

Santana v 417 Knickerbocker Ave. Realty Corp.

2024 NY Slip Op 32827(U)

August 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 525452/2018

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 525452/2018
Return Date: March 15, 2023
Mot. Seq. Nos.: 7-8

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JUAN LORENZO ABREU SANTANA,

Plaintiff,

-against-

417 KNICKERBOCKER AVE. REALTY CORP., 417
KNICKERBOCKER AVE. STORE, INC., and E&J
LAWRENCE CORP.,

Defendants.

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417 KNICKERBOCKER AVE. REALTY CORP.,

DECISION/ORDER

Third-Party Plaintiff,

-against-

417 KNICKERBOCKER AVE. STORE, INC., and E&J
LAWRENCE CORP.,

Third-Party Defendants.

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The following papers, which are e-filed with NYCEF as items 140-169, were read on this motion:

In motion sequence number 8, defendant/third-party plaintiff, 417 KNICKERBOCKER AVE. REALTY CORP., moved for an order (i) pursuant to CPLR 3212, granting summary judgment in its favor dismissing the plaintiff's claims as against it; and (ii) granting it summary judgment on its claims against defendants/third-party defendants 417 KNICKERBOCKER AVE. STORE, INC. and E&J LAWRENCE CORP. for common law and contractual indemnity.

By short form order dated May 15, 2023 (NYSCEF # 188), the Court denied that branch of the motion in which 417 KNICKERBOCKER AVE. REALTY CORP.'s sought summary judgment dismissing plaintiff's complaint insofar as asserted against it, and marked that branch of the motion in which 417 KNICKERBOCKER AVE. REALTY CORP. sought summary judgment against defendants/third-party defendants 417 KNICKERBOCKER AVE. STORE,

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INC. and E&J LAWRENCE CORP. on its claims for common law and contractual indemnity as fully submitted. The Court will now address those claims.

This is an action to recover damages for personal injuries arising from an alleged trip and fall accident that occurred on March 14, 2018, that was allegedly caused by defective cellar doors located on the sidewalk in front of the premises known as 417 Knickerbocker Avenue, Brooklyn, New York. Defendant/Third-party-plaintiff, 417 KNICKERBOCKER AVE. REALTY CORP. is the owner of the premises. The record contains a copy of a lease agreement for the premises between 417 KNICKERBOCKER AVE. REALTY CORP. and 417 KNICKERBOCKER AVE. STORE, INC. (the "lease"), who is referred to as the Tenant. While the lease term, July 17, 2001, to July 31, 2017, does not cover the day of the accident, 417 KNICKERBOCKER AVE. STORE, INC. has admitted that the lease was in effect since 2001 (see NYSCEF #, ¶ 7).

There is no mention of E&J LAWRENCE CORP. in the lease agreement. At his deposition, Max Elman, one of the principles of 417 KNICKERBOCKER AVE. REALTY CORP. claims that E&J LAWRENCE CORP. became a tenant in 2008, and that the lease was renewed sometime thereafter (Elman Deposition - pp. 11-12, 17). The renewal lease, if one exists, is not part of the record.

Pursuant to paragraph numbered "4" of the lease, 417 KNICKERBOCKER AVE. STORE, INC. agreed to make all structural and non-structural repairs to the subject premises during the term of the lease agreement. 417 KNICKERBOCKER AVENUE STORE INC. was also required to repair the "public portions of the building, both exterior and interior, inclusive of all structural repairs."

Paragraph "8" of the lease required 417 KNICKERBOCKER STORE INC. to indemnify and hold harmless 417 KNICKERBOCKER AVE. REALTY CORP. from any claims arising out of the use of the subject premises. This paragraph was modified by paragraph "52(b)" of the lease, which provides:

Tenant shall indemnify and save harmless Landlord and its agents against and from all liabilities obligations, damages, penalties, actions, proceedings, claims, costs and expenses (including without

limitation, attorneys' fees and disbursements) suffered, paid or incurred by Landlord as a result of... **(b) any and all claims... arising from the conduct or management of the demised premises or of any business therein, or any work or thing whatsoever done or any condition created (other than by Landlord for Landlord's or Tenant's account) in or about the demised premises during the term of this lease (Emphasis added).**

Paragraph numbered "8" of the lease required 417 KNICKERBOCKER AVE, STORE, INC. to procure insurance naming the owner as an additional named insured on its commercial general liability policy of insurance. Additionally, pursuant to paragraph numbered "61" of the Rider to the lease agreement, the tenant was required to procure a comprehensive policy of liability insurance protecting the Landlord and Tenant from any claims "occasioned by accident on or about the demised premises." The tenant was to procure insurance naming the Landlord as an additional named insured.

Discussion:

As stated above, this Court previously denied 417 KNICKERBOCKER AVE. REALTY CORP.'s motion for summary judgment dismissing all claims against it. In this regard, even though 417 KNICKERBOCKER AVE. REALTY CORP. may be considered an out-of-possession landlord who assumed no obligation to make repairs to its property, it can still be held liable for injuries caused by a defective condition on the property it either created the condition or had actual or constructive notice of it (*Rodriguez v. Sheridan One Co., LLC*, 177 A.D.3d 801, 801, 110 N.Y.S.3d 316 [internal quotation marks omitted]; see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774; *Vaughan v. Triumphant Church of Jesus Christ*, 193 A.D.3d 1104, 147 N.Y.S.3d 612, 614). This court denied 417 KNICKERBOCKER AVE. REALTY CORP.'s motion for summary judgment since it did not establish as a matter of law that it did not create the alleged defective condition and that it lacked constructive notice of the alleged condition.

While Courts will construe a contract to provide indemnity to a party for its own negligence where the contractual language evinces an "unmistakable intent" to indemnify (see *Levine v. Shell Oil Co.*, 28 N.Y.2d 205, 212, 321 N.Y.S.2d 81, 269 N.E.2d 799), the operative

contractual language contained in paragraph 52(b) of the lease does not evince an “unmistakable intent” that 417 KNICKERBOCKER AVE, STORE, INC. agreed to indemnify 417 KNICKERBOCKER AVE. REALTY CORP. for negligence on its part in creating a defective condition. Indeed, the indemnification provision clearly indicates a contrary intent and specifically states that 417 KNICKERBOCKER AVE, STORE, INC. is not obligated to indemnify 417 KNICKERBOCKER AVE. REALTY CORP. for any claim arising out of a condition created by the Landlord.

For all the above reasons, it is hereby

ORDRED that the branch of KNICKERBOCKER AVE. REALTY CORP. motion for summary judgment against defendants/third-party defendants 417 KNICKERBOCKER AVE, STORE, INC. and E&J LAWRENCE CORP. on its claim for common law and contractual indemnity is **DENIED**.

This constitutes the decision and order of the Court.

Dated: August 7, 2024

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

**KINGS COUNTY CLERK
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