

Rubio v Ezra Cohen Corp.

2021 NY Slip Op 31089(U)

March 31, 2021

Supreme Court, New York County

Docket Number: 158029/2015

Judge: Verna Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERA L. SAUNDERS PART IAS MOTION 36

Justice

-----X
INDEX NO. 158029/2015
MOTION SEQ. NO. 003

ARNALDO RUBIO,
Plaintiff,

- v -

EZRA COHEN CORP., HSBC NORTH AMERICA
HOLDINGS, INC., and THE CITY OF NEW YORK,
Defendants.

DECISION + ORDER ON
MOTION

-----X

EZRA COHEN CORP., HSBC NORTH AMERICA
HOLDINGS, INC.,
Third-Party Plaintiffs,

Third-Party
Index No. 595209/2017

-against-

JONES LANG LASALLE and JONES LANG
LASALLE OF NEW YORK, LLC,
Third-Party Defendants.

-----X

JONES LANG LASALLE AMERICAS, INC.,
Second Third-Party Plaintiff,

Second Third-Party
Index No. 595562/2019

-against-

CGNY RENOVATIONS, INC.,
Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 147, 158, 159, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 190, 191, 194

were read on this motion to/for

SUMMARY JUDGMENT

In this personal injury action, defendants/second third-party plaintiffs Ezra Cohen Corp. ("Ezra") and HSBC North America Holdings, Inc. ("HSBC") (collectively "the moving defendants") move, pursuant to CPLR 3212, for an order dismissing the verified complaint against them or, in the alternative, seeking summary judgment on their common-law and contractual indemnification claims against third-party defendant/second third-party plaintiff Jones Lang LaSalle Americas, Inc. s/h/a Jones Lang LaSalle and Jones Lang LaSalle of New York, LLC ("JLL"). (NYSCEF Doc. No. 107, Notice of Motion). The underlying facts of this case are as follows.

In June 13, 2014, plaintiff Arnaldo Rubio injured his ankle on the sidewalk in front of the premises located at 305-307 Grand Street, New York (also known as 65 Allen Street). (NYSCEF Doc. Nos. 1, *summons and complaint*; 116, *bill of particulars*). In August 2015, plaintiff commenced this action by summons and complaint against Ezra, the alleged owner of the premises, and HSBC, its alleged tenant, for failure to maintain the sidewalk. (NYSCEF Doc. No. 1, *summons and complaint*).¹ The moving defendants interposed a joint answer on August 31, 2015. Thereafter, on March 16, 2017, they commenced a third-party action against JLL, HSBC's facility manager, who was contracted to maintain the premises, asserting, *inter alia*, contractual and common-law indemnification. (NYSCEF Doc. Nos. 14, *joint answer*; 24, *third-party complaint*). On May 19, 2017, JLL filed an answer to the third-party complaint, asserting affirmative defenses and a counterclaim. (NYSCEF Doc. No. 47, *answer to third-party complaint*). On June 28, 2019, JLL filed a second third-party action against a contractor, CGNY Renovations, Inc. ("CGNY"), who had allegedly performed work on the subject sidewalk prior to plaintiff's accident. (NYSCEF Doc. No. 78, *second third-party complaint*).

In support of their motion, the moving defendants proffer, among other things, plaintiff's deposition testimony; the deposition testimony of Catherine Ng ("Ng"), HSBC's branch manager; the deposition testimony of Marvin Cohen, a principal of Ezra; the deposition testimony of Niahm Molloy, a facility manager of JLL; the deposition testimony of Maureen Borger ("Borger"), a property manager employed by JLL; and photographs of the defective sidewalk. (NYSCEF Doc. Nos. 118-123, 136-138). Plaintiff also submits proof that, in March 2013, Borger reported large cracks in the sidewalk abutting the premises. Borger also requested a proposal from CGNY to replace a piece of the subject sidewalk in August 2013. (NYSCEF Doc. Nos. 131-132, *service requests*).

The moving defendants contend that plaintiff cannot show actual or constructive notice of the defective condition to establish liability against them; that the action should be dismissed as against Ezra insofar as it is an "out-of-possession" landlord with a "triple net lease" with HSBC; that HSBC has been wrongly named as a defendant in this action and, thus, that HSBC had no ownership, operation or control over the premises. Alternatively, the moving defendants maintain that they are entitled to common-law and contractual indemnification against JLL, arguing that there is no question that JLL was responsible for the maintenance of the sidewalk as conceded to by both Ng and Borger. Furthermore, they claim that plaintiff's injuries are attributed solely to the negligence or nonperformance of JLL and that they are thus, entitled to common-law indemnification. (NYSCEF Doc. No. 109, *memo of law*).

The contractual indemnification provision in the service agreement between HSBC and JLL states as follows:

"The Service Provider will indemnify HSBC and each HSBC Service Recipient and each Replacement Service Provider against any and all damages, losses, costs, actions, claims, liabilities or expenses suffered or incurred by HSBC, that HSBC Service Recipient or any Replacement Service Provider whether in contract, tort (including negligence), breach of statutory duty or otherwise, arising out of or in connection with the death or personal

¹ Although this action was also commenced as against the City of New York, this action was dismissed as against this defendant in the decision and order dated November 9, 2017. (Motion Sequence 001).

injury of any person, whether such death or personal injury is caused by the negligence of the Service Provider, any Service Provider Affiliate, any Service Provider Personnel or any Sub-Contractor.” (NYSCEF Doc. No. 140, *Indemnity Clause in JLL’s Service Agreement*).

