to indemnify PCS for PCS's own negligence.

The language of the Lease Agreement is ambiguous and does not create a clear indemnity obligation. The first indemnity provision does not require Pazzia to indemnify PCS for Pazzia's negligence while the second indemnity provision is broad as to Pazzia's indemnity obligations. These provisions are ambiguous. Indemnity provisions in a contract are strictly construed and any ambiguity is construed against the drafter of the provision. *Mejia v. Trustees of Net Realty Holding Trust*, 304 A.D.2d 627, 628 (2d Dep't 2003); *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491-492 (1989). General Obligations Law § 5-321 states that an agreement to exempt a lessor from its own negligence is void and unenforceable. As the Lease Agreement was drafted by PCS, the ambiguity of the conflicting lease provisions is to be resolved against PCS and construed to require Pazzia to indemnify PCS only for Pazzia's negligence.

It is unclear whether plaintiff's accident was proximately caused by the lack of a handrail, for which PCS would have been responsible, as the subject staircase was in violation of the 1916 Building Code. If PCS is found actively negligent in this action, then PCS is not entitled to contractual indemnification. If PCS is found not negligent, then no indemnity obligation is triggered. As such, the court denies the branch of PCS's motion for summary judgment granting contractual indemnity in its favor against Pazzia, and grants the branch of Pazzia's motion for summary judgment and dismissal of the contractual indemnity claim, dismissing same.

Breach of Contract Claim

Pazzia moves for summary judgment, dismissing PCS's breach of contract claim for failure to procure insurance. PCS did not oppose this branch of the motion.

Pazzia asserts that it fulfilled its obligation, pursuant to the Lease Agreement, which required it to name PCS on its insurance policy as an additional insured. Pazzia attached a copy of its insurance policy to its motion papers, which lists PCS as an additional insured [Insurance Policy (ex. S to the Bermack aff. for mot. seq. 004)]. Pazzia fulfilled its contractual obligations to PCS in terms of obtaining insurance naming PCS as an additional insured. Thus, the court grants the branch of Pazzia's motion for summary judgment seeking dismissal of the breach of contract for failure to procure insurance claim and dismisses same.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that Plaintiff Jorge Quito's motion (mot. seq. 005) for an order, pursuant to CPLR § 2221(d), granting plaintiff permission to reargue the August 10, 2018 Decision and Order of this court is granted; and it is further

ORDERED, that upon re-argument, the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor as an out of possession landlord is denied; and it is further

ORDERED, that upon re-argument, the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order granting conditional common law indemnification against Pazzia, LLC is denied; and it is further

ORDERED, that upon re-argument, the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order granting conditional contractual indemnification against Pazzia, LLC is denied; and it is further

ORDERED, that upon re-argument, the branch of Third-Party Defendant Pazzia, LLC's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint is denied; and it is further

ORDERED, that upon re-argument, the branch of Third-Party Defendant Pazzia, LLC's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the common law indemnification claim against it is granted and that claim is dismissed; and it is further

ORDERED, that upon re-argument, the branch of Third-Party Defendant Pazzia, LLC's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its

favor and dismissing the contractual indemnification claim against it is granted and that claim is dismissed; and it is further

ORDERED, that upon re-argument, the branch of Third-Party Defendant Pazzia, LLC's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the breach of contract claim against it is granted and that claim is dismissed; and it is further

ORDERED, that the third-party complaint is dismissed in its entirety; and it is further

ORDERED, that the remainder of this action shall continue.

This constitutes the decision and order of the court.

3/26/19
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

JSC

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE