

Mezei v Mark Essex, LLC

2019 NY Slip Op 32857(U)

September 24, 2019

Supreme Court, New York County

Docket Number: 160262/2016

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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PENINA MEZEI and DANIEL MEZEI,

Plaintiffs,

-against-

MARK ESSEX, LLC, GEORGE ESSEX, LLC,
SAM ESSEX, LLC, SHAHNAZ ESSEX, LLC,
SHAHLA ESSEX, LLC, RONIT ESSEX, LLC,
and THE PICKLE GUYS INC.,

Defendants.

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

MEMORANDUM DECISION

In this negligence action, defendant The Pickle Guys, Inc. (“Pickle Guys”), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint against it (motion seq. No. 001). Additionally, defendants Mark Essex, LLC, George Essex, LLC, Sam Essex, LLC, Shanaz Essex, LLC, Shahla Essex, LLC, and Ronit Essex, LLC (collectively, “the Essex Defendants”) move for summary judgment pursuant to CPLR 3212 on their cross-claims against Pickle Guys for contractual and common-law indemnification (motion seq. No. 002). The motions are consolidated for disposition.

BACKGROUND FACTS

On November 13, 2015, plaintiff Penina Mezei (Plaintiff or Mezei) fell while walking on a ramp into the entrance of a store operated by Pickle Guys in the Lower East Side of Manhattan. The store is located in on the ground floor of a building purchased by the Essex Defendants in

January 2015 (NYSCEF doc No. 39, ¶ 8). Pickle Guys occupy the ground floor commercial space pursuant to a lease signed in 2002 under a previous owner (*id.*). The ramp had been installed by Pickle Guys when it completed construction of the store in 2002 (*id.* at ¶ 17). Mezei allegedly sustained injuries as a result of the fall on the ramp, and her husband, Daniel Mezei (together, Plaintiffs), is alleging a loss of services. Plaintiffs argue that Defendants were careless, reckless and negligent in their maintenance of the ramp and entryway, and the ramp was improperly constructed as it was excessively steep and had no adequate handrails or other slip-protection (NYSCEF doc No. 39, ¶ 6). Plaintiffs also allege that the ramp violated various City building code provisions. In their answer to the Complaint, the Essex Defendants cross-claimed against Pickle Guys for contractual and common law indemnification for any judgment rendered against them.

Pickle Guys filed a motion for summary judgment on April 25, 2019, arguing that they had no actual or constructive notice of any dangerous condition on the ramp. Pickle Guys argue that as there was no history of complaints or accidents on the ramp, they lacked any notice regarding the possibility that the steepness of the ramp posed any danger. The Essex Defendants then filed a motion for summary judgment on May 20, 2019 on their cross-claims against Pickle Guys, contending they are owed contractual indemnification, as Pickle Guys is responsible for repairs and maintenance under the lease and has a contractual duty to indemnify them. The Essex Defendants also contend they are entitled to common-law indemnification, as any defect with the ramp could only have been caused by Pickle Guys' own negligence. The Essex Defendants' motion is opposed by Pickle Guys, who argue that there are issues of fact as to which party was ultimately responsible for the condition of the ramp.

DISCUSSION

Summary judgment is granted when “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]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent 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).

A property owner seeking summary judgment in a negligence action is “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 Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate “that it neither created the hazardous condition, nor had actual or constructive notice

of its existence” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

Of course, for a defendant to be liable for a dangerous condition, one must exist on the property in the first place. The issue of “whether a dangerous or defective condition exists on the property of another so as to create liability ... is generally a question of fact for the jury” (*Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977 [1997]). When a defect exists, constructive notice to the defendant requires that the defect be “visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Pickle Guys’ Motion for Summary Judgment

Given that they installed the ramp for the purposes of ingress and egress into their store, Pickle Guys are undoubtedly liable for any defects within or dangers posed by the ramp. However, Pickle Guys contend that they never had actual nor constructive notice of the alleged defect. Pickle Guys contend that, since there is no record of complaints or prior injuries regarding the ramp, they could not have had notice. Thus, Pickles Guys make a *prima facie* showing that they did not have notice of a dangerous condition.

However, Plaintiffs are not alleging that a temporary slipping condition existed on the ramp. Rather, Plaintiffs allege that Pickle Guys created a dangerous condition by installing the subject ramp, as it too steep and lacks handrails. Specifically, Plaintiffs allege that defendants

violated §§ 1010.2 and 1010.8 of the New York City Building Construction Code (Building Code).

In support, Plaintiffs submit an affidavit from Stanley Fein (Fein), an engineer, who examined the documentary evidence and made a site inspection shortly after the incident in December 2015. Fein measured the ramp and concluded that the ramp had an excessive slope of 17%, which violates Section 1010.2 of the Building Code, which requires an elevation of no more than 8% (NYSCEF doc No. 54, ¶ 35). Fein also found the ramp to be in violation of Section 1010.8 of the code, which requires ramps with a rise greater than six inches to have handrails on both sides (*id.* at ¶ 36).

Here, the alleged violations of the Building Code raise a question as to whether a defective condition was present. Moreover, Plaintiffs raise a question of fact as to whether Pickle Guys created the alleged defective condition by installing the subject ramp. Moreover, as the ramp has structural conditions that violate the Code, its very existence creates a question of fact constitutes constructive notice (*see Katz v Blank Rome Tenzer Greenblatt*, 100 AD3d 407 [1st Dep't 2012] ["the configuration of the winding staircase and partial absence of a handrail at its turn, raise triable issues as to whether defendants were on constructive notice of a dangerous condition"]).

