

Salvo v Chatham Holtsville RI LLC
2020 NY Slip Op 31944(U)
May 13, 2020
Supreme Court, Suffolk County
Docket Number: 14-12355
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 14-12355
CAL. No. 18-02174MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 4-18-19
ADJ. DATE 6-13-19
Mot. Seq. # 005 - MotD

-----X
DOROTHY SALVO,

Plaintiff,

- against -

CHATHAM HOLTSVILLE RI LLC,
CHATHAM HOLTSVILLE RI LEASE OC
LLC, ISLAND HOSPITALITY
MANAGEMENT, INC., ISLAND
HOSPITALITY MANAGEMENT III, INC.,
DOCTOR'S ASSOCIATES, INC., FB
HOLTSVILLE RETAIL, LLC, SUBWAY
REAL ESTATE, LLC, CHRISTINE E.
IPPOLITO, FBB HOLTSVILLE
AMUSEMENT CENTER, LLC, O&M
MAINTENANCE OF LONG ISLAND, INC.,
and SITE SERVICES GROUP,

Defendants.
-----X

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YOUNG & YAGERMAN, PC
Attorney for Defendants Chatham and
Island Hospitality
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New York, New York 10038

-----X
FB HOLTSVILLE RETAIL, LLC,

Third-Party Plaintiff,

- against -

O&M MAINTENANCE OF LI, INC.,

Third-Party Defendant.
-----X

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Attorney for Defendant FBB Holtsville
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-----X
O&M MAINTENANCE OF LI, INC.,

Second Third-Party Plaintiff,

- against -

SITE SERVICES GROUP,

Second Third-Party Defendant.
-----X

Upon the following papers numbered 1 to 40 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 28; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 29 - 35; 36 - 38; 39 - 40; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Chatham Holtsville RI LLC, Chatham Holtsville RI Leaseco LLC, Island Hospitality Management, Inc., and Island Hospitality Management III, Inc. for summary judgment dismissing the complaint and all cross claims against them is granted to the extent of granting summary judgment dismissing the complaint and all cross claims against defendant Chatham Holtsville RI LLC and amending the caption to reflect the dismissal, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on February 20, 2014, at approximately 6:50 a.m., when she slipped and fell on ice in the parking lot of a Subway restaurant located at 35 Middle Avenue in Holtsville, New York. The subject premises allegedly

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is leased and maintained by defendants FB Holtsville Retail LLC and FBB Holtsville Amusement Center LLC (collectively "FB Holtsville"), and subleased and operated by defendants Doctor's Associates Inc., Subway Real Estate, LLC, and Christine Ippolito (collectively "Subway defendants"). Prior to the accident, FB Holtsville entered into a snow removal contract with defendant O&M Maintenance of LI, Inc. ("O&M") to perform snow removal operations in the parking lot of the subject premises. The parking lot is adjacent to the parking lot of the Residence Inn by Marriott hotel located at 25 Middle Avenue in Holtsville, New York, which is managed by defendant Island Hospitality Management III, Inc. ("Island Hospitality"). Prior to the accident, Island Hospitality entered into a snow removal contract with defendant/second third-party defendant Site Service Group ("Site") to perform snow removal operations in the parking lot of the hotel. Defendant Chatham Holtsville RI LLC ("Chatham") owns both the Subway restaurant premises and the hotel premises. The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

Chatham now moves for summary judgment dismissing the complaint and all cross claims against it on the basis that it was an out-of-possession owner with no contractual obligation to repair or maintain the parking lot where the accident occurred as there was a written ground lease agreement requiring the tenant to maintain the subject area. Chatham also moves for an order amending the caption to reflect the dismissal of this action against it.

An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct (*see Crosby v Southport, LLC*, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]; *Casson v McConnell*, 148 AD3d 863, 49 NYS3d 711 [2d Dept 2017]; *Gowen v Gabrielle Realty Holdings, LLC*, 140 AD3d 929, 33 NYS3d 431 [2d Dept 2016]). Control may be evidenced by a lease provision making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*see Fernandez v Town of Babylon*, 72 AD3d 636, 897 NYS2d 510 [2d Dept 2010]; *Taylor v Lastres*, 45 AD3d 835, 847 NYS2d 139 [2d Dept 2007]; *Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]).

Here, Chatham has established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not maintain control over the premises at the time of plaintiff's accident, and that it was not contractually obligated to maintain or repair the allegedly defective condition at the subject premises (*see Greco v Starbucks Coffee Co.*, 58 AD3d 681, 873 NYS2d 639 [2d Dept 2009]; *Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121, 858 NYS2d 207 [2d Dept 2008]; *Gavallas v Health Ins. Plan of Greater N.Y.*, 35 AD3d 657, 829 NYS2d 131 [2d Dept 2006]). In his affidavit, Eric Kentoff states that he is the vice president and secretary of Chatham TRS Holdings, Inc., sole member of Chatham. He states that pursuant to section 8.1 of the ground lease agreement between Chatham and FB Holtsville Retail LLC ("FB Holtsville Retail"), FB Holtsville Retail, as tenant, is solely responsible for maintaining the subject premises in good and safe condition and repair throughout the term. Section 8.1

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of the agreement provides, in relevant part that “Tenant, at its sole cost and expense, shall cause the Premises ... to be maintained in good and safe condition and repair.” The terms of the agreement demonstrate that Chatham was an out-of-possession landlord, which had relinquished all control over the subject premises on the day of plaintiff’s accident (*see Stein v Harriet Mgt., LLC*, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]).

In opposition, plaintiff and the FB Holtsville defendants contend that there is an issue of fact as to whether Chatham retained possession and control of the subject premises at the time of the accident. However, they failed to present evidence to support their contention as to Chatham’s control of the premises.

In view of the foregoing, the branch of Chatham’s motion for summary judgment dismissing the complaint and all cross claims against it is granted, and the instant action is severed and shall continue as against the remaining defendants. Accordingly, the branch of Chatham’s motion for an order amending the caption to reflect the dismissal of this action against Chatham is granted.

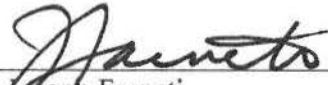
Chatham also moves for summary judgment on its cross claims for contractual indemnification and common-law indemnification against FB Holtsville Retail. FB Holtsville Retail may be liable to Chatham for common-law indemnification even in the absence of a duty running to the injured plaintiff, if plaintiff’s injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of FB Holtsville Retail (*see Peycke v Newport Media Acquisition II*, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; *Baratta v Home Depot USA*, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]). There is a question of fact as to whether plaintiff’s injuries are attributable solely to the negligent performance or nonperformance of an act that was solely within the province of FB Holtsville Retail (*see Franklin v Omni Sagamore Hotel*, 5 AD3d 348, 772 NYS2d 534 [2d Dept 2004]; *Mitchell v Fiorini Landscape*, 284 AD2d 313, 726 NYS2d 673 [2d Dept 2001]). The question of fact precludes the granting of Chatham’s request for summary judgment for common-law indemnification against FB Holtsville Retail. Moreover, Chatham failed to establish its entitlement to summary judgment for contractual indemnification against FB Holtsville Retail, since a question of fact exists with respect to whether FB Holtsville Retail breached the ground lease agreement by failing to perform one or more of the services for which it was responsible (*see Peycke v Newport Media Acquisition II, supra; Baratta v Home Depot USA, supra*). Accordingly, the branch of Chatham’s motion for summary judgment on its cross claims for contractual indemnification and common-law indemnification against FB Holtsville Retail is denied.

Defendants Chatham Holtsville RI Leaseco LLC, Island Hospitality Management, Inc., and Island Hospitality Management III, Inc. move for summary judgment dismissing the complaint and all cross claims against them on the ground that they did not owe a duty to plaintiff because they were not contractually obligated to remove snow or ice from the parking lot of the Subway restaurant where the subject accident allegedly occurred. However, their submissions failed to establish their entitlement to judgment as a matter of law. The adduced evidence does not clearly indicate where plaintiff fell. There

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are questions of fact as to where plaintiff's accident occurred and whether Island Hospitality owed a duty to her. Accordingly, the branch of the motion by defendants Chatham Holtsville RI Leaseco LLC, Island Hospitality Management, Inc., and Island Hospitality Management III, Inc. for summary judgment dismissing the complaint and all cross claims against them is denied.

Dated: May 13, 2020



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION