

Brownstein v Wasserman
2019 NY Slip Op 33622(U)
December 11, 2019
Supreme Court, New York County
Docket Number: 153377/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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HOWARD BROWNSTEIN and ELAINE
BROWNSTEIN

Plaintiffs,

-against-

NATHAN R. WASSERMAN,

Defendant.

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NATHAN R. WASSERMAN,

Third-Party Plaintiff,

-against-

165 E66 RESIDENCES, LLC

Third-Party Defendant

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FRANK P. NERVO, J.S.C.

The instant dispute stems from an incident between Howard Brownstein and Nathan Wasserman in front of their apartment building. The Brownstein's were returning from grocery shopping and sought to utilize a loading zone on the street directly in front of their apartment building; however, Wasserman's unoccupied vehicle was parked in the zone.¹ Plaintiffs allege he and his wife waited approximately 30 minutes for the driver of the vehicle to vacate the zone, and when Defendant moved his vehicle Howard Brownstein chastised him for parking in the zone. Plaintiffs further allege defendant then exited his car and pushed Howard Brownstein, causing him to fall and sustain fractures to his wrist and hip. Defendant was subsequently arrested and pled guilty to Assault in the Third Degree (CPL § 120.00[2]) and Disorderly Conduct (CPL § 240.20). At allocution, defendant admitted he recklessly caused physical injury

¹ Whether the vehicle used by Wasserman was his own is immaterial to this action; however, for clarity the Court will address the vehicle used by Wasserman as "Wasserman's vehicle."

to Howard Brownstein by causing him to fall backward on the ground, whereby he injured his wrist and hip (NYSCEF Doc 20 - Plea Tr. at 7-8).

Plaintiffs and defendant reached a settlement and the main party action was discontinued pursuant to a stipulation (NYSCEF Doc. 53). 165 E. 66 Residences (hereinafter “Building” or “Building defendant”) seeks an order dismissing Wasserman’s action against it, pursuant to CPLR § 3211(a)(7), or summary judgment in its favor, pursuant to CPLR §3212 (mot. seq. 002). The motion was originally returnable August 20, 2019, and after several adjournments to allow Wasserman to file opposition papers, the motion was made returnable November 22, 2019. No opposition papers were filed by Wasserman. At a Court conference held on November 22, 2019, Wasserman again sought leave to file opposition papers to mot. seq. 002. The Court granted Wasserman’s request, setting December 6, 2019 as the deadline for Wasserman to file opposition papers to mot. seq. 002 directly with the Part (NYSCEF Doc. 52). Wasserman failed to file any papers with the Part by the deadline. Therefore, the Court renders its decision on mot. seq. 002 in the absence of any opposition.

As an initial matter, and not raised by the parties, the Court must determine whether a third-party action for reimbursement may be maintained where the main party action has been settled. This determination necessarily turns on whether the third-party plaintiff’s claim is one for indemnification or contribution (*Rosado v. Proctor & Schwartz*, 66 NY2d 21 [1985]). The distinction is critical, as General Obligations Law § 15-108(c) provides that “a tortfeasor who has obtained his own release from liability shall not be entitled to contribution for any other person.” Thus, a settling defendant will be barred from seeking contribution, but not indemnification.

Indemnity is a creature of contract, express or implied, and acts to prevent unjust results (*Id. see also McFall v. Compagnie Mar. Belge [Lloyd Royal], S.A.*, 304 NY 314, 327-28). Indemnity claims, therefore, arise only where the third-party plaintiff and the third-party defendant have a duty to the plaintiff and also a duty to indemnify each other (*Little Rest Twelve, Inc. v. Zajic*, 137 AD3d 540 [1st Dept 2016]; *Garret v. Holiday Inns*, 86 AD2d 469 [4th Dept 1982]). Contribution claims, however, do not require an

agreement between the parties, and instead arise automatically (Siegel, N.Y. Pract. § 169; *Rosado v. Proctor & Schwartz*, 66 NY2d at 24; *Raquet v. Braun*, 90 NY2d 177, 182 [1997] “A contribution claim can be made even when the contributor has no duty to the injured plaintiff”). Generally, the party seeking indemnity has “committed no wrong, but by virtue of some relationship with the tort-feasor was nevertheless held liable to the injured party” (*D’Ambrosio v. City of New York*, 55 NY2d 454, 461 [1982]). On the other hand, a party held liable because of their own negligence may seek only contribution, not indemnification, as against other culpable tortfeasors (*Rosado v. Proctor & Schwartz*, 66 NY2d at 24-25; see also *Glaser v. M. Fortunoff of Westbury Corp.*, 71 NY2d 643 [1988]). A settling party seeking reimbursement must therefore establish it “may not be held responsible in any degree’ for plaintiffs damages” in order to avoid the bar against contribution under GOL § 15-108(c) (*Glaser v. M. Fortunoff of Westbury Corp.*, 71 NY2d at 647 [internal citation omitted]).

Wasserman’s action against Building defendant alleges any “injuries sustained by plaintiff were caused, in whole or in part, by the carelessness and negligence” of the Building defendant (Third-Party Complaint NYSCEF Doc. 11). The third-party complaint further alleges that the Building owed plaintiffs and Wasserman a duty of care and breached that duty when it allowed Wasserman to assault and batter plaintiff. However, Wasserman’s claim fails to allege the Building agreed to reciprocal indemnification between Wasserman and the Building. Having failed to appear on this motion, Wasserman is unable to provide any evidence of an implied or actual indemnity agreement between him and the Building, and therefore his claim against the Building must be deemed one for contribution.

As Wasserman’s claim for reimbursement against the Building is one of contribution, he bears the burden, as third-party plaintiff, to establish he was not held responsible for plaintiff’s damages. Wasserman failed to appear on this motion, and the settlement agreement between plaintiffs and Wasserman is not included in the record. As such, Wasserman has failed to meet his burden to overcome the bar against contribution under GOL § 15-108(c), and his action against the Building defendant is, therefore, dismissed.

As an alternative holding, the Court finds the Building defendant entitled to summary judgment.

On a motion for summary judgment, pursuant to CPLR § 3212, the burden rests with the moving party to make a prima facie showing that it is entitled to judgment as a matter of law, and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “[I]t is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense” (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NYD 175 [1982]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

The incident between Wasserman and Brownstein occurred on the street immediately in front of Building defendant’s building. A landowner/building is not an insurer of the safety of those who use its premises from the acts of a third-person, absent knowledge that a third-person’s conduct is likely to endanger the landowner’s visitors (*Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). Here, the Building has established that it had no duty to prevent the unforeseen attack of Brownstein by Wasserman on the street/sidewalk in front of the Building’s property (*Leyva v. Riverbay Corp.*, 2016 AD2d 150 [1st Dept 1994]). Consequently, the Building has established its entitlement to summary judgment, as a matter of law. Wasserman, having failed to appear, has not raised an issue of material fact to defeat summary judgment.

The Building’s motion to dismiss is academic, the Court having granted summary judgment in movant’s favor. However, were the Court to reach the issue, the third-party

action against the Building would be dismissed in light of the *Nallan and Leyva* authority (*Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507; *Leyva v. Riverbay Corp.*, 2016 AD2d 150).

Accordingly, it is

ORDERED that Third-Party Defendant, 165 E 66 Residences, LLC, motion is granted in its entirety and the Third-Party complaint is dismissed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated December 11, 2019

ENTER:



J.S.C.

HON. FRANK P. NERVO