Commissioners of the State Ins. Fund v Greystone Mgt. Solutions
2022 NY Slip Op 31974(U)
June 22, 2022
Supreme Court, New York County
Docket Number: Index No. 450504/2016
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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COMMISSIONERS OF THE STATE INSURANCE FUND, AS ASSIGNEE OF FERNANDO SALGADO, ASSIGNOR,

Plaintiff,

- v -

GREYSTONE MANAGEMENT SOLUTIONS, GREYSTONE & CO., INC.,

Defendants.

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INDEX NO. 450504/2016

MOTION DATE 06/08/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66, 67, 68, 70, 71, 72, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, Commissioners of the State Insurance Fund, as Assignee of Fernando Salgado, Assignor (plaintiff), commenced this action to recover workers compensation benefits allegedly owed to plaintiff by defendants, Greystone Management Solutions and Greystone & Co., Inc. (collectively defendants). Defendants now move pursuant to CPLR 3212 for summary dismissal of the complaint. Plaintiff opposes the motion. For the following reasons, defendant's motion is denied.

This action stems from a slip and fall on the walkway adjacent to a McDonald's restaurant located within Penn Station, the Long Island Rail Road (LIRR) level, in the County, City, and State of New York. On June 17, 2013, plaintiff's assignor Fernando Salgado (Salgado), who was employed by McDonald's at the time of the incident, exited the McDonald's to retrieve supplies from a storage room located elsewhere within Penn Station. Soon thereafter, Salgado slipped and fell due to a puddle of liquid located on the walkway. Plaintiff applied for, and received, workers' compensation benefits, and Salgado's cause of action herein was assigned pursuant to Workers' Compensation Law § 29(2).

Garry Ryan (Ryan), defendant's executive director, testified that the Metropolitan Transit Authority (MTA) and the LIRR own, operate and control the entire facility at Penn Station.[1] Ryan further testified that the scope of services as it relates to the premises are contained in an agreement between defendants and the MTA. According to the agreement, defendants' "[m]anage the agreements as opposed to the tenants or the facilities themselves. [Defendants] bill and collect rent, [defendants] make sure that people have insurance in place, that the correct tenant is on-site and is maintaining the premises" (NYSCEF doc. no. 57 at 16:22-17:4). Ryan

[1]For the purposes of this decision and order, the MTA and LIRR are referred to collectively as the "MTA."

further testified that defendants' account manager inspected the accounts (i.e., leased spaces), including to ensure that the tenants were maintaining the leased premises and would also field complaints or concerns from a tenant. Ryan states that McDonald's reported leaks to defendants, but that defendants did not investigate the source of the leaks. Ryan testified that "[t]he [MTA] is the owner and manager of the property, and [the MTA] would conduct an investigation as to the possible source or origin of the leak" and that defendants would not have any input as to the investigation (NYSCEF doc. no. 58 at 76:24-77:10).

According to section 3.4(e) of the proposal of services of the agreement, entitled "Investigating and Resolving Complaints":

> "The Project Executive [defendants' employee] will investigate and resolve complaints received from [MTA] personnel and the public. If necessary, the RED Contract Manager [an MTA employee] will immediately be contacted on all such matters and a Tenant Action will be created in Yardi to track follow-up."

(NYSCEF doc. no. 60, proposal at 3.4[e]).

The proposal of services also indicates that defendant would provide certain around the clock emergency services. Section 3.4(f) of the proposal, entitled "Responding to Emergency Conditions on a 24-Hour, 365 Day Per Year Basis," states that:

> "[defendants] will continue to serve as the primary contact to licensees regarding emergency situations and will continue [to] respond to emergency calls on a 24/7, 365 day per year basis. [Defendants] will maintain our on-site response time to be within one hour, if during normal business hours, or three hours, if during non-business hours."

Section 3.4(b) of the proposal of services indicates that defendants' "inspection training and protocols include . . . ."[t]he Director of Tenant Management [defendants' employee] identifies issues and responds by establishing a Yardi Tenant Action, if necessary, and assigning and monitoring the enforcement, correction or document needed to remedy any issues."

In support of their motion to dismiss, defendants first argue that they were not responsible for cleaning the subject premises. Defendants further argue that their obligations under the agreement do not give rise to a duty. Specifically, defendants argue that the agreement is not so comprehensive and exclusive to displace the MTA's responsibility to maintain the premises. In opposition, plaintiff argues that defendants entirely displaced the MTA's duty to maintain the premises safely with respect to tenant management, which included receiving complaints, determining whether to resolve the complaint itself or forward the complaint to be remedied, and monitoring the correction of issues.

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any

issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *Church ex rel. Smith v Callanan Indus., Inc.*, 99 NY2d 104, 111 [2002] ["Ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor"]). The Court in *Espinal* articulated three exceptions to the rule:

> "[A] party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

(*id.* at 140 [internal quotation marks and citations omitted]).

At issue in the instant motion is whether defendants "entirely displaced" the owner's duty to maintain the premises. Under the third exception, a defendant may owe a duty of care where it has a "comprehensive and exclusive" contractual obligation to inspect and maintain the premises safely (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]). Stated otherwise, the contractor must have entirely displaced the landowner's duty to maintain the premises safely (*Espinal*, 98 NY2d at 141).

Here, defendants make a prima facie showing that their agreement with the owners was not so comprehensive so as to entirely displace (owners) duty to maintain the premises by submitting Ryan's testimony demonstrating that defendants did not have a responsibility to investigate the origin of the alleged leak.

In opposition, plaintiff raises an issue of fact as to whether defendants entirely displaced the owners with respect to tenant management, including to resolve complaints concerning the premises made by tenants, by submitting the scope of services demonstrating that defendants received complaints from the MTA, the public, and tenants alike, that defendants did not have a duty to report complaints to the owners and that defendants had broad responsibility to investigate and resolve complaints (*see Stevanovic v T.U.C. Mgmt. Co.*, 305 AD2d 133, 134 [1st Dept 2003] ["However, the management contract, affording defendant broad authority to maintain the premises and make ordinary repairs costing less than $1,000, and to make emergency repairs, regardless of cost, without prior approval of the owner, was sufficient to raise a triable issue as to whether it was under a duty to a building employee, such as plaintiff, to repair a defective staircase handrail"]; *Tushaj v 322 Elm Mgmt. Assocs., Inc.*, 293 AD2d 44, 48, 1st Dept 2002] [finding that the third *Espinal* exception applied where "(the defendant) had a

contractual obligation to inspect the property and to ensure that the building was maintained in good repair. (The defendant) had complete and unfettered authority to undertake all repairs costing less than $500, which clearly included the authority to repair or replace the defective scaffold boards at a cost of no more than $12"]; *cf. Vushaj v Insignia Residential Grp., Inc.*, 50 AD3d 393, 394 [1st Dept 2008]). Further, Ryan testified that defendants were authorized to subcontract for repairs of the premises. In reply, defendants fail to address the provisions of the scope of services within the agreement authorizing defendants to investigate complaint and perform repairs. As an issue of fact exists as to the scope of defendant's duty under the scope of services within the agreement, defendant's motion for summary dismissal is denied.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 for summary dismissal of the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

6/22/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE