Crimlis v City of New York
2021 NY Slip Op 30833(U)
March 17, 2021
Supreme Court, New York County
Docket Number: 150341/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12**

Justice

---X

LAWRENCE CRIMLIS,

Plaintiff,

- v -

CITY OF NEW YORK, BLEECKER TOWERS TENANTS CORP., ATRIUM, THE ATRIUM TRADING GROUP, INC.,

Defendants.

---X

INDEX NO. 150341/2015

MOTION DATE ____________

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

ATRIUM, THE ATRIUM TRADING GROUP, INC.

Third-party Plaintiff,

-against-

644 BRDY REALTY, INC.,

Third-party Defendant.

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Third-Party
Index No. 595169/2017

BLEECKER TOWERS TENANTS CORP.

Second third-party Plaintiff,

-against-

M.A. ANGELIADES INC., VILES CONTRACTING CORP., HELLMAN ELECTRIC CORP., CONSOLIDATED EDISON,

Second third-party defendants.

---X

Second Third-Party
Index No. 595398/2018

The following e-filed documents, listed by NYSCEF document number (Mjotion 008) 213-228, 235-240, 249-256, 260-265

were read on this motion for summary judgment.

By notice of motion, defendant 644 BRDY Realty, Inc. (BRDY) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all claims filed against it, and for summary judgment on its claims against defendant The Atrium Trading Group Inc. (ATG). Defendant Bleecker Tower Tenants Corp. (BTTC) opposes and cross-moves for an order granting it leave to amend its answer to assert cross claims against BRDY, and upon granting leave, granting it summary judgment on its claims against BRDY, ATG, and defendant Atrium. Atrium and ATG oppose, and without notice of cross motion, cross-move for an order summarily dismissing the complaint and awarding ATG summary judgment on its third-party claims.

I. PERTINENT BACKGROUND

By agreement dated January 1, 1978, nonparty-landlord Broadway-Bleecker Restoration Company leased the property located at 644 Broadway in Manhattan to BRDY. The lease is set to expire on December 31, 2077. Pursuant to section 5.1 thereof, BRDY is assigned all rights as landlord for commercial leases covering portions of the property. Section 5.3(d) provides that BRDY may extend or modify existing commercial leases or enter into new commercial leases provided that they "require the Commercial Tenant to carry general public liability insurance in reasonable amounts, in which Landlord and Landlord's managing agent shall be named as additional insureds." Pursuant to section 6.2.2. of the lease, the landlord is responsible for repairing, *inter alia*, the "sidewalks." In addition, section 6.9 provides:

> During the term hereof, [BRDY] shall carry public liability insurance providing limits of not less than $1,000,000 with respect to personal injuries or death and $50,000 with respect to property damage occurring in or about the Demised Premises or the building of which the Demised Premises are a part including without limitation, sidewalks, sidewalk elevator and signs, or in such other or greater limits as may reasonably be required during the term of the lease or the renewal term thereof, if any. All of the insurance policies required to effect such coverage shall name Landlord, Landlord's managing agent, and [BRDY]….

Pursuant to section 6.12:

> [BRDY] agrees to indemnify Landlord and its managing agent and save them harmless from and against any and all claims, liabilities, costs, expenses, demands, actions and judgments for or resulting from personal injury, loss of life and/or damage to property sustained by any person, fire or corporation in or about the Demised Premises, including without limitation, the sidewalk elevator, or the sidewalks or curbs adjacent thereto during the term of this lease arising out of [BRDY]'s use and occupancy of the Demised Premises and [BRDY]'s performance of the covenants and conditions of this lease, and to reimburse Landlord or its managing agent for all costs and expenses (including but not limited to counsel fees) incurred by Landlord or its managing. agent in connection therewith-. The maintenance or existence of an insurance policy shall not be deemed to relieve [BRDY] of any obligations hereunder.

(NYSCEF 225).

