

Sinclair v Sirena Realty Corp.

2024 NY Slip Op 30251(U)

January 17, 2024

Supreme Court, Kings County

Docket Number: Index No. 515570/2020

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of January 2024

HONORABLE FRANCOIS A. RIVERA

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CAROLINE SINCLAIR

Plaintiff,

- against -

SIRENA REALTY CORP., GOLDEN KRUST FRANCHISING, INC. d/b/a GOLDEN KRUST CARIBBEAN BAKERY & GRILL and QUARTZ REALTY CORP.,

Defendants.

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SIRENA REALTY CORP.,

Third-Party Plaintiff,

CONEY BAKERY, LLC, QUE DIEU TE BENNISSE, INC d/b/a GOLDEN KRUST CARIBBEAN BAKERY & GRILL, QUE DIEU TE BENNISSE, INC., QUE DIEU DE PE DENISSE INC., QUE DIEU DE PE DENISSE INC d/b/a GOLDEN KRUST CARIBBEAN BAKERY & GRILL., GOLDEN KRUST CARIBBEAN BAKERY & GRILL, GOLDEN KRUST, and GOLDEN KRUST CARIBBEAN RESTAURANT.

Third-Party Defendants.

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By notice of motion filed on December 22, 2022, under motion sequence number five, defendants Golden Krust Franchising, Inc., s/h/a Golden Krust Franchising, INC. d/b/a Golden Krust Caribbean Bakery & Grill (hereinafter GKF) and Third-Party Defendant Coney Bakery LLC (hereinafter collectively the movants) seek an order

pursuant to CPLR Rule 3212 dismissing the complaint of plaintiff Caroline Sinclair and all cross-claims asserted against GKF.

Plaintiff Caroline Sinclair and defendant third-party plaintiff Sirena Realty Corp. (hereinafter SRC) have opposed the motion.

BACKGROUND

On August 24, 2020, plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office (KCCO).

On October 23, 2020, defendant SRC interposed and filed a verified answer with cross-claims with the KCCO. As relevant here, SRC asserted three cross-claims against GKF for common law indemnity, contribution, and contractual indemnity.

On December 12, 2022, defendant GKF interposed and filed a verified answer with the KCCO.

The verified complaint alleges the following salient facts. On May 17, 2019, defendant SRC was the owner of the premises known as 1516 Mermaid Avenue, Brooklyn, New York 11224 (hereinafter the subject premises). SRC was responsible for controlling, operating, managing, and maintaining the sidewalk adjacent to 1516 Mermaid Avenue, Brooklyn, New York 11224. SRC negligently controlled, operated, managed, and maintained the sidewalk adjacent to the subject premises. On that date, there existed a place of business known as Golden Krust Caribbean Bakery & Grill at the subject premises. Defendant SRC leased space to GKF at the subject premises.

GKF, by and through its franchisee, agents, servants, and/or employees, leased space at 1516 Mermaid Avenue, Brooklyn, New York. The franchise owner of GKF at

1516 Mermaid Avenue, Brooklyn, NY was a franchisee, servant, agent, and/or employee of defendant Golden Krust. Golden Krust, by and through its franchisee, agents, servants, and employees, were responsible for controlling, operating, managing, and maintaining the sidewalk adjacent to 1516 Mermaid Avenue, Brooklyn, NY 11224.

Defendant Quartz Realty Corp. was the owner of the premises 1518-1520 Mermaid Avenue, Brooklyn, NY 11224. Quartz Realty Corp. was responsible for controlling, operating, managing, and maintaining the sidewalk adjacent to 1518-1520 Mermaid Avenue, Brooklyn, NY 11224. Quartz Realty Corp. negligently controlled the sidewalk adjacent to 1518-1520 Mermaid Avenue, Brooklyn, NY 11224. Defendant Quartz Realty Corp. negligently controlled, operated, managed, and maintained the sidewalk adjacent to 1518-1520 Mermaid Avenue, Brooklyn, NY 11224. On May 17, 2019, at approximately 1:00 pm, plaintiff was caused to trip and fall (hereinafter the subject accident) due to a raised, uneven, and broken sidewalk adjacent to the premises 1516 and 1518/1520 Mermaid Avenue, Brooklyn, NY 1122. The subject accident was caused by the defendants' negligence.

MOTION PAPERS

GKF motion papers consist of a statement of material facts, a memorandum of law in support, a notice of motion and an affirmation of counsel in support which refers to fourteen annexed exhibits labeled A through N. Exhibit A is a copy of the summons and complaint. Exhibit B is a copy of SRC's answer with cross-claims. Exhibit C is a copy of GKF's answer. Exhibit D is a copy of the plaintiff's notice of motion for a default judgment against defendant Quartz Realty Corp. Exhibit E is a copy of the Court

decision and order granting the plaintiff's motion for a default judgment against defendant Quartz Realty Corp. Exhibit F and G are a complete copy of the transcript of plaintiff's deposition testimony. Exhibit H is a transcript of the deposition testimony of Michael A. Russo of SRC. Exhibit I is a copy of the transcript of the deposition of Daren Hawthorne from GKF. Exhibit J is a copy of defendant SRC's Third-Party Summons and Verified Third-Party Complaint. Exhibit K is a copy of defendant SRC's Amended Third-Party Summons and Verified Third-Party Complaint. Exhibit L is described as a copy of the lease between SRC and GKF. Exhibit M is described as a franchise agreement between GFK and Coney Bakery LLC. Exhibit N is a copy of the plaintiff's bill of particulars.

SRC's opposition papers consist of an affirmation of counsel which refers to seven annexed exhibits labeled A through G. Exhibit A is a copy of the summons and verified complaint and SRC's verified answer with cross-claims. Exhibit B is a copy of the transcript of the deposition of Daren Hawthorne from GKF. Exhibit C is a copy of defendant SRC's Amended Third-Party Summons and Verified Third-Party Complaint. Exhibit D is an order dated December 8, 2022, pertaining to discovery. Exhibit E is a notice to produce demanded by SRC. Exhibit F is described as the lease between SRC and GKF. Exhibit G is described as a franchise agreement between GFK and Coney Bakery LLC.

Plaintiff's opposition papers consist of an affirmation of counsel which refers to two annexed exhibits labeled 1 and 2. Exhibit 1 is described as a franchise agreement

between GFK and Coney Bakery LLC. Exhibit 2 are excerpt from the transcript of the deposition of Daren Hawthorne from GKF.

GKF submitted an affirmation of its counsel in reply to the opposition of SRC.

LAW AND APPLICATION

The plaintiff's complaint and verified bill of particulars alleges that plaintiff tripped and fell on May 17, 2019, at around 1:00 pm in front of 1516 Mermaid Avenue, Brooklyn, New York due to a dangerous condition, namely, a raised and uneven sidewalk. Plaintiff has alleged that defendant SRC is the owner of the property abutting the defective sidewalk condition. Plaintiff is not claiming that GKF owned the property abutting the dangerous sidewalk or that GKF caused or created the allegedly dangerous condition. Rather plaintiff claims that GKF was negligent in maintaining the subject sidewalk.

GKF submitted a statement of material facts in accordance with 22 NYCRR 202.8-g in which it alleged the following salient facts, among others. The lease dated February 1, 2014, between SRC as lessor and GKF, as lessee, provided, inter alia, for the rental of the ground floor of 1516 Mermaid Avenue in Brooklyn, New York, for a ten-year term. According to the Franchise Agreement, dated February 21, 2014, GFK granted a franchise for a Golden Krust Caribbean Bakery & Grill restaurant to Coney Bakery LLC.

Neither SRC nor the plaintiff submitted a response to GKF's asserted facts contrary to the requirements of Uniform Court Rule 202.8-g (c). Consequently, the facts

asserted in the movant's statement of material facts are deemed admitted in accordance with Uniform Court Rule 202.8-g (c).

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Giuffrida v. Citibank*, 100 N.Y.2d 72 [2003]). A moving party must address the specific factual allegations set forth in the complaint and the bill of particulars (*Parrilla v. Sapphire*, 149 A.D.3d 856, 51 N.Y.S.3d 596 [2nd Dept. 2017], citing, *Terranova v. Finklea*, 45 A.D.3d 572 [2nd Dept. 2007]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 N.Y.2d at 324).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all the evidence must be viewed in the light most favorable to the opponent of the motion (*Boyd v. Rome Realty Leasing Limited Partnership*, 21 A.D.3d 920, 801 N.Y.S.2d 340 [2nd Dept. 2005]).

Administrative Code of the City of New York § 7-210(a) states that it shall be the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition. Administrative Code of the City of New York § 7-210(b) states the owner of real property abutting any sidewalk 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. Administrative Code of the City of New York § 7-210 imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition. (*Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 519 [2008]). Administrative Code of the City of New York § 7-210(c) provides a liability exception for one, two, or three family residential real property that is in whole or in part, owner-occupied, and used exclusively for residential purposes.

The subject property is within the City of New York and within the purview of Administrative Code of the City of New York § 7-210. Inasmuch as the movants do not own the property abutting the allegedly dangerous sidewalk and the plaintiff is not claiming that GKF caused or created the allegedly dangerous condition, there is no basis to hold GKF liable for the subject accident. GKF's contention is that it has no duty to the plaintiff and that it breached no duty to the plaintiff is correct. Neither the plaintiff nor SRC have raised a triable issue of fact on GKF's freedom of liability.

The principle of common law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Board of Mgrs. of the 125 N. 10th Condominium v.*

125 North10, LLC, 150 AD3d 1063, 1064 [2nd Dept 2017], quoting *Curreri v. Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2nd Dept 2008]). The party seeking indemnification must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought and must not have committed actual wrongdoing itself (*Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2nd Dept 2007], quoting *17 Vista Fee Assoc. v. Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious (*Balladares v. Southgate Owners Corp.*, 40 AD3d 667, 671 [2nd Dept 2007]; see also *Dreyfus v. MPCC Corp.*, 124 AD3d 830, 830 [2nd Dept 2015]).

A cause of action for contribution requires that the culpable parties must be subject to liability for damages for the same personal injury (*Nassau Roofing & Sheet Metal v. Facilities Development Corporation*, 71 NY2d 599 [1988]). The parties need not be liable under the same theories or whether the party whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative or even intentional tort-feasor (*id.*). Contribution is not founded upon, nor does it necessarily arise from contract and only a ratable or proportional reimbursement is sought (*McDermott v. City of New York*, 50 NY2d 211 [1980]; *McFall v. Compagnie Maritime Belge S.A.*, 304 NY 314 [1952]). Where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy (*Fox v. County of Nassau*, 183 AD2d 746, 746 [2nd Dept 1992]). To sustain a

cause of action for contribution, the party seeking contribution is required to show that ... a duty was owed to the plaintiff as an injured party and that a breach of that duty contributed to the alleged injuries (*Eisman v. Vil. Of E. Hills*, 149 AD3d 806, 808-809 [2nd Dept 2017] quoting, *Guerra v. St Catherine of Sienna*, 79 AD3d 808 [2nd Dept 2010]). Thus, contribution is not available where the co-defendant owed no duty or breached no duty to either the party seeking contribution or to the plaintiff (see *Rodriguez v. Suffolk*, 305 AD2d 574 [2nd Dept 2003]). Based on GKF's freedom of liability for the subject accident, SRC has no viable cross-claim for contribution or common law indemnity against GKF.

CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor (*Abizadeh v Abizadeh*, 159 AD3d at 857 [2d Dept 2018]); Although GKF also sought dismissal of SRC's cross-claim for contractual indemnity, contrary to the requirements of CPLR 2214(a) its motion papers did not address this branch of its motion. It is therefore denied without prejudice.

CONCLUSION

The branch of defendants Golden Krust Franchising, Inc., s/h/a Golden Krust Franchising, INC. d/b/a Golden Krust Caribbean Bakery & Grill and Third-Party Defendant Coney Bakery LLC for an order dismissing the complaint of plaintiff Caroline Sinclair as asserted against it is granted.

The branch of defendants Golden Krust Franchising, Inc., s/h/a Golden Krust Franchising, INC. d/b/a Golden Krust Caribbean Bakery & Grill and Third-Party

Defendant Coney Bakery LLC for an order dismissing the cross-claims for common law indemnity and contribution as asserted against GKF by defendant third-party plaintiff Sirena Realty Corp is granted.

The branch of defendants Golden Krust Franchising, Inc., s/h/a Golden Krust Franchising, INC. d/b/a Golden Krust Caribbean Bakery & Grill and Third-Party Defendant Coney Bakery LLC for an order dismissing the cross-claims for contractual indemnity asserted against GKF by defendant third-party plaintiff Sirena Realty Corp is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:

Francis A. Rivera

J.S.C.