

Ramos v Caliendo Holdings LLC

2024 NY Slip Op 33134(U)

July 17, 2024

Supreme Court, Kings County

Docket Number: Index No. 509852/2021

Judge: Rupert V. Barry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Index No.: 509852/2021

IAS Term, Part 13, of the Supreme Court of the State of New York, County of Kings, at the courthouse located at 320 Jay Street, Brooklyn, New York, on the 17th day of July 2024.

P R E S E N T:

HON. RUPERT V. BARRY, A.J.S.C.

-----X
RAYMOND RAMOS,

Plaintiff,

Cal. No.: 20 (MSQ No.: 3)
Cal. No.: 21 (MSQ No.: 4)

-against-

Index No.: 509852/2021

CALIENDO HOLDINGS LLC,

Defendants.

DECISION & ORDER

-----X
CALIENDO HOLDINGS LLC,

Third-Party Plaintiff,

-against-

TRI STATE PLUMBING & HEATING INC.,

Third-Party Defendant.

-----X
CALIENDO HOLDINGS LLC,

Second Third-Party Plaintiff,

-against-

QUAN FENG,

Second Third-Party Defendant.

-----X

Recitation, as required by CPLR 2219(a), to papers considered in the review of Defendant/Third-Party Plaintiff CALIENDO HOLDINGS LLC's motion for summary judgment dismissing the complaint and any claims against them (MSQ No.: 3), and Third-Party Defendants TRI STATE PLUMBING & HEATING INC's and QUAN FENG's cross-motion for summary judgment (MSQ No.: 4): NYSCEF Doc. Nos.: 117-151; 154-169.

Index No.: 509852/2021

Upon the foregoing cited papers, this Court finds as follows:

This is an action for personal injuries allegedly sustained by Plaintiff, Raymond Ramos, on January 17, 2020. Plaintiff filed his summons and complaint on April 27, 2021, alleging negligence on the part of Defendant/Third Part Plaintiff owner Caliendo Holdings, LLC (hereafter “Caliendo”). On October 23, 2023, Caliendo filed the instant summary judgment motion (MSQ No.: 3) seeking dismissal of the complaint on the grounds that it was an out of possession landlord, that was not responsible for the maintenance and repair of the leased premises, including the yard area where in the incident occurred. Caliendo also moved for summary judgment, in part, for contractual indemnification and contribution against Third-Party Defendant Tri State Plumbing & Heating Inc. and Third-Party Defendant Feng, guarantor of the lease and Principal/Owner of Tri State (hereafter “Tri State and Feng”), and for breach of contract for failure to name Caliendo as an additional insured on its policy, and for costs and fees.

Tri State and Feng filed their partial opposition papers, requesting this Court grant Caliendo’s motion for summary judgment dismissing the complaint. They also argue that, should this Court deny that portion of Caliendo’s summary judgment motion, Tri State and Feng seek a denial of that portion of Caliendo’s motion requesting indemnification and contribution from Tri State and Feng. They also filed their own cross-motion for summary judgment (MSQ No.: 4) seeking dismissal of Caliendo’s third-party complaint. For the reasons below, Caliendo’s motion for summary judgment dismissing the complaint is granted. The portion of its motion seeking indemnification and contribution is denied as moot. Tri State’s and Feng’s cross-motion for summary judgment is also denied as moot.

Plaintiff allegedly was injured while working at the premises, which was owned by Caliendo, on January 17, 2020. At the time of the alleged accident, Caliendo leased the premises,

Index No.: 509852/2021

which included a rear building, located at 18-82 Flushing Avenue, Ridgewood, New York 11385 (hereinafter, the “Premises”), to Tri State, for the purposes of operating its plumbing and heating business. In the course of its use of the property, Tri State also utilized the yard area to park its trucks, place materials, and move and store heavy metal plates. It is undisputed that the surface of the yard was made of asphalt and that Tri State placed heavy metal plates all throughout the yard area on the asphalt surface.

On the day of the accident, Plaintiff, who was an employee of Tri State, was in the yard of the premises operating a forklift to lift and move metal plates. While attempting to drive the forklift, Plaintiff caused the wheel of the forklift to become stuck in a hole. Another Tri State employee attached a chain from a dump truck to the forklift and pulled the forklift out of the hole with Plaintiff still sitting in the cab of the forklift. Upon the forklift being dislodged, the force from the pull caused the forklift to crash into the dump truck and caused a propane tank on the back of the forklift to become unattached and allegedly striking and injuring Plaintiff.

Out-of-Possession Landlord:

Generally, “[a]n out-of-possession landlord's duty to repair a dangerous condition on leased premises may be imposed by statute or regulation, by contract, or by course of conduct” (*Hawkins v Stewart & Clinton Co., LLC*, 133 AD3d 567, 568 [2d Dept 2015]). Here, Caliendo established, *prima facie*, that it was an out-of-possession landlord and that it relinquished control of the leased premises. Based on the course of conduct of Tri State, which included at some point prior to the accident, covering the hole with one of its own metal plates, and the lack of any such directive in the lease, Caliendo was not obligated under the terms of the lease to maintain or repair the premises (see *Ingargiola v Waheguru Mgmt.*, 5 AD3d 732 [2d Dept 2004]).

Index No.: 509852/2021

Although reservation of a right of re-entry may constitute sufficient retention of control to impose liability on an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception only applies where a specific statutory violation exists and there is a significant structural or design defect (*Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 [2d Dept 2006]). In the instant matter, Plaintiff does not allege the existence of a specific statutory safety violation or the existence of a significant structural or design defect.

In opposition, Plaintiff failed to raise a triable issue of fact as to whether Caliendo retained control over the premises or had a contractual duty to maintain and repair the area of the premises where the accident occurred. Furthermore, although Caliendo retained a right of re-entry, Plaintiff failed to raise a triable issue of fact that there was a significant structural or design defect or a violation of a specific statutory provision (*see Jeter v Seagull Assoc., Inc.*, 43 AD3d 871 [2d Dept 2007]). As Caliendo did not owe a duty to Plaintiff under statute or regulation, the terms of the lease, or a course of conduct, this Court need not address the issue of whether Caliendo had notice of the alleged dangerous condition (*Souffrant v M&K Real Estate Assoc., LLC*, 225 AD3d 914, 916 [2d Dept 2024]).

As to Caliendo's portion of its motion seeking relief against Tri State and Feng, in light of this Court's determination that its summary judgment motion seeking dismissal of the complaint is granted, Caliendo's contentions concerning its cross claim for indemnification and contribution against Tri State have been rendered academic (*see generally Mendoza v Manila Bar & Rest. Corp.*, 140 AD3d 934, 935 [2d Dept 2016]). Similarly, Tri State's cross motion for summary judgment seeking dismissal of Caliendo's cross motion for indemnification is denied as academic.

Accordingly, it is

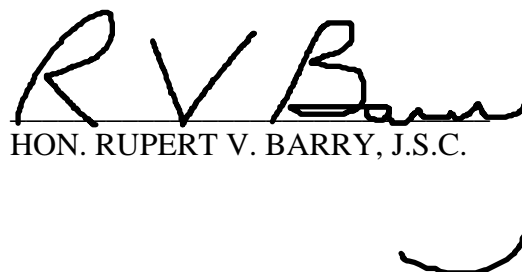
Index No.: 509852/2021

ORDERED, that Defendant/Third-Part Plaintiff Caliendo's motion for summary judgment (MSQ No.: 3) is **GRANTED** and the complaint and any claims against Caliendo are **dismissed**. As a result, the further relief sought by Caliendo regarding indemnification and contribution as against Tri State and Feng is **denied as moot**. It is further

ORDERED, that Third-Party Defendants Tri State's and Feng's cross-motion for summary judgment (MSQ No.: 4) is also **DENIED as moot** in light of this Court's decision and order granting summary judgment to Defendant Caliendo and dismissing the complaint and claims against Caliendo. It is further

ORDERED, that all applications not specifically addressed herein are denied.

This constitutes the decision and order of this Court.



HON. RUPERT V. BARRY, J.S.C.