

Jones v City of New York
2012 NY Slip Op 33395(U)
March 26, 2012
Sup Ct, Bronx County
Docket Number: 21342/06
Judge: Mitchell J. Danziger
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART PPI

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

2

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

JONES, CONNER

Index No. 21342106

-against-

Hon. MITCHELL DANZIGER

THE CITY OF NEW YORK

Justice.

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion and cross motion decided in accordance
with the annexed Memorandum-Decision

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 3/26/17

Hon.  U.S.C.

MITCHELL J. DANZIGER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP1

-----X
CONNIE JONES,

Plaintiff,

DECISION and ORDER
Index No. 21342/06

-against-

Present: Hon. Mitchell Danziger
JSC

THE CITY OF NEW YORK, DOUBLE PAPAS INC.,
d/b/a TWIN DONUTS, FORDHAM CONCOURSE
REALTY ASSOCIATES, ISJ MANAGEMENT
CORP., and EAST FORDHAM SERIES OF TDS
LEASING, LLC.,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underling motion for summary judgment:

Notice of Motion and annexed Exhibits.....	1
Notice of Motion and annexed Exhibits.....	2
Cross-Motion and annexed Exhibits.....	3
Affirmation in Support.....	4
Affirmation in Opposition	5 & 6
Reply Affirmation.....	7

This decision involves two (2) motions to reargue portions of a decision dated October 18, 2011 and a cross-motion to reargue portions of the aforesaid prior order. The cross-motion also seeks to sever the fourth party cross claim in the interests of justice.

This action involves a claim that the plaintiff tripped and fell on a sidewalk that was “lifted up.” The complaint alleges that on March 22, 2006 the plaintiff, Connie Jones tripped and fell as a result of a “raised, broken and uneven sidewalk.” Plaintiff’s accident occurred in front of 140 East Fordham Road, Bronx, New York. The property in question was owned by Fordham Concourse

Realty Associates (hereinafter "Fordham Concourse") and managed by ISJ Management Corp., (hereinafter "ISJ Management"). Further, the property was leased to East Fordham Series of TDS Leasing, LLC., (hereinafter "East Fordham Leasing"). There is a lease between East Fordham Leasing and Double Papas Inc., d/b/a Twin Donuts (hereinafter "Double Papas"). The cross motion contains a copy of a document entitled Store Lease between Fordham Concourse and East Fordham Leasing for 140 East Fordham Road for the period in question. Further, the aforesaid cross motion contains a copy of a document entitled Franchisee Store Lease between East Fordham Leasing and Double Papas.

Motion No. 1

Defendant, Double Papas seeks to reargue so much of the decision of this Court dated October 18, 2011 which granted judgment over against Double Papas in favor of Fordham Concourse and ISJ Management. The portion of the Order in question states as follows: "The cross-motion of defendants, Fordham Concourse and ISJ Management is granted to the extent that judgment over and against East Fordham Leasing and Double Papas on their fourth cross-claim for failure to procure insurance is granted in their favor." Double Papas argues that judgment over them was improper. Double Papas contends that the defendants Fordham Concourse and ISJ Management had separate and independent policies of insurance for this matter. Therefore, they assert that Fordham Concourse and ISJ Management are entitled only to contract damages, not indemnification or "judgment over" against its tenant. Now, Double Papas seeks to have the Court amend its decision dated October 18, 2011 which granted Fordham Concourse and ISJ Management judgment over against Double Papas on their fourth cross-claim for failure to procure insurance.

Motion No. 2

Fordham Concourse and ISJ Management cross-move for leave to vacate the same portion of the order dated October 18, 2011. The cross-movants also seeks pursuant to CPLR §603 to sever their fourth party cross claim against Double Papas and East Fordham Leasing in the interests of justice.

The prior order of this Court is dated October 18, 2011. Fordham Concourse and ISJ Management assert that a correspondence subsequent to the aforesaid order on October 26, 2011 from Associated Mutual Insurance Cooperative stated as follows: "Fordham Concourse is an additional insured under the AMIC policy." The aforesaid letter also states that ISJ Management "is not an additional insured under our policy of insurance." Fordham Concourse asserts as follows:

Up until the time of service of said correspondence, there had never been a representation by AMIC that coverage is actually afforded to Fordham Concourse under the commercial general liability policy issued to its insured, Double Papas.

The Court previously granted Fordham Concourse and ISJ Management judgment over and against East Fordham Leasing and Double Papas on their fourth cross-claim for failure to procure insurance. Now, the aforesaid defendants seek to vacate that portion of the aforesaid Order.

In light of the acknowledgment of the aforesaid documents, the motion by the defendant, Double Papas and the cross-motion by the defendants Fordham Concourse and ISJ Management is granted only to the extent of permitting vacatur of the portion of the Order dated October 18, 2011 which granted Fordham Concourse and ISJ Management judgment over and against East Fordham and Double Papas on their fourth cross-claim for failure to procure insurance.

Cross Motion To Sever Cross Claims

Defendants Fordham Concourse and ISJ Management cross move to sever the fourth party cross claim for failure to procure insurance of Fordham Concourse against Double Papas and East Fordham Leasing. Fordham Concourse and ISJ Management admit that , by letter dated October 26, 2011, after the Court's decision of October 18, 2011, it was discovered that Double Papas procured a general liability policy which named Fordham Concourse as an additional insured. The policy in question is with Associated Mutual Insurance Cooperative. Fordham Concourse and ISJ Management also acknowledges that Double Papas and East Fordham Leasing have a one million dollar insurance policy with RLI Insurance Corp.

Contractual Indemnification

Defendants, Fordham Concourse and ISJ Management seek to reargue a portion of the order dated October 18, 2011 which denied defendants Fordham Concourse and ISJ Management summary judgment over on its crossclaims against defendants Double Papas and East Fordham Leasing for contractual indemnification, including attorneys fees.

The moving papers attaches a copy of a lease dated September 8, 2003 between Fordham Concourse and East Fordham Series of TDS Leasing, LLC for the premises located at 140 East Fordham Rd, Bronx,. New York. The lease was to expire on August 31, 2015. The aforesaid lease states as follows regarding repairs: "Repairs. 4. Owner shall maintain and repair the public portions of the building, both exterior and interior..." The Rider to the aforesaid Lease states in Section 49 under the heading Indemnification by tenant as follows:

Tenant will defend all actions against Landlord and any member,
director, officer, shareholder, employee or agent of Landlord

(collectively, "Indemnified Parties") with respect to, and shall pay, indemnify and hold harmless each Indemnified Party from and against any and all liabilities, losses, damages, costs, expenses, causes of action - - - by reason of the existence or occurrence of any of the following: (a) any alleged or actual injury to or death of any person, or alleged or actual damage to or loss of property, on the demised premises or on any adjoining street, sidewalk or curb or connected with the use, condition or occupancy thereof, - - .

The moving papers contain a document entitled Franchisee Store Lease between East Fordham Series of TDS Leasing, LLC., (Lessor) and Double Papas (Lessee). This lease states as follows with regard to repairs: "The Lessor is not obligated to make any non-structural repairs including, without limitation, any repairs to the roof."

Henry Poyker testified as a witness on behalf of ISJ Management. Poyker testified that the property in question is owned by Fordham Concourse and managed by ISJ Management. Further, the property is leased to TDS Leasing which owns several donut stores. Poyker testified as follows about the sidewalk in question:

Q. If in fact any repair work is needed on the sidewalk located in front of 140 East Fordham Road, whose responsibility would that be?

A. It would be that of the landlord.

Q. And when you say the landlord, who are you referring to?

A. Fordham Concourse Realty Associates.

Movants essentially asserts as follows: "The language of the indemnity agreement in question

is critically different and more broadly phrased than that presented in *Puchalsky v. Historic Travel Agency*, 236 AD 2d 279 [1st Dept., 1997], given that the duty to indemnify is not limited to the extent to which the tenant occupies the sidewalk.” Further, the word “or” following the indemnification clause signifies that “any accident that takes place upon the sidewalk where a claim is made for bodily injury triggers the contractual obligation of Double Papas and East Fordham Leasing towards Fordham Concourse and ISJ Management.”

In opposition to the motion, the defendant, Double Papas refers to Paragraph 4 of the Lease as follows:

Owner shall maintain and repair the public portions of the building, both exterior and interior... Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, - - .

In opposition, defendant, Double Papas argues as follows: “The remedy available to the owner, therefore, is not full indemnification, particularly not for structural repairs which at all times remain the responsibility of the owner.”

DISCUSSION

Defendants, Fordham Concourse and ISJ Management’s motion which seeks to reargue, so much of the order dated October 18, 2011 which denied defendants Fordham Concourse and ISJ Management summary judgment over on its crossclaims against defendants Double Papas and East

Fordham Leasing for contractual indemnification, including attorneys fees, is denied. The Court adheres to that branch of its original decision. (*See, Cavanaugh v. 4518 Associates*, 9 AD 3d 14 [1st Dept., 2004].)

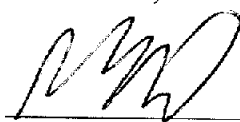
Upon consent, the motion by the defendant, Double Papas and the cross-motion by the defendants Fordham Concourse and ISJ Management is granted only to the extent of permitting vacatur of the portion of the Order dated October 18, 2011 which granted Fordham Concourse and ISJ Management judgment over and against East Fordham and Double Papas on their fourth cross-claim for failure to procure insurance.

The branch of the cross-motion to sever the fourth party cross claim is denied in light of the assertion that insurance was procured. Moreover, judicial economy will be served by having one trial on this issue which are all related.

This constitutes the Decision and Order of this Court.

Dated: March 26, 2012

So Ordered,



Hon. Mitchell Danziger