

Colonna v 181 Ave. U Meats Inc.
2021 NY Slip Op 31030(U)
March 29, 2021
Supreme Court, Kings County
Docket Number: 515637/2017
Judge: Ingrid Joseph
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At an I.A.S. Term, **Part 83** 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 29th day of March 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

P R E S E N T : HON. INGRID JOSEPH, JSC

-----X

TERRY ANN COLONNA,

Plaintiff,

Index No.: 515637/2017
Motion Seq. 5, 6

-against-

181 AVE. U MEATS INC. d/b/a MEATS SUPREME,
and BC REALTY OF NEW YORK INC.,

Defendants,

-----X

181 AVE. U MEATS INC. d/b/a MEATS SUPREME,

Third-Party Plaintiff,

-against-

AI COMMERCIAL HOOD & DUCT CLEANING INC.,

Third-Party Defendant.

-----X

The following e-filed papers considered herein:

E-Filed Papers Numbered

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Exhibits Annexed _____
Opposing Affidavits (Affirmations) _____

121-174; 190-207,
225 - 227; 228 - 238; 242

Reply Affidavits (Affirmations) _____

246 - 249; 250 - 256; 2567 - 260
261 - 267

In this matter, plaintiff, Terry Ann Colonna ("plaintiff"), alleges that she sustained an injury when she slipped and fell on a greasy chemical on the sidewalk adjacent to the building located at 181 Avenue U, Brooklyn, New York on May 29, 2017. Defendant, BC Realty of New York Inc.,

moves pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint, or, alternatively, summary judgment on its cross claims against defendants 181 Ave. U Meats Inc. d/b/a Meats Supreme ("Meats Supreme") and A1 Commercial Hood & Duct Cleaning, Inc. ("A1"). A1 moves to dismiss the third-party complaint and any cross claims asserted against A1 in accordance with CPLR § 3212 and General Obligations Law § 15-108. A1 further requests that the court so-orders the stipulation of discontinuance in accordance with CPLR 3217(b) that was executed by A1 and plaintiff based upon a General Release dated on September 11, 2020.

The sidewalk where plaintiff slipped and fell abuts a building owned by BC Realty and leased to Meats Supreme pursuant to a verbal, month-to-month lease agreement. The sole owner of BC Realty owns seventy-five percent interest in Meats Supreme and maintains BC Realty's office in a space above the store. The parties do not dispute that Meats Supreme has engaged A1 every three months, for the past ten years, to degrease and clean its ventilation and kitchen equipment. The invoice that A1 provided to Meats Supreme for the cleaning service performed on the day of plaintiff's fall describes the service provided by A1 as removal of grease build up around and on an exhaust fan, ventilation stack and duct work, the hood and hood filters. Plaintiff claims to have sustained burns when she slipped and fell while traversing a portion of the sidewalk where A1 workers were actively pressure washing racks from Meats Supreme's kitchen with a caustic water/chemical solution.

BC Realty contends that it is entitled to summary judgment, because BC Realty is separate and distinct from Meats Supreme; does not have a relationship with A1; and did not contract with A1 to perform the work. BC Realty points out that it did not create the dangerous condition that caused plaintiff's accident, nor did BC Realty have actual or constructive notice of its existence. BC Realty maintains that the plaintiff's accident was caused by a transient condition, rather than a sidewalk defect within contemplation of Section 7-210 of the Administrative Code of the City of New York. BC Realty reasons that A1 should be required to provide common law indemnification and contribution to BC Realty, because any liability imposed upon BC Realty would be vicarious in nature.

A1 asserts that the plaintiff executed a general release on September 11, 2020 that fully resolved all of her claims against A1. A1 explains that the plaintiff subsequently executed a stipulation of discontinuance with prejudice in favor of A1, which the remaining parties have refused

to sign. A1 contends that this court should “so order” the stipulation in accordance with CPLR § 3217(a)(2), because there is no prejudice to a substantial right of the remaining defendants or other improper consequences. Regarding BC Realty’s cross claim for contractual indemnification, A1 makes the point that there are no contracts between A1, Meats Supreme, or BC Realty and thus, neither party can seek contractual indemnification from the other. Additionally, A1 argues that BC Realty is not entitled to recovery on its cross claims for common law indemnification or contribution, because plaintiff released A1 from liability when she executed the general release.

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 (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d at 853). Once this showing is made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In a premises liability context, the property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition (*Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]). The defendant real property owner, or a party in possession or control of real property, who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (*Kyte v Amid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015]).

In this case, BC Realty has established prima facie entitlement to summary judgment as a matter of law on the issue of liability concerning plaintiff’s claims, as well as summary judgment against the remaining tortfeasors on their respective cross claims against BC Realty. The sole shareholder of BC Realty, Bartolomeo Castellano, owns seventy-five percent interest in Meats Supreme. Meats Supreme remits monthly lease payments of \$10,000 each month to BC Realty but the two entities have not entered into a lease agreement. Mr. Castellano resides in Florida but testified, during his deposition, that he maintains an office for BC Realty directly above Meats Supreme. There is evidence that Mr. Castellano had been visiting the BC Realty/Meats Supreme

location multiple times each month at or around the time of plaintiff's accident. It is unclear whether Mr. Castellano's visits were in his capacity as part owner of Meats Supreme, owner of the premises, or both. In any event, there is no dispute that Meats Supreme engaged A1 to clean and degrease its kitchen four times each year, ranging between a two to ten year period¹. Although Mr. Castellano was aware that Meats Supreme underwent this cleaning process, there is no evidence of prior reported incidents, nor is there any showing that Mr. Castellano, on behalf of BC Realty, hired A1, was aware of the scheduled cleaning service on May 29, 2017, or that BC Realty created the condition or had actual or constructive notice of its existence. Contrary to plaintiff's contention, Section 7-210 of the Administrative Code does not apply. There is no showing that the alleged dangerous condition resulted from a defect, negligent repairs, or that BC Realty constructed the sidewalk in a special manner for the benefit of BC Realty. Neither Meats Supreme nor A1 submitted evidence of a material issue of fact for trial.

That branch of BC Realty's motion for summary judgment regarding Meats Supreme's alleged obligation to procure insurance for BC Realty as an additional insured is moot. Even if the matter were not rendered moot, the court finds that BC Realty's bald, conclusory arguments, as presented by its counsel, is insufficient to warrant summary judgment in favor of BC Realty as a matter of law. The court declines to address that branch of BC Realty's motion for attorneys fees, since BC Realty's motion omits any evidence, legal argument, or grounds for any such relief.

A1's motion for summary judgment dismissing Meats Supreme's Third Party Complaint and the co-defendant's² cross claims for contribution are based upon Section 15-108 of the General Obligations Law. Under GOL § 15-108, a tortfeasor, such as A1 in this case, who settles with and obtains a release from the plaintiff as to whom the plaintiff is willing to discontinue is entitled to an order of discontinuance with prejudice and is not required to attend and participate as a party in the trial of the action against the remaining tortfeasors, except to the extent that rights of indemnification exist between the settling and non-settling tortfeasors, and prejudice to the remaining tortfeasors is

¹Meats Supreme Assistant Manager, David Vega, testified during his deposition testimony that Meats Supreme engaged A1 consistently for a two-year period. Vashti Persad, President of A1, testified that Meats Supreme has engaged A1 to provide cleaning services for approximately ten years.

²Meats Supreme is the only remaining co-defendant, as provided supra.

shown (see GOL § 15-108). On the surface, it appears that this exception applies, because Meats Supreme commenced a third party complaint against A1, wherein it asserted a cause of action for common law indemnification and contribution. However, Meats Supreme's designation of these claims against A1 is not controlling (*Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988] citing *Rosado v Proctor & Schwartz*, 66 NY2d 21, 24-25 [1985]), and A1 is entitled to a "so ordered" stipulation of discontinuance with prejudice, unless there is a right of indemnification between A1 and Meats Supreme.

The court finds that Meats Supreme does not have a right of common-law indemnification in this case. In *D'Ambrosio v City of New York*, 55 NY2d 454 [1982], the Court of Appeals explained, "in the classic indemnification case, the one entitled to indemnity from another had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party." The Court further explained, that "one who was cast in damages for negligence could, if his negligence was merely 'passive,' nevertheless shift his liability to the tortfeasor whose negligence was considered "active" (*D'Ambrosio v City of New York*, 55 NY2d at 461). Thus, "if a party is liable 'solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent (*D'Ambrosio*, at 462). Conversely, contribution against other culpable tort-feasors is the only available remedy where a party is held liable at least partially because of its own negligence (*Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d ,at 646]).

Here, there is no statutory or contractually-based duty requiring A1 to indemnify Meats Supreme for the incident that occurred on May 29, 2017. The predicate for common law indemnification would be "vicarious liability without actual fault on the part of [Meats Supreme]," which is incompatible with the plaintiff's theory of recovery against Meats Supreme in the Second Amended Complaint. Specifically, plaintiff alleges that Meats Supreme hired A1, had a duty to supervise, manage, and control A1 and the sidewalk appurtenant to the store, and Meats Supreme failed to do so, which resulted in the dangerous and hazardous condition that existed on the day plaintiff slipped and fell. These are allegations that set out a theory of recovery against Meats Supreme based upon its actual wrongdoing, rather than a theory of vicarious liability. Since a party cannot be indemnified for its own negligence, and negligence is the basis of the plaintiff's claim

against Meats Supreme, the court finds that A1 has demonstrated, prima facie, its entitlement to summary judgment as a matter of law regarding Meats Supreme’s cross claim for common law indemnification against A1. A1 failed to eliminate material issues of fact regarding Meats Supreme’s cross claim for contribution.

Further, in light of the above findings, the court finds the proposed stipulation of discontinuance is overbroad and declines to “so order” same. A1 may submit a revised stipulation of discontinuance with provisions that comport with the court’s decision herein.

Based upon the foregoing, it is hereby

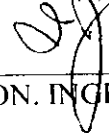
ORDERED, that the motion of BC Realty of New York, Inc. (Motion Sequence 5) is granted to the extent that summary judgment on the issue of liability is granted in favor of BC Realty of New York, Inc. and against plaintiff, and it is further

ORDERED, that all cross claims asserted against BC Realty of New York, Inc. by A1 Commercial Hood & Duct Cleaning, Inc. and 181 Ave. U Meats Inc. d/b/a Meats Supreme are dismissed, and it further

ORDERED, that the motion of A1 Commercial Hood & Duct Cleaning, Inc. (Motion Sequence 6) is granted solely to the extent that summary judgment is granted in favor of A1 Commercial Hood & Duct Cleaning, Inc. on the cross claim asserted by 181 Ave. U Meats Inc. d/b/a Meats Supreme.

This constitutes the decision and order of the court.

ENTER.



HON. INGRID JOSEPH

**Hon. Ingrid Joseph
Supreme Court Justice**