

Barrette v Borenstein

2024 NY Slip Op 34810(U)

July 16, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 616962/2018

Judge: Joseph C. Pastorella

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SHORT FORM ORDER

INDEX No. 616962/2018

CAL. No. 202300742OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003-MD
Mot. Seq. # 004-MD

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LINDA BARRETTE,

Plaintiff,

SIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11701

- against -

MARTIN J. BORENSTEIN and RICHARD
BARRETTE,

Defendants.

WESTERMANN SHEEHY SAMAN &
GILLESPIE, LLP
Attorney for Defendant/Third-Party Plaintiff
Martin J. Borenstein
90 Merrick Avenue, Suite 802
East Meadow, New York 11554

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MARTIN J. BORENSTEIN,

Third-Party Plaintiff,

MARSHALL DENNEHEY, P.C.
Attorney for Defendant/Third-Party
Defendant Richard Barrette
175 Pinelawn Road, Suite 250
Melville, New York 11747

- against -

RICHARD BARRETTE,

Third-Party Defendant.

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Upon the following papers read on this motion and this cross-motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant/third-party defendant Richard Barrette, dated August 31, 2023; Answering Affidavits and supporting papers by defendant/third-party plaintiff Martin J. Borenstein, dated February 14, 2024; Answering Affidavits and supporting papers by plaintiff, dated February 27, 2024; Replying Affidavits and supporting papers by defendant/third-party defendant Richard Barrette, dated March 12, 2024; Notice of Cross-Motion and supporting papers by defendant/third-party plaintiff Martin J. Borenstein, dated September 5, 2023; Answering Affidavits and supporting papers by defendant/third-party defendant Richard Barrette, dated February 19, 2024; Answering Affidavits and supporting papers by plaintiff, dated February 27, 2024; Replying Affidavits and supporting papers by defendant/third-party plaintiff Martin J. Borenstein, dated March 12, 2024; Replying Affidavits and supporting papers by defendant/third-party plaintiff Martin J. Borenstein, dated March 12, 2024;

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ORDERED that the motion by defendant/third-party defendant Richard Barrette for summary judgment dismissing the amended complaint against him is denied; and it is further

ORDERED that the cross-motion by defendant/third-party plaintiff Martin J. Borenstein for summary judgment in his favor on his third-party claims for common-law and contractual indemnification is denied.

Plaintiff Linda Barrette commenced this negligence action to recover damages for personal injuries she allegedly sustained when she fell descending stairs at a home located in West Islip, New York, on April 5, 2018. Pursuant to a lease agreement (hereinafter the lease), defendant/third-party defendant Richard Barrette (hereinafter Barrette) allegedly rented the subject premises from its owner, defendant/third-party plaintiff Martin J. Borenstein. Borenstein asserts third-party claims and cross-claims for contribution and common-law and contractual indemnification. Barrette interposes counterclaims against Borenstein for contribution and common-law indemnification.

Barrette now moves for summary judgment dismissing the amended complaint, cross-claims, and third-party claims against him. Barrette argues, among other things, that the alleged defect was structural in nature, and that Borenstein was responsible for structural repairs under the lease. In support of his motion, Barrette submits, inter alia, the affidavit of his architectural expert, Douglas W. Peden, the deposition transcripts of the parties, and the lease.

Borenstein cross-moves for summary judgment in his favor on his third-party claims for common-law and contractual indemnification. Borenstein contends, in part, that pursuant to the lease, Barrette is obligated to indemnify and hold him harmless, and Barrette was responsible for all repairs and maintenance in connection with his tenancy. In support of his cross-motion, Borenstein relies upon, in part, the parties' deposition transcripts, and the lease.

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct' " (*Weidner v Basser-Kaufman 228, LLC*, 212 AD3d 684, 685, quoting *Fox v Patriot Saloon*, 166 AD3d 950, 951). Here, the lease contained the following maintenance provision:

"Landlord shall have the responsibility to maintain the Premises in reasonably good repair at all times and perform all repairs reasonably necessary to satisfy any implied warranty of habitability except that Tenant will be responsible for: EVERY THING[.]"

Additionally, Mr. Borenstein retained a right of reentry as provided below:

"Subject to Tenant's consent (which shall not be unreasonably withheld), Landlord shall have the right to enter the Premises to make inspections, provide necessary services, or show the unit to prospective buyers, mortgagees, tenants or workers. . . . However, Landlord does not assume any liability for the care or supervision of the Premises."

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The reservation of a right to enter the premises for purposes of inspection and repair, however, does not give rise to liability, unless there exists a significant structural or design defect which violates a specific statutory provision (*see Nikolaidis v La Terna Restaurant*, 40 AD3d 827; *see also Derosas v Rosmarins Land Holdings, LLC*, 148 AD3d 988).

Moreover, a party's right to contractual indemnification "depends upon the specific language of the contract" (*Caracciolo v SHS Ralph, LLC*, 626 AD3d 861, 864, quoting *Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 752). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Errazuri v E Food Supermarket, Inc.*, 2024 NY Slip Op 03168, *1, quoting *Alayev v Juster Assoc., LLC*, 122 AD3d 886, 888). The lease contains the following indemnification provision:

"To the extent permitted by law, Tenant agrees to indemnify, hold harmless, and defend Landlord from and against any and all losses, claims, liabilities, and expenses, including reasonable attorney fees, if any, which Landlord may suffer or incur in connection with Tenants possession, use or misuse of the Premises, except Landlord's act or negligence."

Both Barrette and Borenstein failed to establish a prima facie case of entitlement to summary judgment in their favor. Barrette and Borenstein each failed to eliminate triable issues of fact as to whether the defective condition that allegedly caused plaintiff's injuries was a structural defect (*see Gil v M. Sopher & Co., LLC*, 137 AD3d 508; *Bernardo v 444 Route 111, LLC*, 83 AD3d 753; *Nameny v East New York Sav Bank*, 267 AD2d 108; *cf. Behlulli v. 228 Hotel Corp.*, 172 AD3d 1151). In support of his contention that the alleged dangerous condition was structural in nature, Barrette relies upon the affidavit of his architectural expert, who apparently never visited the premises and based his opinion on his experience, unspecified photographs of the staircase, none of which were included with the moving papers, the bill of particulars, and the parties' deposition transcripts. The expert contends that his review of such photographs revealed a cracked and broken stringer, which constitutes a "significant structural defect." Notably, plaintiff does not allege that her accident was attributable to a cracked and broken stringer. The conclusory affidavit of Barrette's architectural expert, therefore, was insufficient to establish, as a matter of law, that the allegedly dangerous condition was a structural defect (*see Rui-Jiao Liu v City of White Plains*, 95 AD3d 1192; *Howard v Alexandra Restaurant*, 84 AD3d 498; *Vasquez v The Rector*, 40 AD3d 265). Further, the submissions of Borenstein, who relies upon many of the same exhibits submitted by Barrette in support of his motion, were insufficient to establish, as a matter of law, that the allegedly dangerous condition was not structural in nature (*see Gil v M. Sopher & Co., LLC*, 137 AD3d 508; *Bernardo v 444 Route 111, LLC*, 83 AD3d 753; *Nameny v East New York Sav Bank*, 267 AD2d 108).

Since triable issues of fact remain as to the negligence of both Barrette and Borenstein, the issue of whether Borenstein is entitled to contractual or common-law indemnification and contribution from Barrette may not be resolved by summary judgment (*see Randazzo v Consolidated Edison Co. of N.Y., Inc.*, 177 AD3d 796; *Ginter v Flushing Terrace, LLC*, 121 AD3d 840; *Hernandez v East Boy, Inc.*, 104 AD3d 435).

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Accordingly, the motion by Barrette and the cross-motion by Borenstein are denied.

Dated: July 16, 2024



HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION