

Levi v 142 Fulton LLC
2020 NY Slip Op 31193(U)
April 17, 2020
Supreme Court, Kings County
Docket Number: 505523/2017
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 505523/2017

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

MOSHE LEVI,

Plaintiff,

against

142 FULTON LLC, S&J TOMATO INC., GEORGE MANOS
& ASSOCIATES, INC., LEGACY BUILDERS LLC AND
SPRING SCAFFOLDING LLC,

Defendants.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u> </u>
Other	<u> </u>

142 FULTON LLC,

Third-Party Plaintiff,

against

GEORGE MANOS & ASSOCIATES, INC.,

Third-Party Defendant.

142 FULTON LLC,

Second Third-Party Plaintiff,

against

LEGACY BUILDERS LLC AND SPRING SCAFFOLDING
LLC,

Second Third-Party Defendants.

Upon the foregoing papers, defendant S&J Tomato Inc.'s ("S&J") motion for summary judgment (Mot. Seq. 002) and defendant Spring Scaffolding LLC's ("Spring Scaffolding") motion for summary judgment (Mot. Seq. 003), are decided as follows:

Introduction

Plaintiff commenced this negligence action against defendants to recover damages for injuries he contends were caused when he tripped and fell on a defective sidewalk, for which he claims the defendants are responsible. Defendant S&J asserts a cross-claim against defendants 142 Fulton LLC, George Manos & Associates, Inc., Legacy Builders, LLC and Spring Scaffolding for negligence/ indemnification. Defendant 142 Fulton LLC asserts cross-claims against defendants S&J, George Manos & Associates, Inc., Legacy Builders, LLC and Spring Scaffolding for contribution and common law indemnification, and against S&J for contractual indemnification and breach of contract. As third-party plaintiff, 142 Fulton LLC asserts claims for negligence/ indemnification against George Manos & Associates, Inc., as third-party defendant. As second third-party plaintiff, 142 Fulton LLC asserts claims for negligence/indemnification against Legacy Builders, LLC and Spring Scaffolding, as second third-party defendants. Spring Scaffolding asserts a counterclaim for negligence/ indemnification against 142 Fulton LLC, and cross-claims for negligence/indemnification against defendants 142 Fulton LLC, S&J, George Manos & Associates, Inc., and Legacy Builders, LLC.

Factual Background

Plaintiff testified at his deposition that he tripped and fell in a hole in the sidewalk in front of the subject property on February 3, 2017. He testified that the hole was approximately two feet long, two feet wide, and one inch deep. He testified that he had not previously complained to anyone about the hole, and that he is not aware of any other complaints or accidents involving the hole. Fabiana Mazzocco is the financial manager for ASG Equities, formerly Century Realty, who were the owners of 142 Fulton LLC at the time of the alleged

accident. She testified at her deposition that 142 Fulton LLC is the owner of the subject property.

Ms. Mazzocco authenticated the lease between 142 Fulton LLC, as landlord, and S&J, as tenant, for the subject property. The lease states in paragraph 30 that "Tenant shall, at Tenant's sole cost and expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto necessary as a result of the acts or omissions of Tenant or Tenant Parties". In addition, there is a rider to the lease, which states in paragraph 40 that, to the extent that the terms of the lease and rider conflict, the rider controls. The rider states in paragraph 42 that "Landlord shall, at Landlord's sole cost and expense, install a new sidewalk directly in front of the Demised Premises prior to the Rent Commencement Date"

Sung Jeun Yoo, the manager of S&J, testified at his deposition that 142 Fulton LLC did not install a new sidewalk as promised. He testified that he asked 142 Fulton LLC, through his attorney, to repair the sidewalk. He testified that he believes 142 Fulton LLC repaired the sidewalk at least twice. He also testified that S&J never repaired the sidewalk. Ms. Mazzocco testified that, prior to the subject accident, 142 Fulton LLC received a notice of violation about the condition of the sidewalk abutting the subject property. She testified that 142 Fulton LLC hired George Manos ("possibly" of defendant George Manos & Associates) to fix the sidewalk.

