PR Jericho Stor. LLC v SAKS Plumbing & Heating Corp.
2020 NY Slip Op 32627(U)
August 11, 2020
Supreme Court, Kings County
Docket Number: 525228/19
Judge: Mark I. Partnow
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At an IAS Term, Part 68 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 11th day of August, 2020.

PRESENT:

HON. MARK I. PARTNOW,
Justice.

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PR JERICHO STORAGE LLC, STORAGE POST MANAGEMENT, LLC A/K/A STORAGE MANAGEMENT, LLC and SELF STORAGE MANAGEMENT LLC D/B/A STORAGE POST,

Plaintiffs,

- against -

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SAKS PLUMBING & HEATING CORP., SAKS METERING and ROBERT VANELLA,

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	32-43 24-25
Opposing Affidavits (Affirmations)	25 44-54
Reply Affidavits (Affirmations)	44-54 30

Upon the foregoing papers, defendants SAKS Plumbing & Heating Corp., SAKS Metering (collectively, SAKS) and Robert Vanella (Vanella) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (7), dismissing the complaint.

Plaintiffs PR Jericho Storage LLC, Storage Post Management, LLC a/k/a Storage Management, LLC and Self Storage Management LLC d/b/a Storage Post (collectively,

Storage Post) cross-move (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3212, granting them summary judgment on their third cause of action for contractual indemnification.

Background

The SAKS Rental Agreement

On April 28, 2016, Vanella, in his capacity as a warehouse manager of SAKS, entered into a month-to-month occupancy agreement on behalf of SAKS for the rental of a storage unit from Storage Post (SAKS Rental Agreement). Paragraphs 17 and 18 of the SAKS Rental Agreement provide that:

> "17. RELEASE OF MANAGER AND/OR OWNER'S LIABILITY FOR BODILY INJURY: Manager, Manager's agents and employees, Owner, and Owner's agents and employees shall not be liable to Occupant or Occupant's agents for injury or death as a result of Occupant's use of the storage space or the self-storage facility, *even if such injury is caused by the active or passive acts or omissions or negligence of the Manager*, Manager's agents and employees, Owner, and Owner's agents and employees (emphasis added).
>
> "18. INDEMNITY: Occupant agrees to indemnify, hold harmless and defend Manager, Manager's employees and agents, Owner and Owner's employees and agents from all claims, demands, actions or causes of action (including attorneys' fees and all costs) that are hereinafter brought by others arising out of Occupant's use of the storage space and common areas."

Youngstein's Accident

On June 24, 2016, at approximately 7:00 a.m., plaintiff Matthew Youngstein (Youngstein), who was employed by SAKS as an installer, allegedly suffered personal injuries when the door/gate to a storage unit at Storage Post located at 1990 Jericho

Turnpike in New Hyde Park, New York, fell and hit him in the head. Specifically, according to Youngstein's deposition testimony, he went to the storage unit occupied by SAKS at approximately 7:00 a.m. to pick up water meters. Youngstein testified that he opened the storage door/gate to the SAKS storage unit and was attempting to enter the storage unit when the door/gate came down fast onto the top of his head. According to Youngstein's bill of particulars, he sustained soft-tissue injuries, disc bulges and herniations at varying levels of the cervical spine and lumbosacral spine, laceration to the head requiring staples, a cerebral and vestibular concussion and an exacerbation of degenerative conditions.

Youngstein testified that he had previously complained to his supervisor, Vito Oddo, about issues with the condition of the SAKS storage unit. Vanella, who frequented the Storage Post on a weekly basis to open the storage unit for SAKS' installers, testified that he opened the storage unit at least six times prior to Youngstein's accident and experienced issues with the door/gate on some of these occasions. Approximately one month before Youngstein's accident, Vanella "rolled" the door/gate up, it did not stay up and the door/gate fell down quickly. Vanella testified that he informed the front desk Storage Post employee of the defective condition, and the Storage Post employee advised Vanella that the facility's maintenance man was expected within the week. Vanella provided Storage Post with his business card so that Storage Post could contact him to unlock the storage unit but was never contacted by Storage Post. According to Vanella, Storage Post never repaired the storage unit door/gate.

