

Young v Crescent Coffee, Inc.

2019 NY Slip Op 35078(U)

August 5, 2019

Supreme Court, Kings County

Docket Number: Index No. 513711/16

Judge: Carolyn E. Wade

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of August, 2019.

P R E S E N T:

HON. CAROLYN E. WADE,
Justice.

-----X
DAVID YOUNG AND NOVELETT YOUNG,

Plaintiffs,

- against -

CRESCENT COFFEE, INC., BARBARA SEMEL AND
MARC SEMEL,

Defendants.
-----X

DECISION and ORDER

Index No. 513711/16

Motion Seq. Nos. 3-4

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion,
Affirmation (Affidavit), and Exhibits Annexed _____
Affirmation (Affidavit) in Opposition and Exhibits Annexed _____
Reply Affirmation (Affidavit) and Exhibits Annexed _____

43-44, 61-62, 72
83, 91
88, 95

Upon the foregoing papers, defendant Crescent Coffee, Inc. (Crescent Coffee) moves in motion (mot.) sequence (seq.) 3, for an order, pursuant to CPLR 3212, granting summary judgment in its favor, dismissing the cross claims of defendants Barbara Semel (Ms. Semel) and Marc Semel (Mr. Semel) (collectively, defendants Semel) with prejudice and, pursuant to 22 NYCRR 130-1.1, granting costs, legal fees and sanctions against defendants Semel. They move in mot. seq. 4 for an order, pursuant to CPLR 3212, granting each of them summary judgment dismissing the action.

2019 AUG 14 AM 7:24
FILED

Background

On February 5, 2015, slightly after 5:00 a.m., plaintiff David Young arrived at 4210 2nd Avenue in Brooklyn (the premises) to make a delivery to Crescent Coffee. Upon Mr. Young's arrival, Mr. Sherif Aboutabl, owner of Crescent Coffee, directed Mr. Young to back his delivery truck into a loading bay and stop approximately 5 inches from the loading dock, which stood approximately 4 to 5 feet above the ground. Mr. Young then exited his truck, opened its back door, and Mr. Aboutabl removed the items. Once the items were removed, Mr. Young placed his right foot on the rear of the truck, leaving his left foot on the loading dock, pulled the back door closed and latched the door to secure it. When Mr. Young attempted to place his right foot back onto the loading dock, his foot instead entered the 5-inch space between the truck and the loading dock, resulting in Mr. Young falling and sustaining injuries.

When the accident occurred, Mr. Semel maintained a 25% interest in the premises, with nonparty SNL 9, LLC (SNL 9) maintaining a 75% interest therein. Nonparty Feinrose Associates (Feinrose) leased the premises, pursuant to a contract with Mr. Semel and SNL 9's predecessors-in-interest, and pursuant to that lease, constructed the trucking terminal at its own cost. Feinrose subsequently retained nonparty Goodrich Management, LLC (Goodrich) to manage the premises. Feinrose subleased the premises to nonparty Alnour Distributors, Inc., which later assigned its sublease to nonparty Nour Trading Corp. Crescent Coffee, by way of an oral agreement, leased certain portions of the trucking terminal from Nour Trading Corp.

Following the accident, plaintiffs commenced this action seeking damages for their alleged injuries.¹ Subsequently, all defendants answered and asserted various affirmative defenses and cross claims. Defendants Semel asserted cross claims against Crescent Coffee for common-law indemnification, breach of contract, and contractual indemnification. Subsequently, plaintiffs and Crescent Coffee stipulated that plaintiffs' action as to Crescent Coffee be discontinued with prejudice. Now, Crescent Coffee, as mentioned above, moves for an order, granting it both summary judgment dismissing defendants Semel's cross claims and imposing costs, legal fees and sanctions against defendants Semel. They, as also previously mentioned, move for an order granting them summary judgment dismissing the complaint as asserted against them.

Defendants Semel's Summary Judgment Motion as to Barbara Semel

The Parties' Positions

In support of the branch of defendants Semel's summary judgment motion as to Ms. Semel, defendants Semel proffer, among other evidence, the affidavit of Erwin Holzli (Mr. Holzli), Goodrich's property manager for the premises, exhibiting various lease agreements and documents relating to ownership interest in the premises.² Mr. Holzli avers that Ms. Semel had no responsibility to maintain, operate, or control any portion of the premises on the date of the accident. Mr. Holzli also attests to being fully familiar with Goodrich's

¹ Plaintiff Novelett Young, Mr. Young's wife, brings a derivative claim for loss services, society and consortium.