Finally, Pickle Guys dispute that Plaintiff fell due to the steepness of the ramp, and contend that there was an alternate way for her to enter the store (NYSCEF doc No. 54, ¶ 31). While Pickle Guys argue that Plaintiff is unable to articulate the cause of her accident, she testified three times in deposition that she fell due to the excessive slope of the ramp (*id.* at ¶ 7). This testimony, which must be read in a light most favorable to Plaintiff, is sufficient to preclude

summary judgment (*see Cruz v Bronx Lebanon Hosp.*, 129 AD3d 631 [1st Dept 2015], *aff'd*, 27 NY3d 925 [2016]).

As Plaintiffs have raised an issue of fact as to whether Pickle Guys created a dangerous condition that caused her accident, Pickle Guys' motion for summary judgment must be denied.

The Essex Defendants' Motion for Summary Judgment

The Essex Defendants seek summary judgment on their indemnification claims as against Pickle Guys. While Pickle guys oppose the application, Plaintiffs take no position.

The rider to the lease between the Essex Defendants and Pickle Guys clearly states that:

“Tenant shall indemnify and save harmless Landlord and its agents against and from (a) any and all claims (i) arising from the conduct of business by tenant or management of the premises or any work or thing whatsoever done or any condition created (other than by Landlord for Landlord's or Tenant's account) in or about the premises during the term of this lease or (ii) arising from any negligent or otherwise wrongful act or omission of Tenant or any of its subtenants or licensees or its or their guests, invitees, patrons, employees, agents or contractors, and (b) all reasonable costs, expenses and liabilities incurred in or in connection with such claim or action or proceeding brought thereon. In case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, shall resist and defend such action or proceeding by counsel chosen by Tenant who shall be reasonably satisfactory to Landlord. Tenant or its counsel shall keep Landlord fully apprised at all times of the status of such defense.”

(NYSCEF Doc No. 62, ¶ 47.1).

“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]). The one seeking indemnity pursuant to a contract “need only establish that it was free from any negligence” and was held liable solely due to vicarious liability, and “[w]hether or not the

proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v. Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v. Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Pickle Guys allege that the indemnification provision is overbroad and violates General Obligations Law § 5-321, which holds that provisions releasing lessors from liability for actions resulting from their own negligence are unenforceable. However, the section in the lease rider here is limited to the tenant's acts, and contains an insurance procurement provision, so it does not violate § 5-321 (see *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 A.D.3d 494 [1st Dep't 2018]).

The Essex Defendants have established that they are free of negligence. For out-of-possession property owners, it is well settled law that:

“[a]n out-of-possession landlord is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision”

(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017]).

The Essex Defendants have definitively established that they are an out-of-possession landlord and that they did not cause or create the condition that caused Plaintiff's accident. Pickle Guys constructed the ramp and installed it under a prior landlord, years before the Essex Defendants purchased the building (NYSCEF doc No. 68, ¶ 4).

Moreover, Pickle Guys maintained control over the ramp. The rider to the lease between the Essex Defendants and Pickle Guys states that “Tenant covenants and agrees to make all

repairs, alterations, additions, or replacements to the inside and outside of premises leased to Tenant” (NYSCEF doc No. 62 at ¶ 50). The lease also states that the tenant is responsible for the complete renovation of the property (*id.* at ¶ 66). The ramp on which Plaintiff fell is an entryway used for ingress and egress into the store and is therefore an appurtenance to the premises (*see Pacific Coast Skills, LLC v 247 Realty, LLC*, 76 Ad3d 167, 173 [1st Dept 2010]). Consistent with the lease provisions, the Essex Defendants never sent a representative to the store to do any sort of maintenance work on the ramp (NYSCEF doc No. 68, ¶ 11). The Essex defendants cannot be negligent for the alleged defect on the ramp, as the Pickle Guys were responsible for its maintenance and repair of the ramp.

In these circumstances, the Essex Defendants are entitled to contractual indemnification under the lease, as the indemnification provision is clearly triggered. That is, Plaintiff’s allegations arise from Pickle Guys’ management of their business under the Lease. Accordingly, the Essex defendants’ application for summary judgment on their contractual indemnification claims against Pickle Guys must be granted. As such, the branch of the Essex defendants motion that seeks summary judgment on their common-law indemnification claims against Pickle guys is moot.

CONCLUSION

Based on the foregoing, it is hereby

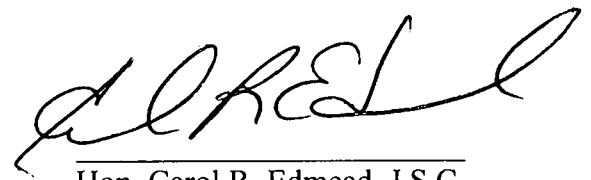
ORDERED that Defendant The Pickle Guys, Inc.'s motion for summary judgment (Motion Seq. 001) is denied; and it is further

ORDERED that Defendants Mark Essex, LLC, George Essex, LLC, Sam Essex, LLC, Shanaz Essex, LLC, Shahla Essex, LLC, and Ronit Essex, LLC's motion for summary judgment on their cross-claims against the The Pickle Guys, Inc. for indemnification (Motion Seq. 002) is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly and the remaining claims are severed and continue; and it is further

ORDERED that counsel for Plaintiffs shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: September 24, 2019



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDMOAD
J.S.C.**