The lease also states in paragraph 8 that S&J agrees to maintain commercial general liability insurance in favor of itself and 142 Fulton LLC. Paragraph 8 of the lease further includes reciprocal indemnification provisions between S&J and 142 Fulton LLC for any claims caused by the other's breach or the breach of its "agents, contractors, employees, invitees, or licensees of any covenant" or for any "carelessness, negligence or improper conduct" of the other or the other's "agents, contractors, employees, invitees, or licensees."

The rider also contains mutual indemnification clauses between 142 Fulton LLC and S&J in paragraph 46. They are different from the lease language, and from each other, and are stated in full as follows:

(A)(i) Tenant shall defend, pay, indemnify and hold Landlord and Landlord Parties (hereinafter defined) harmless from and against any and all claims, demands, liabilities, fines, suits, actions, proceedings, orders, decrees and judgments of any kind of nature by or in favor of anyone whomsoever and from and against any and all costs and expenses, including, without limitation, reasonable attorneys' fees and disbursements, resulting from and in connection with loss of life, bodily or personal injury or damage to property arising, directly or indirectly, out of or from or on account of any occurrence in, at, upon, or from the Demised Premises or occasioned wholly or in part through the use and occupancy of the Demised Premises or any improvements therein or appurtenances thereto, or by any act, omission or negligence of Tenant or any subtenant, concessionaire or licensee of Tenant, or their respective affiliates, subsidiaries, employees, agents, invitees (while within the Demised Premises or Building), customers (while within the Demised Premises or the Building) (or contractors (collectively, "Tenant Parties") in, upon, at or from the Demised Premises or its appurtenances or by any default by Tenant or any Tenant Parties under this lease including any failure by Tenant to comply with any Laws or discharge any liens.

(ii) Landlord shall indemnify and hold Tenant harmless from and against (a) any and all claims of whatever nature against Tenant to the extent arising from any willful misconduct or negligence of Landlord or Landlord Parties, (b) any and all claims against Tenant to the extent arising from any accident, injury or damage occurring within or about the Building to the extent such accident, injury or damage results or is claimed to have resulted from the willful misconduct or negligence of Landlord or Landlord Parties and (c) any breach, violation or non-performance of any covenant, condition or agreement contained in this lease to be fulfilled, kept, observed and performed by Landlord. The foregoing indemnity by Landlord shall not include claims, demands, liabilities, suits, fines, actions, proceedings or costs arising from the negligence or willful misconduct of Tenant or Tenant Parties in, at or from the Building or the Demised Premises, and shall not include indirect or consequential damages of any kind or character.

William Knight, the vice president of Spring Scaffolding, testified at his deposition that Legacy Builders hired Spring Scaffolding to erect a scaffold at 144 Fulton Street, adjacent to the subject property. Mr. Yoo testified that he recalled the scaffold but was not aware if the scaffold

caused any damage to the sidewalk. Mr. Knight states in his affidavit that, when Spring Scaffolding erected and dismantled the scaffold, it surveyed the ground to ensure that there was no damage.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

As an initial matter, 142 Fulton LLC contends that S&J's motion is not timely. Pursuant to Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6, the parties have 60 days from the date of the filing of the note of issue to move for summary judgment. The note of issue was originally filed on June 12, 2019, and then a corrected version was filed on June 19, 2019. Even based on the earlier date, S&J's motion is timely. Sixty days from June 12, 2019 was August 11, 2019, which was a Sunday. In accordance with General Construction Law § 25-a, the deadline to move for summary judgment ended on the following Monday, August 12, 2019, the date S&J filed and served its motion.

Plaintiff's Claims Against S&J

In general, liability for a dangerous or defective condition on property is based on ownership, occupancy, control, or special use of the property (*Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 818 [2d Dept 2008]). Thus, a tenant of property adjacent to a sidewalk typically does not owe a duty to third persons to maintain the sidewalk in a safe condition except "where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely

displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party" (*Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept 2016] [internal quotation marks omitted]).

