

<b>Autenrieth v Eklecco Newco LLC</b>
2020 NY Slip Op 31658(U)
May 26, 2020
Supreme Court, New York County
Docket Number: 154753/2018
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERN L. SAUNDERS PART IAS MOTION 36
Justice
INDEX NO. 154753/2018
JOHN AUTENRIETH, Plaintiff, MOTION SEQ. NO. 001

- against -

EKLECCO NEWCO LLC, SHAWMUT DESIGN & CONSTRUCTION, APOLLO RETAIL SPECIALISTS, LLC, PALISADES CENTER, LLC., PYRAMID MANAGEMENT GROUP, LLC, and ZARA USA, INC., Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT

Plaintiff commenced this action to recover damages for personal injuries sustained on October 27, 2015. On the day of the incident, plaintiff was a subcontractor performing work at the construction site of a Zara clothing store located at 1000 Palisades Center Dr., West Nyack, NY, a mall/shopping center. Plaintiff alleges that while working at a table saw, he slipped on unmaintained sawdust, lost his balance, and his right thumb and forefinger were injured by a saw blade.

At the time of the incident, defendants Eklecco Newco, LLC ("Eklecco") and Pyramid Management Group, LLC ("Pyramid") were the owner and property manager, respectively, of the subject premises. On March 11, 2015, Eklecco entered a shopping center lease agreement with co-defendant Zara, USA, Inc. ("Zara") for a space in the mall/shopping center. Zara engaged various contractors including defendants Shawmut Design & Construction ("Shawmut") and Apollo Retail Specialists, LLC ("Apollo") to build out the space. Thereafter, on July 1, 2015, Zara purportedly took physical possession of the space through its contractor Shawmut. On the date of the incident, plaintiff was employed as a construction worker by CLP Employers, a subcontractor of co-defendants Shawmut and Apollo.

Defendants, Eklecco and Pyramid now move pursuant to CPLR § 3212 seeking an order granting summary judgment in their favor as to their respective cross-claims against co-defendant Zara for contractual indemnification, breach of contract, and for attorney's fees on the

1 See Movant's Exhibit H.
2 See Movant's Exhibit H-1.
3 See Zara's Answer, annexed as movant's Exhibit F.
4 See Movant Exhibits I and I-1.
5 See Plaintiff's Complaint, annexed as Movant's Exhibit A.

grounds that Zara breached its lease with Eklecco by failing to defend/provide indemnity for Eklecco and Pyramid; and failing to procure insurance.

Defendant Palisades Center, LLC (“Palisades”) also hereby moves pursuant to CPLR § 3212 seeking an order granting summary judgment in its favor dismissing plaintiff’s complaint as against it arguing that it does not own the mall, has no role in the operation of the mall, and is protected by Limited Liability Company law. Specifically, Palisades asserts that, while it was an active entity,<sup>6</sup> it was a manager and a member of Eklecco LLC,<sup>7</sup> which itself was the 100% member of Eklecco MezzCo, LLC, which was the 100% member of co-defendant Eklecco Newco, LLC. Palisades maintains that at the time of the accident it had no employees, did not operate the subject premises, nor had active involvement in the operation, management, or control of same.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 [NY 1986] and *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that a fact is arguable, the motion must be denied. (See *Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *aff’d* 99 NY2d 647, 760 NYS2d 96 [2003].)

Here, Eklecco and Pyramid argue entitlement to summary judgment based on Zara’s alleged breach of the parties’ lease agreement. In opposition, Zara argues that movants have failed to prove their prima facie burden as questions of fact remain as to what negligence, if any, is attributable to movants for plaintiff’s accident and thus, whether the movants are entitled to contractual indemnification. Additionally, Zara contends that Eklecco and Pyramid failed to authenticate the lease; that Pyramid is not explicitly named in the lease and thus, not entitled to contractual relief; and finally, that movants have failed to show that the lease was in effect on the date of the accident.

As to the lease, Article 2.01, paragraph (a) provides, in part, that the following conditions must be met for term commencement; the term of the lease shall commence in one hundred eighty days of, (I) the date tenant receives a fully executed counterpart of this lease (II) the date the landlord delivers possession of the premises to tenant with landlord’s work substantially performed (III) the date the landlord delivers a clean air certificate and (IV) the date of the approval by the applicable governmental authority of Tenant’s landlord approved plans. See Movant’s *Exhibit H-1*. Moreover, paragraph (a) also provides, “in the event that Tenant elects to initially open for business during a Blackout Period, then the Term Commencement Date shall be the date upon which Tenant initially opens for business.” *Id.* The “Blackout Period” is defined as June 1st through July 31st and November 15th through January 31st of any given year.

<sup>6</sup> Palisades Center LLC is no longer an active entity as it dissolved in February of 2017.

<sup>7</sup> A separate legal entity from co-defendant Eklecco Newco, LLC.

Assuming, *arguendo*, that the lease agreement is properly authenticated,<sup>8</sup> the court finds that on this record it is unclear on what date the lease took effect. Thus, whether the lease, which includes provisions for contractual indemnification and insurance for the landlord and managing agent, was controlling on the date of the accident cannot be conclusively established. Though it is undisputed that Zara opened for business on November 18, 2015, during the Blackout Period, Eklecco and Pyramid maintain that July 1, 2015 is the controlling date as Zara purportedly took possession of the tenant space through its contactor Shawmut on that date. However, the affidavits submitted by movants do not address the Blackout opening date, or whether all elements were met on July 1, 2015 to constitute a commencement date. Ultimately, the nature of a summary judgment motion is to ascertain whether triable issues of fact remain. On this record, it is unclear what constitutes the commencement date of the lease and thus, defendants Eklecco and Pyramid's motion for summary judgment is denied.

As it pertains to Palisades' motion for summary judgment, Palisades relies upon the affidavit of Tenant Coordination Manger Giacomo Servedio who avers that mall personnel was not involved in the direction, control, or the manner/methods used to accomplish the work; the affidavit of Geoffrey Langan, Real Estate Counsel for Pyramid Managemet Group, who states that Palisades had no employees and was the member of Eklecco LLC, which itself was the 100% member of Eklecco MezzCo, LLC, which was the 100% member of undisputed owners Eklecco Newco, LLC, as well as, the lease and deed which name Eklecco as the owner of the subject premises.

In opposition, plaintiff and co-defendants argue that the motion is premature; that Palisades failed to prove that it did not have employees who could be implicated in plaintiff's accident; and that the accompanying affidavits are insufficient. However, the court finds these arguments unavailing as it is unclear how additional discovery will benefit the parties if Palisades does not have employees and thus, would not have records of same. Further, the owner and landlord as indicated by the lease and deed is Eklecco Newco, LLC. Therefore, the parties are not hindered from seeking relief from the owners. Based on the foregoing, summary judgment as to Palisades is warranted. Accordingly, it is hereby

ORDERED that defendants Eklecco Newco, LLC and Pyramid Management Group, LLC's motion for summary judgment is denied; and it is further

ORDERED that defendant Palisades Center, LLC's motion for summary judgment is granted and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that this action is severed and continued under this index number against all remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

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<sup>8</sup> The lease agreement, annexed as Movant's *Exhibit H-1*, includes signatures from Eklecco and Zara as landlord and tenant, respectively.

ORDERD that the movants are directed to serve a copy of this order with notice of entry upon the Clerk of the Court and the Trial Support Office within thirty days of receipt of this order; and it is further

ORDERED that any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the Court.

May 26, 2020

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE