

Savinkina v 1055 BBA LLC

2023 NY Slip Op 34761(U)

March 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 514129/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 (MOA) of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 9th day of March, 2023.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X

VALENTINA SAVINKINA,

Plaintiff,

-against-

1055 BBA LLC, L & L FARMERS MARKET
INC. I and MAGDI A. YAFAI,

Defendant.

-----X

1055 BBA LLC,

Third-Party Plaintiff,

-against-

L & L FARMERS MARKET INC. I and
MAGDI A. YAFAI,

Third-Party Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	37-39, 41-52
Opposing Affidavits (Affirmations).....	54-57,
Reply Affirmation or Affidavit	61, 62
Memorandum of Law.....	40

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on May 9, 2018. Plaintiff, Valentina Savinkina (hereinafter the “Plaintiff”) allegedly injured herself when she purportedly tripped on the sidewalk abutting the premises known as 1055 Brighton Beach Avenue, Brooklyn, New York (the “Premises”). Defendant 1055 BBA, LLC (hereinafter the “Defendant” or “Landlord”) is the purported owner of the Premises.

Defendants/Third-Party Defendants L&L Farmers Market, Inc. (“Tenant” or “L&L”) and Magdi A. Yafai, limited guarantor (“Yafai”) (hereinafter collectively the “Third Party Defendants” or “Tenants”) now move (motion sequence #1) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the Plaintiff’s amended complaint, and granting summary judgment dismissing the Defendant’s cross-claims against them for contractual and common-law indemnification. The Third Party Defendants also seek summary judgment on their counterclaim for “common law indemnification over and above Defendant 1055 BBA, LLC”.¹ In their motion for summary judgment, the Third-Party Defendants argue that they were not responsible, pursuant to the lease agreement relating to the party defendants (the “Lease”), to repair sidewalk defects and they did not create the alleged condition at issue. The Third-Party Defendants also argue that the Defendant had a nondelegable duty to repair any sidewalk defects.

The Defendant/Landlord opposes the motion. The Landlord argues that the motion should be denied as there are issues of fact regarding whether the Lease is clear as to maintenance and repair of the sidewalk. The Landlord also argues that there are issues of fact regarding whether the Tenants had notice of the condition at issue and had a responsibility to inform the Landlord regarding the alleged dangerous and defective condition. The Landlord also opposed the Tenants’ motion in as much as Tenants seek dismissal of the common law indemnification claims because the Landlord contends that there are issues of fact regarding how the defect was created and whether the Tenants were responsible for repair and maintenance of the sidewalk pursuant to the Lease. The Plaintiff also opposes the motion.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d

¹ The Plaintiff amended the summons and complaint to include the 3rd Party Defendants as direct Defendants.

361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter “the Sidewalk Law”). The Sidewalk Law provides in pertinent part that:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain

sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

Turning to the merits the motion made by the Third Party Defendants (motion sequence #1) the Court finds that they have met their *prima facie* burden. In support of the Tenants' motion, the Tenants rely primarily on the deposition of the Plaintiff, the deposition of Giovanni Palumbo, a member of the Defendant, the deposition of Yafai, and the Lease. The Tenants argue that they did not have a duty to repair the sidewalk and that the Lease required the Landlord to make any necessary repairs to the sidewalk. In general, the Court has held that "a landowner's duty under section 7-210 is an affirmative, nondelegable obligation." *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 174, 137 N.E.3d 469 [2019; see also *Gambino v. 475 Park Ave. S., LLC*, 197 AD3d 621, 150 N.Y.S.3d 235 [2d Dept 2021]. As the Court stated in *Xiang Fu He v. Troon Mgmt., Inc.*, "the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210." *Id.*

When asked what caused her to trip, the Plaintiff stated "[a] hole, a small hole there that was there." (See Tenant's Motion, Exhibit H, Page 22). When asked if her foot became stuck in the defect, the Plaintiff stated, "I believe so, right foot." (See Tenant's Motion, Exhibit H, Page 22). The Plaintiff was asked to review a photograph and when asked what it depicted, the Plaintiff stated that "[i]t shows the store and the hole." (See Tenant's Motion, Exhibit H, Page 28). When asked if it fairly and accurately depicted the sidewalk at the time her accident occurred, the Plaintiff stated "[y]es." (See Tenant's Motion, Exhibit H, Page 29-30). A clear depiction of the sidewalk condition is contained in the Third Party Defendants' affirmation in support (NYSCEF #39).

When asked what relationship he had to 1055 BBA, LLC, Palumbo stated, "[i]t's an LLC, and me and my sister own it." He also stated that the property was purchased eight years prior to the deposition

held on March 10, 2020. (See Tenant's Motion, Exhibit I, Page 7). When asked if BBA owned the property on the day of the accident, Palumbo stated, "[y]es." (Page 8). When asked if he had ever repaired the sidewalk since purchasing the Premises, Mr. Paulmbo stated "[n]o." (Page 18). Mr. Palumbo sat for a second deposition on January 29, 2021. As to sidewalk repairs, Mr. Palumbo stated "[u]nder the terms of the lease; I mean, if, if there's any repairs, that the, or any problem with it, that the landlord would fix it." (Page 13).

When asked during his deposition whether, at the time of the accident, he had an ownership interest in Tenant L&L, Yafai stated "[y]es, I used to be the owner." (Page 13). When asked if he operated the store for the entirety of the Lease, Mr. Yafai stated, "[n]o, only two years." (Page 14) When asked who was responsible for repairing the sidewalk adjacent to the store, Mr. Yafai stated, "[i]t was the landlord's duty. Its not my own store." (Page 16). When asked if he had ever performed construction on or otherwise repaired the sidewalk, Mr. Yafai stated "[n]o, I didn't do anything. I took it like that and I gave it back like that." (Page 16). When asked if the sidewalk defect existed when he took possession, Mr. Yafai stated, "[y]es." (Page 18). The aforereferenced testimony is sufficient to show that the Third Party Defendants did not have a duty to repair the sidewalk and did not cause or create the condition at issue. *See Morelli v. Starbucks Corp.*, 107 AD3d 963, 964, 968 N.Y.S.2d 542 [2d Dept 2013]. Accordingly, the Plaintiff's direct claims against the Defendants L&L and Yafai are dismissed.

Indemnification

Lease Provisions:

Article 8 provides in pertinent part that-

Article 8- Indemnification Tenant hereby indemnifies and agrees to hold Landlord harmless from and against all liability, damages, costs and expenses from causes of action, suits, claims demands and judgments of any nature whatsoever caused by the use and occupancy of the Premises by Tenant its invitees, officers or agents, except to the extent

caused by the negligence or willful misconduct of the Landlord, its agents or employees, or Landlord's breach of this Lease. Landlord hereby indemnifies and agrees to hold Tenant harmless from and against all liability, damages, costs and expenses from causes of action, suits, claims, demands and judgments of any nature whatsoever caused by the negligence or willful misconduct of Landlord, its agents or employees, or Landlord's breach of this Lease. The indemnity contained in this section shall survive the expiration or earlier termination of this Lease.

Section 10.01 provides in pertinent part that-

Section 10.01. Except as provided in Section 10.02, Landlord shall maintain the Property in a first class condition and in compliance with all laws and repair all structural components of the Building, including, without limitation, the foundation, structural floors, joists, interior load bearing walls of the Building, and only that portion of the plumbing which is brought into the premises from the main plumbing lines. Landlord agrees to be responsible for the roof and exterior walls of the Building. The landlord shall not however be responsible for any water damage caused by any leaks within the Premises.

Section 10.02 provides in pertinent part that-

Section 10.02. Tenant, at its sole expense, shall maintain, repair and/or replace the Heating unit, the HVAC unit and make all interior repairs to the Premises (not otherwise required to be performed by the Landlord) during the Term which are necessary to keep the Premises in substantially as good condition as on the commencement Date, excepting reasonable wear and tear, damage by condemnation the elements, fire or other casualty or matters as to which this Lease does not require Tenant to provide insurance. Tenant shall cause trash to be removed from the Premises as necessary, including any medical waste, if any, at its sole cost and expense and agrees to remove all snow and ice from the sidewalk servicing the demised premises at its own cost and expense. Tenant shall not create any unsanitary condition or nuisance on or adjacent to the demised premises or sidewalk curb and 18 inches from the curb; shall not permit rubbish to be placed or stored in front of the demised premises, except for rubbish pickup, and shall promptly remove all waste from the premises, and shall be responsible for defending any proceeding and payment of any fines levied in connection therewith by the New York City Department of Sanitation, Environmental Control Board, Department of Health, or by any other City, State or Governmental agency, issued as a result of the fault of the Tenant only.

Article 28 provides in pertinent part that-

Section 28.01. Landlord or its agents shall not in any way whatsoever be liable for any injury or damage to any person or property happening on or about the demised premises or basement, or to any property of Tenant or to any property of any other person, firm, association, or corporation on or about the demised premises from whatever cause whatsoever, including but not limited to fire, theft, explosion, falling plaster, steam, gas, electricity, water, rain, snow, or leaks from any part of said building or from the pipes,

appliances, or plumbing works, or from the roof, unless caused by or due to the negligence of the Landlord, its agencies, servants or employees.

Section 28.02. Tenant shall give immediate notice to the Landlord in case of fire or accident in the demised premises, or of defects therein or in any fixtures or equipment.

Section 28.03. Notwithstanding the insurance requirements of this Lease, the Tenant shall indemnify and save harmless the Landlord from and against any and all suits, claims, demands of every kind and nature, including reasonable counsel fees, by or on behalf of any person, firm, association, or corporation arising out of or based upon any accident, injury, or damage, however occurring, which shall or may happen on or about the demised premises, or in or about the vaults, streets, sidewalks, or curbs in front of the Property or adjacent thereto, and against any matter or thing growing out of the condition, maintenance, repair, alteration, use, occupation, or operation of the demised premises or of the vaults, streets, sidewalks, or curbs in front of or adjacent thereto. Tenant shall not be responsible for any such damages on items contained in this paragraph if caused by or due to the negligence of the Landlord, its agents, servants, or employees

The Tenants move to dismiss the Landlord's Third Party action. The Tenants contend that they were not negligent and not required to make any repairs to the sidewalk pursuant to the Lease. Further, they contend that they did not cause or create the condition. The Tenants point to language in Section 10.01 that the Landlord would repair all the structural components of the building.

Contractual Indemnification

Generally, “[a] party's right to contractual indemnification depends upon the specific language of the relevant contract.” *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. What is more, “[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor.” *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010]. The Defendants/Third Party

Defendants/Tenants have shown that they are free from negligence and had no obligation to repair the sidewalk under the Lease. Article 8 of the Lease requires the Tenant (including the limited guarantor, Yafai, under the provisions of the limited guarantee) to indemnify the Landlord for the Tenant's use and occupancy except for negligence or willful conduct of the Landlord. Therefore, this provision does not trigger the Tenant's obligation to indemnify the Landlord because the accident was not caused by the Tenants' use and occupancy. However, Paragraph 28.03 of the Lease also provides for the Tenants' indemnity obligations to the Landlord. Under this provision, except as caused by the Landlord's negligence, Tenants are responsible to indemnify and save harmless the Landlord for any suits, claims or demands relating to, among other things, the sidewalk, "however occurring", in addition to "any matter or thing growing out of the condition, repair, alteration, use, occupation, or operation of the demised premises or the" "...sidewalks..." As such, unlike the language of Article 8, in the event that Landlord is not found to be negligent, Tenants' obligations under this indemnity provision would be triggered. Insofar as the Landlord's liability has not been determined, the issue of contractual indemnity cannot be determined at this time. Therefore, the claim for contractual indemnity in the 3rd Party Complaint shall continue.

Common Law Indemnification

Tenants also seek summary judgment on their counterclaim for common law indemnification against the Landlord. The Tenants also move to dismiss the Landlord' common law indemnity claim against them as contained in the Third-Party Complaint. "The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor." *Metadijia Atanasoki v. Braha Indus., Inc.*, 124 AD3d 705, 706, 2 N.Y.S.3d 524, 525 [2d Dept 2015]. However, to establish common law indemnification,

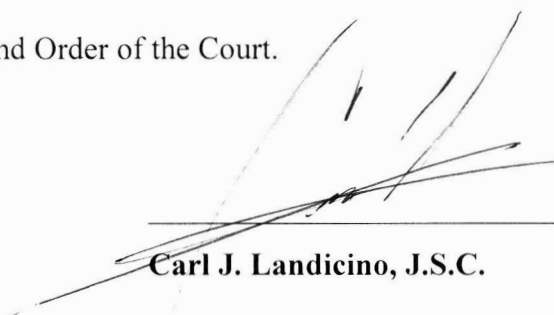
a party must show not only that it was not negligent, but that the other party was responsible. *See Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808, 888 N.Y.S.2d 81, 83 [2d Dept 2009]. Moreover, "...the predicate of common law indemnity is vicarious liability without actual fault..." *Dreyfus v. MPCC Corp.*, 124 AD3d 830, 3 N.Y.S.3d 365 [2d Dept 2015]. Neither party has a common law indemnification claim. The Lease serves to govern the issue of indemnification.

Based upon the foregoing, it is hereby ORDERED as follows:

The Defendant/Third Party Defendants' (L&L, Yafai) motion for summary judgment (motion sequence #1) is granted solely to the extent that the direct claim by the Plaintiff as provided in the amended complaint is dismissed as against L&L and Yafai, and the Defendant Third Party Plaintiffs claim for common law indemnification against L&L and Yafai is dismissed. The motion in relation to the Defendant/Third Party Defendants' motion for summary judgment on its counterclaim for common law indemnity against the Defendants/Third Party Plaintiffs is denied. The Third Party Complaint claim for contractual indemnification shall continue.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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