Cutugno v DL

2024 NY Slip Op 32008(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 162527/2019

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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JANET CUTUGNO,

Plaintiff,

- v -

THE DL, 95 DELANCEY LLC,93 LUDLOW ST. INC.,JUDITH A. SAN ROMAN, REELHOUSE PRODUCTIONS, LLC,

Defendants.

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INDEX NO. 162527/2019

MOTION DATE 01/16/2024

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

93 LUDLOW ST. INC.

Plaintiff,

-against-

JUDITH SAN ROMAN, REELHOUSE PRODUCTIONS, LLC.

Defendants.

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Third-Party
Index No. 595506/2020

The following e-filed documents, listed by NYSCEF document number (Motion 005) 159, 160, 161, 162, 163, 164, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185 were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury trip and fall action defendants Judith A. San Roman and Reelhouse Productions, LLC ("Reelhouse") move for summary judgment seeking dismissal of the Amended Complaint as against them. San Roman and Reelhouse also seek to dismiss the cross-claims against them by 95 Delancey LLC ("95 Delancey"); 93 Ludlow St. Inc ("95 Ludlow") and The DL (collectively "The Delancey defendants").

The Delancey defendants brought a third-party action against San Roman and Reelhouse. Plaintiff then amended her complaint to add San Roman and Reelhouse as direct defendants. In their answer to the Amended Complaint, the Delancey defendants asserted the same cross-claims

that they asserted in the third-party complaint. Plaintiff alleges negligence on a premises liability theory against all defendants. The Delancey defendants' third-party complaint and cross-claims as against San Roman and Reelhouse allege the same five causes of action. They allege 1) Contractual Indemnification; 2) Contractual Indemnification – Third-Party Beneficiary; 3) Breach of Contract for failure to Procure Insurance Coverage; 4) Common Law Indemnification; and 5) Contribution

BACKGROUND

Plaintiff alleges she tripped and fell at a movie premier event at 95 Delancey Street, New York, NY (NYSCEF Doc No 174 ¶ 6). Defendant, 95 Delancey LLC owned the property and defendant The DL operated a rooftop bar/lounge at the space (*id*.). The DL leased two floors of its space to San Roman to host a movie premier for a film produced by Reelhouse, an LLC of which San Roman is the sole member (*id*.). The contract between San Roman and The DL provided the space for a 6-hour event to host the premier (*id*. at ¶ 27). During the event plaintiff alleges that she tripped and fell due to a height differential in floorboards (*id*. at ¶ 8 – 10).

DISCUSSION

Summary Judgment Standard

It is well settled that '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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]).

"The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp*., 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

San Roman's Authority to bind Reelhouse

Reelhouse first argues that it cannot be held liable for either plaintiff's claim or the third-party claims, and cross-claims because it was not a signatory on any of the contracts leasing the space, and San Roman signed those documents in her own personal capacity. The Delancey defendants oppose arguing that San Roman, as the sole and managing member of the Reelhouse LLC, was acting on behalf and for the benefit of the LLC, and thus bound Reelhouse.

NY Limit Liab Co § 412 states:

> (a) Unless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the

> limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority.

Here, it is undisputed that San Roman is the sole member of the Reelhouse LLC (NYSCEF Doc No 176 at 10:12 – 10:13; see also NYSCEF Doc No 183). The movie that was being premiered was written and produced by Reelhouse LLC (*id*. at 10:16 – 10:18). The event was branded with Reelhouse's logo and Ms. Roman filled out a Credit Card Authorization Form naming Reelhouse Productions as the Organization name for the event (NYSCEF Doc Nos 182 & 184). The space was rented for the benefit of Reelhouse LLC and was "for apparently carrying on in the usual way the business of the limited liability company" and thus "binds the limited liability company" (NY Limit Liab Co § 412).

Therefore, San Roman bound Reelhouse and it will not be dismissed from the action under this theory.

Premises Liability

San Roman and Reelhouse argue that since they are not the owner of the property, they did not owe a duty of care to plaintiff. They further argue that because they did not create the allegedly dangerous condition, they cannot be found liable even if they did owe a duty of care to plaintiff. Plaintiff and Delancey defendants oppose arguing that as licensees, San Roman and Reelhouse exercised control over the property and owed a duty to plaintiff to maintain the premises safely.

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premise" (*Gibbs v Port Auth. of New York,* 17 AD3d 252, 254 [1st Dept 2005]). "[A] licensee exercising control, owe[s] a duty to those on the property to maintain the premises in a reasonably safe condition during the period of its use"

(*Stevenson v Saratoga Performing Arts Ctr., Inc.*, 115 AD3d 1086, 1087 [3d Dept 2014]). Defendants moving "for summary judgment in a [trip]-and-fall case [have] the initial burden of establishing, prima facie, that it neither created the dangerous condition that allegedly caused the underlying accident nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy" (*Sawicki v GameStop Corp.*, 106 AD3d 979, 979 [2d Dept 2013]). "To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident" (*Tuck v Surrey Carlton Hous. Dev. Fund Corp.*, 208 AD3d 1383, 1384 [2d Dept 2022]).

It is undisputed that San Roman and Reelhouse did not occupy or own the property, however, as a licensee they did control the property and had a duty to maintain the premises in a safe condition. Delancey defendants rely on *Stevenson* arguing that San Roman and Reelhouse, "conceived of, planned, orchestrated and supervised the [event, and] had control over the premises during the set up and the event and thereby owed a duty of care to those present to maintain the site in a reasonably safe condition" (*Stevenson*, 115 AD3d at 1087). However, in *Stevenson* the plaintiff tripped over a wire that was placed by a company that was hired by the defendant. Here, San Roman and Reelhouse submit plaintiff's testimony where she stated that she tripped because of a height differential in the floorboards (NYSCEF Doc No 161 at 79:7 – 79:16). Unlike in *Stevenson*, where the allegedly dangerous condition was a temporary wire created by a company that defendant was responsible for supervising, here San Roman and Reelhouse were not responsible for remedying allegedly defective flooring for an event space they licensed for 6 hours. San Roman and Reelhouse also established that they did not have actual or constructive notice of the allegedly defective floor by submitting San Roman's EBT

where when asked about the flooring she stated that she was unaware of any defects in the floor and that her team had inspected the area where they placed a red carpet prior to the event (NYSCEF Doc No 176 at 62:15 – 65:18).

Therefore, San Roman and Reelhouse have established *prima facie* that they did not create the allegedly defective condition, nor did they have notice of the allegedly defective condition and plaintiff and Delancey defendants have failed to raise a triable issue of fact to dispute this showing. Accordingly, summary judgment will be granted in San Roman and Reelhouse's favor and the complaint will be dismissed as against them.

Third-Party Complaint and Crossclaims

Contractual Indemnification

"[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" (*Mejia v Cohn*, 188 AD3d 1035, 1038 [2d Dept 2020]). Here, since as a matter of law San Roman and Reelhouse were not negligent, and the Delancey defendants cannot be contractually indemnified for their own negligence the contractual indemnification claims must be dismissed.

Common Law Indemnification and Contribution

"[T]o establish a claim for common-law indemnification, a party must prove … that it was not negligent, [and] that the proposed indemnitor's actual negligence contributed to the accident, or … that the indemnitor had the authority to direct, supervise, and control the work giving rise to the injury" (*Mohan v Atl. Ct., LLC*, 134 AD3d 1075, 1078-79 [2d Dept 2015]). Contribution on a negligence claim also requires the party to prove the negligence of the party it

is seeking contribution from (*Costanza Const. Corp. v City of Rochester*, 135 AD2d 1111 [4th Dept 1987])

Here, as above, San Roman and Reelhouse were not negligent, and they did not have the responsibility to fix the allegedly dangerous condition, therefore the common law indemnification claim must be dismissed.

Breach of Contract to Procure Insurance

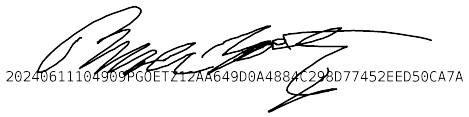
San Roman and Reelhouse did not present any argument regarding the Delancey defendants' breach of contract for a failure to procure insurance claim. While the record is not clear whether this was a requirement to the contract, since San Roman and Reelhouse did not submit any admissible proof regarding this claim, summary judgment dismissing this claim will be denied.

Based on the foregoing, it is

ORDERED that the branch of defendants San Roman and Reelhouse's motion for summary judgment dismissing the complaint as against them is granted and the complaint is dismissed as against San Roman and Reelhouse; and it is further

ORDERED that the branch of San Roman and Reelhouse's motion to dismiss the third-party complaint and the cross-claims them is granted to the extent that the cross-claims for contractual indemnification, common law indemnification, and contribution against San Roman and Reelhouse by the Delancey defendants are dismissed and the motion is denied as to the cross

claim for failure to procure insurance.



6/11/2024
DATE

PAUL A. GOETZ, J.S.C.

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