By agreement dated October 1, 2006, BRDY, as "owner," subleased the ground floor of the premises to ATG for a term of 17 years. Section 8A of the attached rider reflects that the agreement is a sublease, as BTTC leased the entire premises located at 644 Broadway to BRDY on January 1, 1978. The parties also agree that BRDY will perform and observe all terms and conditions in the 1978 lease and "hold [ATG] harmless from and against any and all claims damages, of every kind or natured, based upon or incurred on account of any violation by [BRDY] of any such terms, covenants or conditions." In addition, BRDY agrees to deliver a copy of the 1978 lease to ATG. Pursuant to section 38, ATG agrees to maintain, *inter alia*, an insurance policy with limits of liability not less than $5,000,000 per occurrence, and BRDY and BTTC are to be named as additional insureds, and pursuant to section 40:

> to indemnity [sic] and save harmless [BRDY] against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from any work or thing whatsoever done by or on behalf of [ATG], in or about the Demised Premises, and will further indemnify and save [BRDY] harmless against and from any and all claims arising from any breach or default on the part of [ATG] in the performance of any covenant or agreement on the part of [ATG] to be performed, pursuant to the terms of this lease, or arising from any act or negligence of [ATG], or any of its agents, contractors, servants, employees or licensees, and from and against all costs, reasonable counsel fees, expenses and liabilities incurred in or about any such claim or action or proceeding brought thereon; and in such case or proceeding to be brought against [BRDY] by reason of any such claim, [ATG], upon notice from [BRDY], covenants to resist or defend, at [ATG]'s expense, such action or proceeding by counsel

reasonably satisfactory to [BRDY], but chosen by [ATG].

Pursuant to section 58, ATG is responsible for cleaning, not repairing, the sidewalks, and pursuant to section 60, it is not responsible for repairs to the sidewalk in front of or alongside the premises. (NYSCEF 226).

At a hearing held pursuant to Civil Rights Law § 50-h and at his deposition, plaintiff testified that on February 12, 2014, while walking on the sidewalk along Broadway in Manhattan, he turned the corner onto Bleecker Street, and in front of the premises, an Atrium store, his left foot got stuck on the sidewalk, causing him to trip and fall, sustaining injury. After he fell, he looked back and saw a hole, approximately a foot and a half in length and two to three inches deep, in the sidewalk. While he believed that he had walked in front of the Atrium store before, he had not previously observed the hole. Afterward, he entered the store, asked for a manager, and after he told the manager about his accident, she denied responsibility and claimed that the City was responsible. (NYSCEF 227).

At her deposition, the current property manager for the residential portion of the premises testified that at the time of plaintiff's accident, the building was a residential co-op with one commercial space, that BRDY was the original sponsor of the co-op, and that BRDY managed the commercial space. She did not recall who was responsible for maintaining the sidewalk outside the premises. If there was an issue with the sidewalk, she would bring it the attention of BRDY and the building's board, BTTC. (NYSCEF 250).

At her deposition, BRDY's president testified that BRDY leases the commercial space on the first floor of 644 Broadway, and that Broadway-Bleecker Restoration Company no longer exists. She denied that BRDY provided services to the commercial tenant, confirmed that it is not responsible for the sidewalk, and asserted that, as of 2014, the commercial tenant is

responsible for the upkeep and repair of the commercial space and that the co-op is responsible for the sidewalk abutting the commercial space. (NYSCEF 228).

At his deposition, Atrium's CFO testified that in 2014 his office was in the basement of 644 Broadway, and he observed no issues with the sidewalk. Had there been, the CFO contended, he would have relayed them to BRDY's president as Atrium was not responsible for any issues with the sidewalk. (NYSCEF 252).

By supplemental summons and verified amended complaint dated January 20, 2015, plaintiff alleges that BTTC, Atrium, and ATG negligently maintained the sidewalk, and that they are thus liable for his injuries. (NYSCEF 2).

On March 16, 2015, Atrium and ATG submitted a verified answer, in which they advance cross claims against BTTC. (NYSCEF 216).

By verified answer dated March 16, 2015, BTTC advances cross claims against Atrium and ATG for common-law and contractual indemnification, contribution, and breach of contract for failure to procure insurance. (NYSCEF 217).

By third-party summons and complaint March 2, 2017, ATG commenced a third-party action against BRDY, alleging that plaintiff's injuries were due to BRDY's negligence, and thus seeking common-law indemnity and contribution. (NYSCEF 219).

By amended answer dated April 5, 2017, BRDY advances cross claims and counterclaims for contractual and common law indemnification and for contribution against BTTC and ATG, and a counterclaim for breach of contract for ATG's failure to procure insurance. (NYSCEF 220).

By decision and order dated May 1, 2017, plaintiff's motion to consolidate was granted, thereby making BRDY a direct defendant in this action. (NYSCEF 32).

