

Ellis v Newmark & Co. Real Estate, Inc.
2022 NY Slip Op 31232(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 161342/2019
Judge: Richard Latin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN PART 46V

Justice

-----X

LAVERNE ELLIS

Plaintiff,

- v -

NEWMARK & COMPANY REAL ESTATE, INC.,

Defendant.

-----X

INDEX NO. 161342/2019

MOTION DATE 02/24/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 56

were read on this motion to/for DISMISS

Upon the foregoing cited papers, defendant Newmark & Company Real Estate, Inc.'s motion for summary judgment, dismissing the complaint pursuant to CPLR 3212, and plaintiff's cross motion for leave to amend the pleadings are determined as follows:

Factual and Procedural Background

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on February 17, 2017, when she tripped and fell because of a defect in the threshold of a doorway at 515 Madison Avenue (the "Building"), also known as the DuMont Building, in New York, New York. Plaintiff timely brought this action against defendant Newmark & Company Real Estate, Inc. by filing a summons and complaint on November 21, 2019.

On November 19, 2021, defendant moved for an order pursuant to CPLR 3212 granting summary judgment, dismissing plaintiff's complaint. On January 19, 2022, plaintiff filed a cross-motion for an order pursuant to CPLR 3025, 1003 granting leave to file and serve a supplemental summons and amended complaint naming as defendants 515 Madison, LLC ("515 Madison"),

Newmark Family Properties, LLC (“NFP”), and GFP Real Estate, LLC (“GFP”) (collectively “Proposed Defendants”). A cause of action against the Proposed Defendants arising out of the February 17, 2017 incident would be time-barred unless the relation-back doctrine is applicable (*see* CPLR 214; CPLR 203[c]).

On December 31, 2009, 515 Madison, as owner of the Building, made defendant the managing and leasing agent for the Building pursuant to the Standard Management Agreement and the Exclusive Right Agreement (“2009 Agreements”). These agreements were amended and restated on October 14, 2011, pursuant to the Amended and Restated Management Agreement and the Amended and Restated Leasing Representation Agreement (“2011 Agreements”). The 2011 Agreements included a provision in which 515 Madison agreed to indemnify defendant against negligence claims, which stated in part: “[I]t is understood and acknowledged that in the event a Loss involves personal injury or property damage, [defendant] shall nonetheless be indemnified by [515 Madison] even if [defendant’s] actions are deemed negligent or in material breach of the terms of this Agreement.” Moreover, 2011 Agreements stated that the indemnification would survive the termination of the agreements.

On January 1, 2015, defendant subcontracted its management rights and responsibilities over certain properties, including the Building, to NFP pursuant to the Sub-Management Agreement and the Subcontract and Office Sharing Agreement (“2015 Agreements”). The 2015 Agreements included a provision in which defendant agreed to indemnify NFP against all claims arising out of “[t]he negligence or willful misconduct of [defendant] in the performance of its duties and obligations under, or in connection with, this Sub-Management Agreement.” In turn, NFP agreed to indemnify defendant against all claims arising out of “[t]he negligence or willful

misconduct of [NFP] in the performance of its duties and obligations under, or in connection with, this Sub-Management or any Management Agreement.”

According to defendant, GFP replaced NFP as managing and leasing agent for certain properties, including the Building, pursuant to an agreement between GFP and 515 Madison effective November 1, 2016. Defendant did not produce the agreement, but rather produced a termination letter dated July 2, 2019 (“2019 Letter”) that was sent to defendant referencing the agreement and identifying GFP as “successor in interest” to NFP.

Based on evidence produced by plaintiff and defendant, Jeffrey Gural is associated with defendant and each of the Proposed Defendants. A screenshot of defendant’s website identifies Gural as defendant’s Chairman Emeritus. Plaintiff produced a GFP corporate brochure and a screenshot of GFP’s website identifying Gural as Chairman of GFP. In the 2015 Agreements, the Building is listed as among the properties in “Gural Ownersh[ip].” Moreover, Jeffrey Gural is listed custodial addressee for 515 Madison in the 2011 Agreements and for NFP in the 2015 Agreements. Finally, the 2019 Letter listed the Building as one of the “Gural properties.”

Discussion

A. Defendant’s Motion for Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets their burden, the non-moving party bears the burden to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Defendant argues that it is entitled to summary judgment because it did not manage or control the premises when the alleged incident occurred. There is a general duty of one who owns or possesses real property to maintain the premises in a reasonably safe condition (*See Rodriguez v 1201 Realty LLC*, 10 AD3d 253, 254 [1st Dept 2004]). However, that duty is “premised on the landowner’s exercise of control over the property” (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]; *see also Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005] (“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises.”)). Where a defendant does not own or manage the property, there is consequently no duty to maintain the premises in reasonably safe condition (*see Santos v Daniello Carting Co., LLC*, 148 AD3d 463, 464 [1st Dept 2017]). In support of its motion, defendant produced the 2015 Agreements by which defendant subcontracted all management responsibilities for the Building to NFP on January 1, 2015 — more than two years prior to the alleged incident on February 17, 2017. Defendant thus had no control over the Building at the time of the alleged incident, and consequently had no legal duty to maintain the premises in a reasonably safe condition.

Even if defendant was not the managing agent of the Building at the time of the alleged incident, plaintiff argues that there exists a triable issue of fact as to whether defendant caused or created the defect. A defendant that moves for summary judgment in a trip and fall case “has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice” for sufficient time to remedy the condition (*see Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436 [2d Dept 2005]). In its reply affirmation, defendant merely produced proof that its management role ended on January 1, 2015, and defense counsel speculates that a managing agent would have no involvement in creating a defect in the threshold of a

doorway. The mere affirmation of an attorney lacks evidentiary value and is insufficient to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 563). Defendant has thus not established the absence of material fact as to whether it caused or created the condition during the time it served as managing agent. Therefore, defendant failed to establish its prima facie entitlement to judgment as a matter of law.

B. Plaintiff's Cross Motion

Plaintiff contends that under the relation-back doctrine of CPLR 203[c], the proposed causes of action against 515 Madison, NFP, and GFP were interposed when the action was timely commenced against defendant. To establish the availability of the relation-back doctrine to permit the addition of a new defendant beyond the expiration of the statute of limitations, a plaintiff must demonstrate that:

“1) both claims arise out of the same conduct, transaction or occurrence, 2) the party to be joined is united in interest with the original named defendant(s) and, by reason of that relationship, can be charged with notice of the commencement of the action so that the party to be joined will not be prejudiced in maintaining his or her defense due to the delay and 3) the party to be joined knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well”

(*27th St. Block Ass'n. v Dormitory Auth. of State of New York*, 302 AD2d 155, 163-164 [1st Dept 2002], citing *Buran v Coupal*, 87 NY2d 173 [1995]).

First, the claims against the Proposed Defendants arise out of the same occurrence as those described in the original complaint. Thus, plaintiff has satisfied the first prong.

As for the second prong, parties are united in interest where “the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other” (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1st Dept 1997]). Unity of interest will be found where one is vicariously liable for the acts of the other (*see id.*; *Connell v Hayden*, 83 AD2d 30, 45 [2d Dept 1981]; *Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007]). Parties may be found vicariously liable for the purpose of unity of interest by virtue of a contractual indemnification provision (*see Brunero v City of New York Dept. of Parks and Recreation*, 121 AD3d 624, 626 [1st Dept 2014]; *see also Austin v Interfaith Med. Ctr.*, 264 AD2d 702, 704 [2d Dept 1999]). In *Brunero*, the court found that the Parks Department was vicariously liable for the Central Park Conservancy’s negligence in the course of maintaining the park by virtue of the contractual indemnification provision, and thus the parties were united in interest (121 AD3d at 626).

Here, as in *Brunero*, the Proposed Parties are united in interest with defendant based on the contractual indemnification provisions of the 2011 Agreements and the 2015 Agreements. Under the 2011 Agreements, 515 Madison agreed to indemnify defendant for “personal injury . . . even if [defendant’s] actions are deemed negligent.” Thus, 515 Madison was vicariously liable for defendant’s negligence. Pursuant to the 2015 Agreements, defendant and NFP agreed to indemnify one another for all claims arising out of the “negligence . . . in the performance of its duties and obligations” under the agreement. Defendant concedes that GFP was the “successor in interest” to NFP. Since defendant did not produce any of the agreements related to GFP, it is reasonable for

the Court to infer that GFP took on the obligations of NFP, including the duty to indemnify. Thus, defendant and NFP/GFP were vicariously liable for the other's negligence.

Defendant cites to *Powell v City of New York*, 187 AD3d 554 [1st Dept 2020] for the proposition that a legal obligation to indemnify does not create a unity of interest. In *Powell*, the court wrote, "We find unpersuasive the reasoning in *DaCosta v City of New York* (296 F Supp 3d 569, 586 [EDNY 2017]) that unity of interest also may be established between defendants where there is a legal obligation on one to indemnify the other" (*id.* at 555). However, both *Powell* and *DaCosta* dealt with whether the City and police officers were united in interest pursuant to a statutory duty to indemnify. In those cases, it was clear that the City had no vicarious liability under Section 1983 for officers' civil rights violations. By contrast, in *Brunero* and the case at bar, the basis for unity of interest was a contractual provision agreed to by the parties to indemnify each other for negligence (*see Tavassoli v City of New York*, 2020 N.Y. Slip Op. 34431[U], 8 [N.Y. Sup Ct, Queens County 2020] (distinguishing between contractual indemnification provision and statutory indemnification obligation)). As such, defendant's reliance on *Powell* is unavailing. The relevant indemnification provisions of the 2011 Agreements and the 2015 Agreements are thus sufficient to satisfy the second prong.

As for the third prong, plaintiff's failure to bring causes of action against Proposed Defendants was a mistake (*see Buran*, 87 NY2d at 180 (mistake need not be "excusable")). According to plaintiff, it was not until defendant's motion for summary judgment that it became aware of the Proposed Defendants. Moreover, plaintiff was not aware of the interwoven relationships, notably with Jeffrey Gural associated with each of these entities. According to the evidence produced, Gural serves as Chairman of GFP, is listed as custodial addressee of NFP and 515 Madison, and the Building is identified in two documents as being under Gural ownership.


The evidence produced at this stage indicates that these were related entities with at least one common principal. The Proposed Defendants should have known that but for plaintiff's mistake they would have been named defendants in this action. Thus, the third prong is satisfied.

In accordance with the foregoing, it is hereby:

ORDERED that defendant's motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that plaintiff's cross motion pursuant to CPLR 3025, 1003 granting leave to file and serve the first supplemental summons and amended complaint naming 515 Madison, LLC, Newmark Family Properties, LLC, and GFP Real Estate, LLC as defendants is granted.

This constitutes the decision and order of the Court.

4/8/2022						
DATE			RICHARD LATIN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input 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