

Moscoso v 157 Realty Corp.

2019 NY Slip Op 33590(U)

October 1, 2019

Supreme Court, Bronx County

Docket Number: 23206/2016E

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART _____

MIGUELINA MOSCOSO,

INDEX NUMBER: **23206/2016E**

Plaintiff,

HON. ALISON Y. TUITT

-against-

Justice

**157 REALTY CORP., LUCKY NAIL CAI, INC.
and MEI CHUNG MEI RESTAURANT, INC.**

Defendants.

The following papers numbered 1-3

Read on this Defendant’s Motion for Contractual Defense and Indemnification

On Calendar of 6/17/19

Notice of Motion-Exhibits and Affirmation _____ 1

Affirmation in Opposition _____ 2

Reply Affirmation _____ 3

Upon the foregoing papers, defendant 157 Realty Corp.’s (“57 Realty”) motion for contractual indemnification from defendant Mei Chung Mei Restaurant, Inc. (“Mei Chung”) is decided as follow:

This matter involves claims by plaintiff that she sustained personal injuries as the result of an accident on May 3, 2015, when she allegedly tripped and fell on a broken sidewalk adjacent to the premises located at 157 West 231st Street, Bronx, New York. Abraham Darwish testified that he is the owner of 157 Realty which owns the property abutting the subject sidewalk. At the premises are a Chinese restaurant and a nail salon, which occupy the space pursuant to a lease for the premises. Plaintiff’s accident allegedly occurred in front of the restaurant. At her deposition, plaintiff was shown photographs that depict the alleged defective condition, and she identified the area of the sidewalk that caused her fall. Mr. Darwish was shown the photograph at his deposition and he testified that he had called the City of New York many times to have the

sidewalk fixed, and claims that they would not allow him to fix it. Juan Cai, the owner of defendant Lucky Nail Cai, testified that she witnessed plaintiff's accident and plaintiff fell in front of the Chinese restaurant, not the nails salon. Xiao Ling Li testified that she and her husband, Fu Duan Wang, own the Chinese restaurant in front of where the alleged accident occurred. There was a lease in effect with the landlord Mr. Darwish in 2005.

Paragraph 4 of the lease, "Repairs" provides, in relevant part,:

Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted.

Paragraph 39 of the lease, "Heat, Cleaning" provides, in relevant part:

Tenant shall at Tenant's expense, keep demised premises clean and in order, to the satisfaction to Owner, and if demised premises are situated on the street floor, Tenant shall at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto...

The hold harmless agreement provides:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney's fees paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees or licensees, of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, invitees or licensees.

Defendant 157 Realty moves for summary judgment arguing that defendant Mei Chung is contractually obligated to defend and indemnify it under the terms of the lease. The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion)

shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well-settled law that courts determine the rights and obligations of parties under insurance contracts based on the specific language of the policy. State v. Home Indemnification Co., 66 N.Y.2d 669 (1985). Where the provisions of an insurance policy are clear, the contract must be enforced as written. See, Moshiko, Inc. v. Seiger v. Smith, Inc., 529 N.Y.S.2d 284 (1st Dept. 1988). The party claiming insurance coverage has the burden of proving entitlement. Moleon v. Kreisler Borg Florman Gen. Const. Co., 758 N.Y.S.2d 621 (1st Dept. 2003); Allied Sheet Metal Works Inc. v. Kerby Saunders Inc., 619 N.Y.S.2d 260 (1st Dept. 1994). A party is entitled to full contractual indemnification provided that the intention to indemnify can be implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. Drzewinski v. Atlantic Scaffold & Ladder Co., Inc., 70 N.Y.2d 774 (1987); Torres v. Morse Diesel International, Inc., 788 N.Y.S.2d 97 (1st Dept. 2005); American Express Bank v. Uniroyal, 562 N.Y.S.2d 613 (1st Dept. 1990), *lv. denied* 77 N.Y.2d 807 (1991)(Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment). Moreover, it is well-settled that, except where prohibited by statute, an agreement that indemnifies a party for damages resulting from its own negligent conduct is enforceable. See, New York Telephone Co. v. Gulf Oil Corporation, 609 N.Y.S.2d 244 (1st Dept. 1994).

Although the “Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk” (Collado v. Cruz, 81 A.D.3d 542, 542, 917 N.Y.S.2d 178 [1st Dept.2011]), a “tenant may be held liable to the owner for damages resulting from a violation of ... [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of [the property]” (*id.*). Wahl v. JCNYS, LLC, 20 N.Y.S.3d 65 (1st Dept. 2015). In Bhanmattie Rajkumar Kumar v. PI Associates, LLC, 3 N.Y.S.3d 372 (2d Dept. 2015), plaintiff tripped on a broken piece of sidewalk, and commenced an action against the landlord and tenant of the premises abutting the sidewalk. The defective condition on the sidewalk was located in front of, or adjacent to, a first-floor store that defendant Pretty Girl leased from the landlord PI. The lease provided that “Tenant, shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto.” The lease also provided that Pretty Girl would indemnify PI from all claims for damages incurred as a result of Pretty Girl's breach of the lease. The First

Department held that provisions in rider to the lease, which required tenant to keep the sidewalk clean and free from debris and snow, and to make all nonstructural repairs to the demised premises, not including the public sidewalk, did not conflict with the lease's provision that obligated the tenant to make all sidewalk repairs. Thus, the First Department held that Supreme Court should have granted the landlord's motion for a directed verdict on its cross claim against its tenant for contractual indemnification.

In the instant matter, the motion for contractual indemnification is conditionally granted to the extent that if 157 Realty is found to be negligent, Mei Chung must indemnify 157 Realty pursuant to the terms of the lease. Mei Chung assumed the contractual duty to perform sidewalk repairs in the lease.

This constitutes the decision and Order of this Court.

Dated: 10/11/19



Hon. Alison Y. Tuitt