

Ghaly v St. John's Univ.

2022 NY Slip Op 34796(U)

March 31, 2022

Supreme Court, Queens County

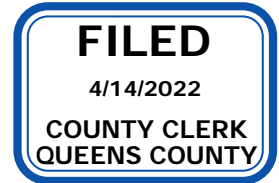
Docket Number: Index No. 707707/18

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE DARRELL L. GAVRIN
Justice

IA PART 27

MARIANNE GHALY,

Index No. 707707/18

Plaintiff,

Motion

Date September 21, 2021

- against-

ST. JOHN'S UNIVERSITY, EXECUTIVE CLEANING SERVICES, LLC, EXECUTIVE CLEANING SERVICES OF LONG ISLAND LTD, and COLLINS BUILDING SERVICES, INC.,

Motion

Cal. No. 11, 12, 13 & 14

Motion

Seq. No. 2, 3, 4 & 5

Defendants.

The following papers numbered EF 55 - 175 read on the motion (Seq. 2) by plaintiff for summary judgment; motion (Seq. 3) by defendant, St. John's University for summary judgment dismissing the complaint and all cross claims alleged against it and granting its claim for contractual indemnification against defendant, Executive Cleaning Services, LLC; and motions (Seq. 4 & 5) by defendants, Executive Cleaning Services of Long Island Ltd. and Executive Cleaning Services, LLC for summary judgment dismissing the complaint and all cross claims alleged against them.

Papers Numbered

Table listing papers and their numbers: Notice of Motion (Seq. 2) - Affirmation - Exhibits - Memorandum of Law... EF 55 - 84; Response to Statement of Material Facts... EF 171; Memorandum of Law in Opposition... EF 140; Affirmation in Opposition... EF 151 - 152; Reply Affirmation - Exhibit... EF 158 - 160; Notice of Motion (Seq. 3) - Affirmation - Exhibits ... EF 85 - 98; Memorandum of Law in Opposition... EF 141; Reply Affirmation... EF 175; Affirmation in Opposition - Exhibits - Memorandum of Law.. EF 99 - 108; Notice of Motion (Seq. 4) - Affirmation - Exhibits - Memorandum of Law... EF 109 - 132; Affirmation in Opposition - Exhibits - Memorandum of Law.. EF 143 - 150; Reply Affirmation - Exhibit... EF 164 - 165; Affirmation in Partial Opposition... EF 168 - 169; Reply Affirmation - Exhibit... EF 172 - 173; Reply Affirmation... EF 174

Notice of Motion (Seq. 5) - Affirmation - Exhibits -

Memorandum of Law..... EF 133 – 139

Affirmation in Opposition - Memorandum of Law..... EF153 – 157

Affirmation in Partial Opposition..... EF161 – 163

Memorandum of Law in Reply..... EF166 – 167

Memorandum of Law in Reply..... EF170

Upon the foregoing papers, it is ordered that the motion sequences 2, 3, 4 and 5 are decided as follows:

Plaintiff commenced this action to recover damages for personal injuries she sustained on October 6, 2016 when she allegedly slipped and fell in a bathtub while taking a shower in her apartment located at 147-28 Union Turnpike, Apt. 2, in Queens, New York (hereinafter “premises”). Plaintiff was a graduate student at defendant St. John’s University (hereinafter SJU) and was living in student housing owned by defendant, SJU. At the time of plaintiff’s accident, defendant, SJU entered into an agreement with defendant, Executive Cleaning Services, LLC (hereinafter “ECS”) for custodial and handyman services (hereinafter “SJU contract”). Defendant, ECS subcontracted the SJU contract to defendant, Executive Cleaning Services of Long Island Ltd. (hereinafter “ECSLI”). The parties move separately for summary judgment in their favor.

This court will first address defendant, SJU’s motion. “A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition.” (*Dougherty v 359 Lewis Ave. Assoc., LLC*, 191 AD3d 763 [2d Dept 2021].) “In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence.” (*Fraser v 147 Rockaway Pkw, LLC*, — AD3d —, 2022 NY Slip Op 01772 [2d Dept 2011].) Therefore, “[i]n a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence.” (*Beri v Chung Fat Supermarket, Inc.*, 125 AD3d 587 [2d Dept 2015].)

In support of its motion, defendant, SJU submitted, among other things, a copy of the SJU contract, a printout of work tickets related to work performed in plaintiff’s apartment, the parties’ deposition testimony, and an affidavit from its director of branch campus operations. Upon review of the evidence submitted, questions of fact exist as to who was responsible for maintaining the premises, which party installed the shower curtain rod in question, and whether SJU had constructive notice of the alleged defect. Further, the parties’ deposition testimony reveals credibility issues, which are to be resolved by the trier of fact. (*See Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019]; *Durand v Salvation Army*, 186 AD3d 1325, 1326 [2d Dept 2020]; *Sanders v Sangemino*, 185 AD3d 617, 618 [2d Dept 2020], *lv dismissed*, 35 NY3d 1110 [2020].)

Accordingly, the motion by defendant, SJU for summary judgment, is denied.

With respect to SJU's claim for contractual indemnification, a party's right to contractual indemnification depends on the specific language of the relevant contract. (*O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009] [internal quotation marks omitted].) "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 659 [2d Dept 2014].)

The indemnification provision found in the SJU contract provides:

To the fullest extent permitted by law, [ECS] shall indemnify, defend and hold [SJU], its Board of Trustees, officers, employees, agents and servants harmless from and against all claims, suits, damages, liabilities, losses, demands, costs and expenses, including reasonable attorneys' fees and disbursements, and punitive damages of every kind and nature, by or on behalf of any person, firm, association or corporation, in connection with [ECS's] performance under this Agreement. [ECS's] obligation to indemnify the University shall survive the expiration or termination of this Agreement.

Although the contract is sufficiently specific to compel indemnification as stated herein, there are triable issues of fact concerning the degree of fault attributable to the indemnified parties. Therefore, summary judgment on this contractual indemnification claim against defendant, ECS is not appropriate at this juncture. (*See Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 1000 [2d Dept 2017]; *Langner v Primary Home Care Servs., Inc.*, 83 AD3d 1007 [2d Dept 2011].)

This court will next address defendants, ECSLI's and ECS's respective motions for summary judgment. "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." (*Lancene Union v Excel Commercial Maintenance*, 185 AD3d 869, 869 [2d Dept 2020], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002].)

"[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]; *Szulinska v Elrob Realty, LLC*, 190 AD3d 777 [2d Dept 2021], quoting *Arnone v Morton's of Chicago/Great Neck, LLC*, 183 AD3d 862 [2d Dept 2020].) "However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (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." (*Cikoja v*

Diebold, Inc., 182 AD3d 573 [2d Dept 2020], quoting *Hagan v City of New York*, 166 AD3d 590, 592 [2d Dept 2018]; see *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d at 140.)

In support of their respective motions, defendants, ECSLI and ECS submitted, among other things, the parties' deposition testimony, a copy of the SJU contract and the contract between defendants, ECSLI and ECS (hereinafter "subcontract"). In the case at bar, defendants, ECSLI and ECS both failed to demonstrate that they did not owe a duty of care to plaintiff. It is unclear from the SJU contract whether defendant, ECS has entirely displaced defendant, SJU's duty to maintain the premises. The SJU contract does not specify what tasks, if any, were defendant, ECS required to perform on a regular basis with respect to the premises. The subcontract it is also silent as to defendant, ECSLI's specific tasks with respect to the premises. The subcontract does not refer back to the SJU contract. Further, the witnesses who testified on behalf of defendants, ECS, ECSLI and SJU provided conflicting testimony regarding their responsibilities.

"Summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.' " (*Singletary v Alhalal Rest., Inc.*, 163 AD3d 738, 739 [2d Dept 2018], quoting *Ruggiero v DePalo*, 153 AD3d 870, 872 [2d Dept 2017].) Therefore, defendants, ECSLI and ECS failed to establish their prima facie entitlement to judgment as a matter of law. (*Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1352 [2d Dept 2021].)

Accordingly, the motions by defendants, ECS and ECSLI for summary judgment, are denied.

This court will now consider plaintiff's motion. "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries." (*Sebagh v Capital Fitness, Inc.*, 202 AD3d 853 [2d Dept 2022].) "Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (see *Rodriguez v City of New York*, 31 NY3d 312, 324-325), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence." (*Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]; see *Ramirez v Wangdu*, 195 AD3d 646 [2d Dept 2021].)

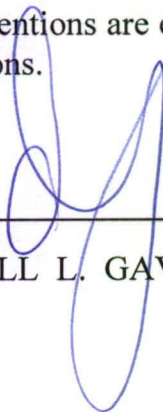
As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable.' " (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [citations omitted]; see *Bader v Riv. Edge at Hastings Owners Corp.*, 159 AD3d 780, 783 [2d Dept 2018].)

In the instant case, plaintiff failed to establish her *prima facie* entitlement to judgment as a matter of law on the issue of liability. As discussed above, it is unclear which defendant or defendants owed plaintiff a duty to maintain the premises. Further, the evidence submitted in support of her motion presented a triable issue of fact as to whether plaintiff provided proper notice of the alleged condition.

Consequently, the parties' failure to make the requisite showing requires denial of their respective motions, regardless of the sufficiency of the opposition papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Stanger v City of New York*, 190 AD3d 776, 777 [2d Dept 2021].)

The parties' remaining arguments and contentions are either without merit or need not be addressed in light of the foregoing determinations.

Dated: March 31, 2022



DARRELL L. GAVRIN, J.S.C.

