

Lawrence v YTE Diagnostic Ctr., Inc.

2024 NY Slip Op 34736(U)

September 25, 2024

Supreme Court, Queens County

Docket Number: Index No. 711734/2019

Judge: Karen Lin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 24**

-----X
CANDACE LAWRENCE,

Plaintiff,

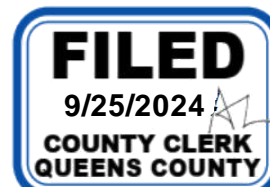
**Index No. 711734/2019
Motion Seq. No. 4**

-against-

DECISION AND ORDER

**YTE DIAGNOSTIC CENTER, INC., BAISLEY
SERVICES INC. and BP,**

Defendants.



-----X
The following papers were considered on the motion for summary judgment:

<i>Papers</i>	<i>NYSCEF Doc. No.</i>
Notice of Motion, annexed Exhibits, Affidavits, and Memorandum of Law.....	66 - 89
Answering Affidavits and Exhibits.....	90 - 99
Reply Affirmation.....	100 - 102

Upon the foregoing papers, it is ordered that the motion for summary judgment is decided as follows:

Plaintiff commenced this action to recover for injuries that she allegedly sustained on December 13, 2018, as a result of a trip and fall while she was walking on or near the paved area of the exterior of a BP gas station located at 122-05 Merrick Boulevard, St. Albans, New York (“premises”). Plaintiff contends that she fell when she stepped into a hole in the blacktop surface of the premises. The premises is owned by defendant YTE Diagnostic Center (“YTE”). Under a “triple-net” lease agreement, defendant YTE leased the premises to nonparty 122-05 Merrick Corp. (“Merrick Corp”) on August 9, 2001 (“Master Lease”). Pursuant to the Master Lease, the Merrick Corp. was required to maintain the premises in good condition, to effect needed repairs, and to pay all taxes and utility charges and to maintain liability insurance. Nonparty The Macchia Group owns the Merrick Corp. and owns the Master Lease. The Merrick Group, in turn, subleased the premises to defendant Baisley Services Inc. (“Baisley”) on May 10, 2011, wherein Baisley agreed to be bound by all terms and conditions of the Master Lease (“sublease”).

YTE moves pursuant to CPLR 3212 for an order: 1) granting summary judgment dismissing plaintiff's complaint and all cross claims of co-defendants Baisley and BP; and, 2) granting it summary judgment on its cross claims for contractual indemnification against Baisley. YTE contends that that it is an out-of-possession owner of the premises and that it did not create or have actual or constructive notice of the condition that caused plaintiff to fall. YTE further contends that pursuant to the triple-net lease, Baisley was responsible to maintain and repair the premises.

In support of their motion, defendant YTE submits, *inter alia*, i) the deposition transcripts of plaintiff, Lorenzo Macchia, a principal of The Macchia Group, and Gansham Sainchand, the owner of Baisley Services Inc., ii) photographs, iii) a copy of the Master Lease, and iv) a copy of the sublease.

Baisley opposes asserting that YTE was responsible for making structural repairs at the premises and that the contractual indemnification provision is not enforceable since it does not contain a savings clause in violation of GOL § 5-322.1.

Plaintiff also opposes the motion contending that YTE failed to carry its *prima facie* burden of establishing entitlement as a matter of law that it was an out-of-possession landlord that did not owe plaintiff a duty to maintain the premises in a safe condition. Plaintiff further contends that there exist questions of fact as to whether YTE had actual or constructive notice of the dangerous condition.

It is well established that the proponent of a summary judgment motion must make a *prima facie* case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). "It is not the function of a court ... to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

The court's role is "issue-finding, rather than issue determination" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

Generally, the duty of a landowner to maintain the premises in a reasonably safe condition is premised on the landowner's exercise of control over the property (*see Peralta v Henriquez*, 100 NY2d 139 [2003]; *Butler v Rafferty*, 100 NY2d 265 [2003]). "That duty is premised on the landowner's exercise of control over the property, as the person in possession and control of the property is best able to identify and prevent any harm to others" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011] [internal citations and quotation marks omitted]). In contrast, "a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronski v County of Monroe*, 18 NY3d at 379 [2011]). An out-of-possession landlord is not liable for injuries caused by defective conditions on its premises in the absence of a duty imposed on the landlord by statute or regulation, by contract, or by a course of conduct" (*Muller v City of New York*, 185 AD3d 834, 845 [2d Dept 2020]).

Here, YTE has satisfied its initial burden of demonstrating that it did not exercise sufficient control over the premises. YTE established that it could not be liable for plaintiff's injuries because it is an out-of-possession landlord who did not have a duty imposed by contract, statute, or by course of conduct. Under the sublease, it is uncontroverted that Baisley was obligated to "maintain in thorough repair and good order and safe condition . . . parking and driveway areas, curbs, curb-cuts and the like in front of, adjacent to, and behind the premises" (Sublease, NYSCEF Doc. No. 82 at 11). It is also uncontroverted that plaintiff's accident occurred in the driveway area of the premises. In opposition, neither Baisley nor plaintiff raises an issue of material fact as to whether YTE was contractually obligated to maintain and repair the specific defective condition upon which plaintiff tripped.

Plaintiff and Baisley also fail to raise a triable issue of fact as to whether YTE assumed such duty by a course of conduct. The only evidence in the record is the sole instance when Baisley notified the Macchia Group about the blacktop in front of the convenience store that needed repairs. However, Baisley admitted that it was responsible for paying for the repairs. This evidence alone is insufficient to constitute a course of conduct (*e.g. Ritto v Goldberg*, 27 NY2d

887 [1970]). Although the sublease gave the Lessor or its agents the right to reenter the premises, a right to reenter to make repairs will impose liability only where a course of conduct establishes that the landlord has assumed responsibility to maintain a particular portion of the premises (*Gelardo v ASMA Realty Corp.*, 137 AD2d 787, 788 [2d Dept 1988]). Furthermore, the mere reservation of the right to enter the premises for inspection, without a specific statutory violation and the existence of a significant structural or design defect, may not constitute sufficient control to permit a finding that the owner or lessor had constructive notice of a defective condition (*see Thompson v Port Auth. of NY & NJ*, 305 AD2d 581, 582 [2d Dept 2003]). While plaintiff asserts two statutory violations, NYC Adm. Code §§ 7-210 and 19-152, these statutes specifically relate to sidewalk defects and maintenance/repair of building parapets and are not applicable to plaintiff's accident. As neither Baisley nor plaintiff offered any evidence establishing the existence of any structural design defect in violation of a specific statutory provision, they fail to raise a triable issue of fact in opposition to YTE's *prima facie* showing. Therefore, the court grants YTE's motion for summary judgment to dismiss plaintiff's complaint and all cross claims asserted against it.

Contractual Indemnification

“The right to contractual indemnification depends upon the specific language of the contract” (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “[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” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). Generally, a contractual indemnification clause will be upheld so long as it does not purport to indemnify a party for its own negligence (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]).

It is undisputed that under the terms of the sublease, Baisley agreed to indemnify the “Lessor, as well as Lessor's members, managers, principals, agents, Stockholders, directors and officers, from and against any liability, responsibility, and damages, and against any and all suits, claims, actions, . . . arising out of or based upon any accident, injury . . . growing out of the condition, maintenance, repair . . . and/or Tenant's failure to comply with its obligations hereunder” (Sublease, NYSCEF Doc. No. 82 at 13). It is also undisputed that under the terms of

the sublease, “Lessor will be the fee owner of the premises” (*id.* at 30). There is also a clause requiring Baisley to procure insurance.

Contrary to Baisley’s assertion, General Obligations Law § 5-322.1 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm’s length between two sophisticated parties when coupled with an insurance procurement requirement allocating the risk of liability between themselves (*Spence v Merrick Cent., LLC*, 188 AD3d 940 [2d Dept 2020]). Moreover, the terms of the indemnification provision are clear that YTE cannot be indemnified for its own negligence. Inasmuch as the broad language of the indemnity clause obligated Baisley to indemnify YTE, this portion of YTE’s motion for summary judgment on its claim for contractual indemnification against defendant Baisley is granted.

Accordingly, it is hereby

ORDERED, that the branch of YTE’s motion for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED, that the Clerk is directed to enter judgment in favor of YTE; and it is further

ORDERED, that the branch of YTE’s motion for summary judgment on its cross claim for contractual indemnification against Baisley is similarly granted; and it is further

ORDERED, that YTE is directed to serve a copy of this decision and order with notice of entry upon all parties, within thirty (30) days of the date of entry.

This constitutes the decision and order of this court.

Dated: September 25, 2024



HON. KAREN LIN, J.S.C.