Here the lease states that S&J is responsible for only for defects to the sidewalk that it caused. The rider states that 142 Fulton LLC was obligated to install a new sidewalk in front of the subject property. Thus, the lease and the rider are not in conflict in this regard. The only evidence that S&J did not cause the alleged hole that is the subject of this accident is Mr. Yoo's testimony that S&J never repaired the sidewalk. While this evidence is fairly thin, no party opposes S&J's motion to dismiss plaintiff's claims against it on summary judgment. Additionally, S&J argues that its use of the sidewalk did not amount to "special use". There is no evidence of special use, and again, no party objected. Accordingly, plaintiff's negligence claims against S&J are dismissed.

142 Fulton LLC's Claims Against S&J

142 Fulton LLC asserts cross-claims against S&J for common law and contractual indemnification, contribution, and indemnification. As S&J has already established it was not negligent, 142 Fulton LLC's claims for common law indemnification and contribution are dismissed, and 142 Fulton LLC does not argue otherwise (*Cutler v Thomas*, 171 AD3d 860, 861 [2d Dept 2019]).

S&J argues that 142 Fulton LLC's breach of contract claim should also be dismissed because, in accordance with the lease, S&J purchased insurance. S&J provides a copy of the declaration page for the insurance policy it purchased. However, 142 Fulton LLC argues, and S&J does not dispute, that the insurance S&J purchased does not insure 142 Fulton LLC, as required by the lease. Instead, S&J argues on reply that 142 Fulton LLC's damages are limited

to its out-of-pocket expenses in obtaining insurance. Even if S&J is correct, such limitation would not completely dispose of 142 Fulton LLC's claim. In any event, the court will not consider this new argument submitted for the first time on reply (*Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]).

S&J also seeks dismissal of 142 Fulton LLC's contractual indemnification claim. Here, the lease language for indemnification directly conflicts with the rider language. Accordingly, the rider language controls. S&J argues that the contractual indemnification claim should be dismissed because the indemnification provision in the rider for S&J conflicts with the indemnification provision for 142 Fulton LLC. S&J does not reference any specific parts of the provisions that conflict, however.

Upon review, I find that the provisions do not conflict. However, I also find that S&J is entitled to dismissal of the contractual indemnification claims against it. There is no viable argument that S&J made a special use of the sidewalk in front of its demised premises. The sidewalk is not otherwise a part of the demised premises. S&J denies that it performed any repairs on the sidewalk, and the contract explicitly provided that this responsibility resided with 142 Fulton LLC. Even assuming the failure of S&J to name 142 Fulton LLC in its procured insurance policy, and even assuming that such a failure would constitute a default under the lease, no one argues that the subject occurrence arises from that default. And the court notes that 142 Fulton LLC does not oppose the dismissal of plaintiff's claims against S&J. Accordingly, even viewing the relevant facts in the light most favorable to 142 Fulton LLC, there is no basis to maintain 142 Fulton LLC's claims for contractual indemnification against S&J.

Spring Scaffolding Claims Against S&J

Lastly, S&J requests dismissal of Spring Scaffolding's cross-claims for indemnification

and contribution because, it argues, there is no indemnification agreement and because S&J was not negligent. No party opposes this motion.

The Claims Against Spring Scaffolding

Spring Scaffolding moves for dismissal of all claims and cross-claims against it on the basis that it did not own or otherwise have anything to do with the property located at 142 Fulton Street. Rather, as Mr. Knight testified at his deposition, Spring Scaffolding erected a scaffold at an adjacent property. No party opposes this motion.¹


Conclusion

For the foregoing reasons, S&J's motion is granted to the extent that the following claims against it are dismissed: plaintiff's claims; Spring Scaffolding's cross-claims; and 142 Fulton LLC's cross-claims for common law and contractual indemnification, and contribution. Spring Scaffolding's motion is granted, and it is dismissed from this action.

This constitutes the decision and order of the court.

April 17, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court

¹ Spring Scaffolding asks this court to "consolidate" its motion for summary judgment with S&J's motion for summary judgment. Both were argued on the same return date and have been resolved in this decision.