Youngstein's Personal Injury Action

On February 6, 2017, Youngstein commenced a personal injury action against Storage Post, alleging that Storage Post was negligent in its ownership, operation, maintenance and control of the property. On April 11, 2017, Storage Post answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that Youngstein's damages "were caused by persons and/or entities over which these answering defendants had no control." After issue was joined, discovery ensued.

Meanwhile, on October 31, 2017, Storage Post filed a third-party summons and complaint against SAKS and Vanella asserting four causes of the action for: (1) common law indemnification; (2) contribution; (3) contractual indemnification; and (4) breach of contract by failing to procure and maintain liability insurance in favor of Storage Post, pursuant to the terms of the SAKS Rental Agreement. On February 7, 2019, SAKS and Vanella answered the third-party complaint, denied the allegations therein and asserted affirmative defenses and cross claims against Storage Post for indemnification and contribution. The third-party action was subsequently severed from Youngstein's personal injury action.

Saks' and Vanella's Dismissal Motion

Saks and Vanella now move for an order, pursuant to CPLR 3211 (a) (7), dismissing Storage Post's complaint for failure to state a cause of action. Saks and Vanella contend that Storage Post is not entitled to common law indemnification and/or contribution, asserted in the first and second causes of action, because Youngstein did not sustain a grave

injury and "[a]n employer can be found liable for common-law indemnification *if* the employee sustained a grave injury as defined by the Workers' Compensation Law § 11."

SAKS and Vanella argue that dismissal of the third cause of action for contractual indemnification is warranted "because the indemnity clause in the subject lease agreement is in violation of General Obligations Law [GOL] § 5-321" which "precludes a landlord from obtaining indemnification for his own negligence." SAKS and Vanella assert that "GOL § 5-321 renders a lease provision which purports to exempt a lessor from liability for its own negligence as void an[d] unenforceable." SAKS and Vanella thus argue that the indemnification provision in the SAKS Rental Agreement is unenforceable because it "attempts to shift the entire responsibility for damages from STORAGE POST to SAKS regardless of the Defendant, STORAGE POST's negligence."

SAKS and Vanella note that "[t]he record reflects that SAKS did not assume any maintenance and repair responsibility for the lease[d] premises" and that Storage Post "although responsible to maintain the premises, admittedly did not maintain the premises." SAKS and Vanella rely upon the deposition testimony of Shawn Lutchmidat (Lutchmidat), a representative of Storage Post, who testified that the storage unit doors/ gates were installed prior to Storage Post's acquisition of the property, and that they were never replaced. Lutchmidat also testified that the storage unit roll up doors are kept in place on a track by the use of two tensioners, and that Storage Post did not employ anyone to inspect the tensioners and did not have a maintenance procedure for the tensioners.

SAKS and Vanella also contend that the fourth cause of action for breach of the SAKS Rental Agreement should be dismissed because "[t]he Agreement governing the

self-storage unit did not require SAKS and ROBERT VANELLA to 'secure liability insurance in favor of or for the benefit of' STORAGE POST . . ." SAKS and Vanella note that paragraph 15 of the SAKS Rental Agreement only required them to "maintain a policy of fire, extended coverage endorsement, burglary, vandalism and malicious mischief insurance for the actual cash value of the stored property."

Storage Post's Summary Judgment Cross Motion and Partial Opposition

Storage Post cross-moves for summary judgment on its third cause of action for contractual indemnification and submits a "partial" opposition to SAKS' and Vanella's dismissal motion.

Importantly, Storage Post specifically concedes that Youngstein did not sustain a grave injury and, for this reason, agrees that its first and second causes of action against SAKS and Vanella for common law indemnification and contribution are subject to dismissal. Storage Post similarly concedes that SAKS and Vanella "were not obligated to procure a commercial general liability insurance policy naming [it] as additional insured[,]" and therefore, its fourth cause of action for breach of the SAKS Rental Agreement is likewise subject to dismissal.

Storage Post only opposes that branch of SAKS' and Vanella's dismissal motion seeking dismissal of Storage Post's third cause of action for contractual indemnification. Storage Post argues that the indemnity provision in the SAKS Rental Agreement does not violate GOL § 5-321 because that statute "does not even apply to the indemnity agreement herein." Storage Post asserts that SAKS and Vanella rely on inapposite cases which apply GOL § 5-321 to a lease of real property "for the purpose of human habitation – whether

those persons be workers on the premises, patrons of the premises, residents in an apartment building, or [t]he like." Storage Post argues that the SAKS Rental Agreement, in contrast, is not a lease, but rather, "an agreement to rent a storage space unit" for the "storage of things." Essentially, Storage Post contends that GOL § 5-321 only applies to "cases involving the habitable occupancy of real property pursuant to a lease." Storage Post argues that SAKS Rental Agreement is more akin to an agreement to rent a locker or a safety deposit box, and therefore, GOL § 5-321 is not applicable here.

Storage Post argues that the indemnity provision in the SAKS Rental Agreement is valid and enforceable, and cross-moves for summary judgment on the third cause of action for contractual indemnification, pursuant to the plain language of paragraphs 17 and 18 of the SAKS Rental Agreement. According to Storage Post, "[t]hese provisions plainly convey that Defendants are required to indemnify Storage Post from all claims and actions, even if injury results from its negligence."

SAKS' and Vanella's Reply and Opposition to the Cross Motion

SAKS and Vanella, in reply and in opposition to the cross motion, contend that GOL § 5-321 applies to the SAKS Rental Agreement because it is "a lease of real property." SAKS and Vanella quote the language in GOL § 5-321 and argue that it "does not contain *any* requirement that the real property be habitable." SAKS and Vanella note that "there is permissive law that applies G.O.L. § 5-321 to storage units" and submit a copy of the New York County Supreme Court's decision in *Anable v Public Storage Prop. XIV, Inc.*, 2012 NY Slip Op 31418 (U) (Sup Ct, New York County 2012) (Anable Case).

Storage Post's Reply

Storage Post, in reply, argues that the holding in the Anable Case is not applicable because the parties in the Anable Case did not dispute that GOL § 5-321 was applicable in the context of a storage unit. Storage Post asserts that "application of the statute in published decisions that describe the location at issue, demonstrate that the statute has been applied consistently to habitable premises."

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment 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 issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

In contrast, a dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]).

GOL § 5-321 provides that:

> "Every covenant, agreement or understanding in or in connection with or collateral to *any lease of real property* exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable" (emphasis added).

Contrary to Storage Post's contention, GOL § 5-321, by its plain and unambiguous terms, is not limited to leases of *habitable* real property. Instead, GOL § 5-321 specifically applies to "any lease of real property," which would include the SAKS Rental Agreement at issue here (*see Anable v Public Storage Prop. XIV, Inc.*, 2012 NY Slip Op 31418 [U] [Sup Ct, New York County 2012] [holding that broad indemnification provision in lease agreement for self-storage unit violates GOL § 5-321]). "If the purpose of an indemnification clause in a lease is to exempt the landlord from liability to the victim for its own negligence, it violates [GOL] § 5-321" (*id.*).

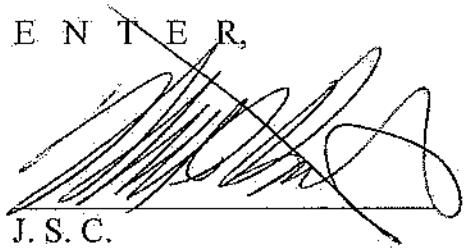
Here, the indemnification provisions in paragraphs 17 and 18 of the SAKS Rental Agreement exempts Storage Post from liability for its own negligence and is, therefore, "void against public policy and unenforceable," pursuant to GOL § 5-321. Consequently, Storage Post's third cause of action for contractual indemnity fails to state a viable cause of action and is subject to dismissal. Storage Post does not oppose dismissal of its remaining causes of action. Accordingly, it is

ORDERED that SAKS' and Vanella's motion (in mot. seq. one) seeking to dismiss the complaint, pursuant to CPLR 3211 (a) (7), is granted; and it is further

ORDERED that Storage Post's cross motion (in mot. seq. two) for summary judgment on its third cause of action for contractual indemnification against SAKS and Vanella is thus, denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.