In opposition, plaintiff argues, *inter alia*, that the moving defendants fail to meet their *prima facie* entitlement to summary judgment insofar as they fail to address the allegations in the complaint that they created the hazard at issue. Plaintiff also asserts that Ezra’s status as an out-of-possession landlord is irrelevant to the issue of liability because it has a nondelegable duty to maintain the sidewalk abutting its property and, furthermore, that the subject lease did not delegate to HSBC any responsibility to maintain the sidewalk. According to plaintiff, the moving defendants’ claim that HSBC had no ownership or control of the sidewalk is belied by the testimony of both Ng and Cohen, who testified that HSBC was responsible for repairing the sidewalk. Moreover, he claims that there is contradictory testimony regarding the defect alleged and whether it was repaired by HSBC’s agent, CGNY, prior to the subject accident. (NYSCEF Doc. No. 174, *plaintiff’s affirmation in opposition*).

JLL also opposes the motion, arguing, *inter alia*, that the motion as against it is premature insofar as discovery is not complete; that the moving defendants fail to submit proof in admissible form that JLL had notice of the defect; that the indemnification clause relied on was not triggered; that the moving defendants fail to proffer proof establishing that they were free from negligence; that JLL did not have exclusive control over the sidewalk insofar as they only inspected the premises once a month; and that Ezra has a non-delegable duty to maintain the sidewalk in a reasonably safe condition. (NYSCEF Doc. No. 183, *JLL’s affirmation in opposition*).

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (*see Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

Generally, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control or special use of the property. (*see Sewesky v City of NY*, 140 AD3d 666, 666-667 [1st Dept 2016]; *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). A plaintiff must establish that a landlord created the dangerous condition or failed to repair the defect despite actual or constructive notice. (*see Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]). Nevertheless, pursuant to New York City Administrative Code § 7-210, often referred to as the “sidewalk law,” owners of real property have a nondelegable duty to maintain the sidewalk in a reasonably safe condition. (*see Brown v NY City Dept. of Transp.*, 187 AD3d 535, 536 [1st Dept 2020]; *LaRosa v Corner Locations, II, L.P.*, 169 AD3d 512, 513 [1st Dept 2019]; *Baghban v City of NY*, 140 AD3d 586, 586 [1st Dept 2016]). Here, Ezra’s status as an out-of-possession landlord does not absolve it from its

nondelegable duty to make repairs to the sidewalk abutting its property. (*see Labiner v Jerome Florist, Inc.*, 189 AD3d 624, 625 [1st Dept 2020]; *Herrera v Vargas*, 183 AD3d 542, 543 [1st Dept 2020]; *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 174 [2019]). Furthermore, this Court rejects the moving defendants' argument that its "triple-net lease" with HSBC, requiring HSBC to maintain the sidewalk, warrants summary judgment in Ezra's favor. As clarified by the Court of Appeals, "[w]hile an owner [may] shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210." (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d at 174). Thus, assuming, *arguendo*, that Ezra has a viable claim against HSBC based on an alleged covenant in its lease to maintain the property, that issue is of no moment here.

The moving defendants' argument regarding notice is also unavailing. The moving defendants' proof, including the testimony of Borger, who was tasked with inspecting the premises, confirms that there were large cracks in the sidewalk as early as March 2013 and that Borger requested a proposal from CGNY to "replace a piece of the sidewalk" in front of the premises in August 2013. Whether the subject defect relates to these prior observations is unclear and raises an issue of fact with respect to notice. Furthermore, the photographs of the defective sidewalk, which are date stamped June 17 and August 15, 2014, respectively, "depict a condition that a jury might find existed for a sufficient period of time for [the moving defendants] to have discovered and corrected it." (*Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc.*, 147 AD3d 507, 508 [1st Dept 2017]; *see Tsotakos v TSE Group, LLC*, 191 AD3d 495, ___, 2021 NY Slip Op 00822, *1 [2021]).² Insofar as the moving defendants have failed to establish their *prima facie* entitlement to summary judgment against plaintiff, that branch of the motion is denied.

Turning next to the moving defendants' argument regarding its contractual and common-law indemnification claims against JLL, it is well-settled that "[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant." (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999], citing *Brown v Two Exch. Plaza Partners*, 76 NY2d 172 [1990]). "In distinction, in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law." (*Correia v Professional Data Mgt., Inc.*, 259 AD2d at 65).

Here, while it is undisputed that JLL was responsible for inspecting the abutting sidewalk on a monthly basis and making any necessary repairs based on its routine inspection, there is no proof establishing when the defect came into existence so as to establish, as a matter of law, that JLL should have known of the defect and should have made any repairs. Furthermore, the moving defendants fail to establish that they were free from negligence or were not put on notice

² The argument with respect to summary judgment as against HSBC, based on the argument that HSBC is not in fact Ezra's tenant, is rendered moot by this Court's decision and order on Motion Sequence 004, relating to plaintiff's motion seeking to amend the caption.

about the dangerous condition. Based on the foregoing, the moving defendants have failed to establish their entitlement to common-law indemnification, and the enforceability of the contractual indemnification provision cannot be determined at this time. (see *Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 590 [1st Dept 2018]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]). Since the moving defendants have failed to establish their *prima facie* entitlement to summary judgment against JLL, the motion is denied in its entirety.

All remaining arguments are either without merit or need not be addressed given the findings above.

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants/second third-party plaintiffs Ezra Cohen Corp. and HSBC North America Holdings, Inc. is denied in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon all parties.

This constitutes the decision and order of this Court.

March 31, 2021

HON. VERNA L. SAUNDERS, JSC

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