² While Mr. Holzli's was deposed, the court shall consider Mr. Holzli's affidavit as it does not contradict any statements he made during his deposition testimony (*cf. Zylinski v Garito Contr.*, 268 AD2d 427, 428 [2d Dept 2000]).

business practices and that the exhibited documents have been maintained in the ordinary course of Goodrich's business. Among other documents, Mr. Holzli exhibits a bargain and sale deed between defendants Semel, dated June 5, 2012, showing that Ms. Semel sold her ownership interest in the premises to Mr. Semel. The deed was duly filed with the Office of the City Register of the City of New York on October 16, 2012 under City Register File Number (CRFN) 2012000409386. Defendants Semel contend that Ms. Semel, pursuant to this transaction, maintained no ownership in the premises on the date of the accident. Plaintiffs do not oppose this branch of defendants Semel's motion.

Discussion

On a summary judgment motion, the court determines whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (see *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant 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 issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a prima facie case, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a material factual issue (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not

resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Here, Ms. Semel presented prima facie entitlement to judgment as a matter of law by showing that she had no ownership interest in the premises nor any responsibility to manage or control the premises (*see generally Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034, 1035-1036 [2d Dept 2010]; *see also Tomback v Kew Gardens Assn., LLC*, 290 AD2d 437, 437 [2d Dept 2002]). Plaintiffs present no opposition to Ms. Semel's showing. Accordingly, that branch of defendants Semel's motion seeking summary judgment as to Ms. Semel is granted (*see generally Mogul v Baptiste*, 161 AD3d 847, 848 [2d Dept 2018]).

Defendants Semel's Summary Judgment Motion as to Mr. Semel

The Parties' Positions

In support of the branch of defendants Semel's summary judgment motion as to Mr. Semel, defendants Semel proffer, among other evidence, Mr. Holzli's affidavit, which attests that Mr. Semel is among several ground owner lessors leasing the premises to Feinrose. Mr. Holzli avers that Feinrose, pursuant to the lease, assumed responsibility to take good care of the premises and make all repairs at its own cost. Mr. Holzli further attests that Mr. Semel was neither responsible or even aware of the day-to-day operations of the premises. Mr. Holzli also avers that Mr. Semel maintained no ownership interest in the trucking terminal and only maintains an interest in the land on which the trucking terminal sits.

Defendants Semel also proffer the controlling lease between the premises' owners and Feinrose. The lease pertinently provides that "the Tenant shall take good care of the

premises and shall, at the Tenant's own cost and expense make all repairs" and that "Tenant agrees that the said Landlord . . . shall have the right to enter into and upon said premises . . . for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof" (aff of Mr. Holzli, exhibit 1, ¶¶ 2, 6). Based on such documentation, defendants Semel argue that Mr. Semel is an out-of-possession landlord with no contractual obligation to maintain the premises. Additionally, defendants Semel maintain that plaintiffs have not alleged any specific statutory safety provision relating to the alleged dangerous condition, e.g., need for bumpers. As such, defendants Semel maintain that Mr. Semel is entitled to judgment as a matter of law dismissing the action.

In opposition, plaintiffs contend that Mr. Semel cannot be deemed an out-of-possession landlord because he retains both the right to re-enter the premises and a contractual obligation to replace broken glass at the premises. Plaintiffs argue that as Mr. Semel should not be deemed an out-of-possession landlord, he failed to demonstrate his prima facie entitlement to judgment as matter of law by failing to establish that he did not create or have notice of the dangerous condition, i.e. the lack of a bumper. Plaintiffs further contend that there are various factual questions as to Mr. Semel's ownership interest in the premises. Plaintiffs also note a lease provision which provides that title to the trucking terminal will be transferred to the land owners at the conclusion of the fifty-year lease term.

In reply, defendants Semel reassert their previous position of Mr. Semel's status as an out-of-possession landlord. Defendants Semel further argue that while the trucking terminal will cede to the land owners, including Mr. Semel, at the end of the lease, Feinrose,

not Mr. Semel, owned the trucking terminal on the date of the accident. Defendants Semel maintain that they have demonstrated Mr. Semel's entitlement to judgment as a matter of law and that plaintiffs have failed to raise a triable factual issue.

Discussion

Where a land owner leases his/her land and permits the lessee to construct a building on the land, the lessee owns the building, absent specific lease language giving title to the land owner or a showing that the land owner had authority to approve, disapprove, or make alterations to the structure's design specifications (*see Bettis v County of Nassau*, 212 AD2d 749, 750 [2d Dept 1995]). The land owner in such an arrangement is deemed an out-of-possession landlord (*id.*). "An out-of-possession landlord is not liable for injuries occurring on the premises unless it has retained control of the premises, is contractually obligated to perform maintenance and repairs, or is obligated by statute to perform such maintenance and repairs" (*Denermark v 2857 W. 8th Street Assoc.*, 111 AD3d 660, 661 [2d Dept 2013] [internal citation omitted]).

"Although reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception applies only where a specific statutory violation exists and there is a significant structural or design defect" (*Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686, 686 [2d Dept 2006] [internal quotation marks and citations omitted]; *see also Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988, 991 [2d Dept 2017]).