II.CONTENTIONS

A. BRDY (NYSCEF 213-228)

In support of its motion for summary dismissal, BRDY denies owing a duty to plaintiff under the City Administrative Code, as it does not own the premises and asserts that plaintiff cannot prove that it created or had notice of the sidewalk defect upon which plaintiff tripped and fell.

B. BTTC (NYSCEF 235-240)

In opposition to BRDY's motion and in support of its cross motion, BTTC contends that BRDY should be deemed an owner for the purposes of the City Administrative Code, given its 99-year lease for the ground floor of the commercial space which it analogizes to a life estate, the holder of which may be held liable for such property defects.

BTTC also seeks leave to file an amended answer to assert cross claims against BRDY for contractual indemnification, contribution, and breach of contract for failure to procure insurance. Given the indemnification provision in the 1978 lease agreement, BTTC argues that regardless of whether BRDY was negligent, BRDY is obligated to indemnify it, and to the extent that BTTC was negligent, which it denies, the indemnification provision contains a savings clause. It submits a proposed amended answer. (NYSCEF 240). BTTC argues that as the sublease requires Atrium to indemnify and defend BRDY and to purchase insurance covering both BRDY and BTTC, and as Atrium was provided a copy of the 1978 lease pursuant to section 8A of the sublease, the 1978 lease is incorporated by reference into the sublease, and thus, Atrium is also obligated to indemnify and defend BTTC.

C. Atrium and ATG (NYSCEF 249-253)

Atrium and ATG contend that as plaintiff's accident occurred on the sidewalk, they are

not liable to plaintiff, BRDY, or BTTC for his injuries, and moreover, that plaintiff's accident did not arise from any work done by them. They too contend that BRDY should be deemed an owner, given its 99-year lease on the commercial space, and deny any obligation to insure BTTC, observing that there is no lease or contract between them and BTTC. They also deny that the 1978 lease is incorporated by reference into their sublease.

D. Plaintiff (NYSCEF 260-263)

Plaintiff observes that although Atrium and ATG purport to cross-move for summary judgment, they did not file a notice of cross motion. To the extent that the cross motion is considered, plaintiff opposes.

Plaintiff too argues that BRDY should be treated as an owner under the City Administrative Code, and argues that none of the movants demonstrate their lack of notice, as they all fail to establish when the sidewalk was last inspected before plaintiff's accident. Moreover, plaintiff argues that photographs of the sidewalk's condition (NYSCEF 261) and the pertinent Big Apple Map (NYSCEF 262) create issues of fact as to notice, and even if BRDY is solely a tenant, by choosing to maintain the sidewalk, it is liable to plaintiff for his injury. According to plaintiff, the leases are not sufficiently authenticated, but to the extent they are, he observes that the 1978 lease provides that BRDY is responsible for structural repairs if the repairs are necessitated by sublessees, the sublease provides that Atrium and ATG are responsible for cleaning the sidewalk, and to the extent the sidewalk has been chipped, Atrium and ATG are responsible for its upkeep and thus likely noticed the defect.

E. BTTC's reply (NYSCEF 264)

BTTC reiterates its earlier contentions and maintains that as a third-party beneficiary of the sublease, and Atrium and ATG are obligated to indemnify and defend it. It denies that BRDY

demonstrates prejudice if the late amendment is permitted.

F. BRDY's replies (NYSCEF 258, 265)

BRDY reiterates its earlier contentions.

III. DISCUSSION

A. ATG's and Atrium's cross motion

Although ATG and Atrium filed no notice of cross motion and a cross motion may not include a prayer for relief against a non-moving party (*Hennessey-Diaz v City of New York*, 146 AD3d 419, 420 [1st Dept 2017]), as BRDY and plaintiff have substantively responded to the purported cross motion and suffer no prejudice, ATG's and Atrium's motion is considered. (*See Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004], *lv denied* 3 NY3d 605 [2004] [objections concerning procedural defects with notice of motion waived where plaintiff opposed motion on the merits]).

B. Summary judgment standard

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

C. Duty to plaintiff

In New York City, it is the duty of the owner of real property abutting any sidewalk to maintain the sidewalk in a reasonably safe condition. (Administrative Code § 7-210; *Tropper v Henry St. Settlement*, 190 AD3d 623 [1st Dept 2021]). The term "owner" is not defined, but it has been strictly construed to encompass "all owners, regardless of their out-of-possession status and whether the owner has contracted with the lessee or another to keep the sidewalk in reasonably safe condition." (*Xiang Fu He v Troon Mgmt., Inc.*, 34 NY3d 167, 173 [2019]).

Here, the lease is not "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk" (*Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept 2016], quoting *Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept 2010]). And, pursuant to it, BTTC expressly retains responsibility for maintaining the sidewalk. This case is not like those in which the duty was imposed on a life tenant (*see Lai-Hor Ng Yiu v Crevatas*, 33 Misc 3d 267, 273 [Sup Ct, Kings County 2011], *affd* 103 AD3d 691 [2d Dept 2013] [life tenant an owner for purposes of Administrative Code § 7-210]), as "a life tenant is entitled to possession, control, and enjoyment of the property for the duration of his or her life" (56 NY Jur 2d Estates, Powers, Etc. § 35). Here, by contrast, BRDY is merely a tenant with restricted rights under the lease. Accordingly, BTTC may not delegate the duty imposed by section 7-210 to BRDY, and absent any claim that BRDY, Atrium or ATG created the condition or made special use of the sidewalk, plaintiff may advance its negligence claim against only BTTC. (*See Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011] [tenant who did not create condition or make special use of sidewalk owes no duty to third party]).

Absent a duty to plaintiff, whether BRDY, Atrium, or ATG had notice of the defect need not be addressed.

D. Indemnification, contribution, and failure to procure insurance

Under the 1978 lease, BRDY is obligated to defend and indemnify BTTC for personal injury claims in or about the premises arising out of BRDY's performance of the covenants and conditions of the lease. The lease also expressly provides that BTTC is obligated to perform all repairs to the sidewalk, unless the repairs are necessitated by some act of BRDY. The evidence reflects that the sidewalk defect and plaintiff's resulting injury were not the consequence of negligence on the part of BRDY. Thus, the basis of BTTC's motion to amend its answer to assert claims of indemnification or contribution against BRDY is palpably without merit. (*See McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013] [owner not entitled to indemnification or contribution from tenant where lease obligates owner to make structural repairs and there is no evidence that plaintiff's injuries arose from tenant's negligence]; *see also Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [leave to amend not warranted where amendment patently lacking in merit]). In addition, BTTC may not pursue its claim for breach of contract against BRDY, because even if BRDY failed to procure insurance as required by the lease, BRDY was not responsible for repairing the sidewalk, and thus, any liability imposed on BTTC is not proximately caused by BRDY's failure to procure insurance. (*See New York City Hous. Auth. v Merchants Mut. Ins. Co.*, 44 AD3d 540, 542 [1st Dept 2007] [dismissing cause of action for failure to procure insurance where damages did not result from that failure, because even if required insurance was maintained, coverage would not have been afforded]).

Regardless of whether the 1978 lease was incorporated by reference into the sublease, both the sublease and 1978 lease reflect that BTTC alone is responsible for maintaining the sidewalk. Moreover, the evidence reflects that the sidewalk defect and plaintiff's resulting injury were not the consequences of negligence on the part of Atrium or ATG. Consequently, BTTC is

not entitled to indemnification or contribution from them, nor it is entitled to pursue its breach of contract claim, because any liability imposed on BTTC is not proximately caused by ATG's and Atrium's failure to procure insurance.

As BRDY, Atrium, and ATG may not be held liable for plaintiff's injuries or for BTTC's potential damages, they may not advance claims for indemnification, contribution, or breach of contract for failure to procure insurance.

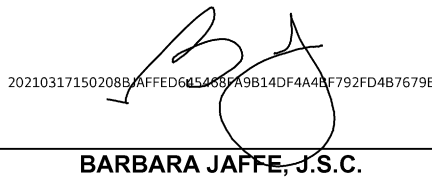
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant 644 BRDY Realty, Inc.'s motion is granted to the extent that plaintiff's claims against it are severed and dismissed, and defendant The Atrium Trading Group, Inc.'s third-party complaint is dismissed, and is otherwise denied; it is further

ORDERED, that defendant Bleecker Tower Tenants Corp.'s cross motion is denied in its entirety; and it is further

ORDERED, that defendants Atrium and The Atrium Trading Group, Inc.'s cross motion is granted to the extent that plaintiff's claims against them are severed and dismissed, and is otherwise denied.



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3/17/2021	BARBARA JAFFE, J.S.C.
DATE	

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	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
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