Further, "a landlord's mere reservation of a right to enter a leased premises to make repairs is insufficient to give rise to liability for a subsequently arising dangerous condition" (*Felder*

v Wank, 227 AD2d 442, 442 [2d Dept 1996] [internal citation omitted]; *see also Windvand v 4612 Ave. Realty Corp.*, 296 AD2d 527, 527 [2d Dept 2000]).

Here, Mr. Semel demonstrated his prima facie entitlement to judgment as a matter of law by establishing that he was an out-of-possession landlord with no contractual obligations to perform repairs (*see generally Denermark*, 111 AD3d at 661). While during Mr. Young's deposition he conclusively asserted that trucking terminals are to maintain bumpers on the loading docks because "it's law" and plaintiffs' bill of particular alleges that the loading bay was out of compliance with proper loading dock bay regulations, plaintiffs fail to allege any specific statutory violation which would obligate Mr. Semel nor do plaintiffs proffer any statutory provisions in opposition to defendants Semel's motion (*see Garcia v Home Ctr.*, 240 AD2d 629, 630 [2d Dept 1997]; *see also Couluris*, 31 AD3d at 687).

Plaintiffs' contention that a question of fact exists as to Mr. Semel's ownership interest in the premises is unavailing. While the terms of the lease make clear that *at the conclusion of the lease term* any building constructed by the lessee will become the property of the lessor, the lease did not confer authority on Mr. Semel to approve, disapprove, or make alterations to the structure's design specifications (*Bettis*, 212 AD2d at 750). Further, the existence of such a lease provision necessitates finding that during the term of the lease the lessee remains owner of the physical structure, i.e. the trucking terminal, and only at the conclusion of the fifty-year term does the land owner acquire title to the trucking terminal. Accordingly, that branch of defendants Semel's motion seeking summary judgment in Mr. Semel's favor is granted.

Crescent Coffee's Summary Judgment Motion

As plaintiffs have discontinued their action as to Crescent Coffee and defendants Semel's summary judgment motion has been granted, dismissing the remainder of the action, Crescent Coffee's summary judgment motion is denied as moot.

Crescent Coffee's Motion for Costs, Legal Fees and Sanctions

The Parties' Positions

In support of its motion for costs, legal fees and sanctions, Crescent Coffee argues that defendants Semel's cross claims for common-law indemnification, contractual indemnification, and breach of contract are without merit and frivolous. Crescent Coffee maintains that defendants Semel's own witness, Mr. Holzli, testified at his deposition that Crescent Coffee and defendants Semel were never parties to a contract, and yet, despite this fact, defendants Semel refused to withdraw their cross claims for breach of contract or contractual indemnification. Further, Crescent Coffee contends that defendants Semel's cross claim for common-law indemnification is equally without merit as Mr. Holzli testified that Alnour Distributors, Inc., not Crescent Coffee, was responsible to maintain and repair the subject loading dock.

In opposition, defendants Semel maintain that their cross claims were not plead to harass Crescent Coffee, nor does their conduct rise to the level of frivolous or meritless litigation. Defendants Semel also contend that while they would not agree to sign a

stipulation of discontinuance concerning all their cross claims, they were willing to execute a stipulation of partial discontinuance, discontinuing their cross claims for breach of contract and contractual indemnification. In reply, Crescent Coffee asserts that defendants Semel's opposition papers are the first instance offering to discontinue the cross claims for breach of contract and contractual indemnification. Crescent Coffee also maintains that as defendants Semel are willing to discontinue these cross claims now, such willingness is further evidence of defendants Semel's sanctionable conduct.

Discussion

The Court may impose sanctions against a party for frivolous conduct (*Joan 2000, Ltd. v Deco Const. Corp.*, 66 AD3d 841, 842 [2d Dept 2009], citing 22 NYCRR 130-1.1). Conduct is frivolous if, among other things, "it is completely without merit in law or fact and cannot be supported by a reasonable argument for the extension, modification, or reversal of existing law" or if such conduct "is taken to harass or maliciously injure another" (*Joan 2000, Ltd.*, 66 AD3d at 842, citing 22 NYCRR 130-1.1 [c] [1], [2][remaining citations omitted]).

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

(22 NYCRR 130-1.1 [c]). Here, the record does not support Crescent Coffee's position that defendants Semel engaged in frivolous conduct by not voluntarily discontinuing their cross claims. Accordingly, it is

ORDERED that Crescent Coffee's motion, mot. seq. 3 is denied in its entirety; and it is further

ORDERED that defendants Semel's motion, mot. seq. 4, is granted in its entirety, and the action is hereby dismissed.

This constitutes the decision and order of the court.

2019 AUG 14 AM 7:25
A

ENTER,

J. S. C. HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE