SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

MARIO ZAPOT,

Plaintiff,

-against-

SAMANTHA DELI GROCERY CORP., THIRD AVENUE BRONX HOLDINGS LLC and PARK AVENUE SOUTH MANAGEMENT, LLC,

Defendants.

Index No. 306410/2011

DECISION and ORDER

Hon. Sharon A. M. Aarons:

Defendants Third Avenue Bronx Holdings LLC (Third Avenue) and Park Avenue South Management, LLC (Park Avenue), move for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against them, and for summary judgment on their cross-claims against defendant Samantha Deli Grocery Corp. (Samantha Deli) for common law and contractual indemnification. Defendant Samantha Deli submits written opposition.[1] The motion is granted in part and denied in part.

On January 1, 2011, the plaintiff was allegedly injured when he stepped into a purportedly open trap door located in a grocery store owned and operated by defendant Samantha Deli in Bronx County. Defendant Third Avenue is the owner of the premises, and defendant Park Avenue is the managing agent. Defendant Samantha Deli disputes the facts as to the accident, alleging that the plaintiff was inebriated, and in essence fabricated his present claims because the employees of Samantha Deli would not sell him beer.

In support of the motion, the defendants submit the pleadings, the amended bill of particulars, the Note of Issue, the unsigned, certified deposition testimony of the plaintiff, a photograph of the trap door located inside the premises, the unsigned, certified deposition testimony of Jorge Martinez (an employee of Samantha

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[1]The plaintiff has not submitted opposition to the motion.

Deli), the unsigned, certified deposition[2] testimony of Maurice McKenzie (the owner of defendant Park Avenue), the lease for the premises between defendant Third Avenue and certain non-parties as tenants, the assignment of the lease to defendant Samantha Deli, defendant Third Avenue's and Park Avenue's Notice to Admit, correspondence whereby Third Avenue and Park Avenue tendered the defense of this action to the insurer of the premises and to defendant Samantha Deli, and the declaration page of the policy of general liability insurance for the premises. Plaintiff's deposition indicates that as he was walking toward the refrigerated section of the store to get a beverage, he did not notice the open trapdoor, and fell partway into it, striking his leg and shoulder. The bill of particulars alleges that the defendants collectively violated Real Property Law 234, New York City Health Code § 135.17, and New York City Admin Code §§ 27-109, 27-127 and 27-128. Paragraph 4 of the form lease to the premises states that, "Tenant shall, throughout the term of the lease, take good care of the demised premises...and at its sole cost and expense, make all non-structural repairs thereto...." Defendants Third Avenue and Park Avenue assert that as the accident occurred solely as a result of conditions for which they, as out-of-possession owners, or as the owner's managing agent, are not responsible, they are not liable as a matter of law for the happening of the accident.

In addition, paragraph 8 of the lease, which was assumed by defendant Samantha Deli, provides that the owner or its agents shall not be liable for property damage or personal injury except arising out of the owner's or its agent's negligence, and that, "Tenant shall indemnify and save harmless the Owner against and from all liabilities...for which owner shall not be reimbursed by insurance, including reasonable attorneys' fees...." In addition, Paragraph 49 of the rider to the lease provides that, "Tenant covenants and agrees that the Tenant will and shall indemnify, defend and save the owner harmless from all claims...including, without

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[2]A deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]). As the accuracy of the unsigned depositions is not challenged herein, the deposition transcripts are competent evidence.

limitation, reasonable attorney's fees...." The moving defendants contend that they are entitled to common law and contractual indemnity for the costs of defending this action from Samantha Deli.

In opposition, defendant Samantha Deli maintains that the testimony of its employee establishes that the defendant in fact never fell inside the premises, and thus, negligence on the part of Samantha Deli has not been established. In addition, Samantha Deli argues that the moving defendants have not established their own freedom from negligence, and thus they are not entitled to indemnity at this juncture. Moreover, Samantha Deli argues that the moving defendants are not entitled to indemnity, on the ground that the deposition witness produced by defendant Park Avenue is a managing agent for the owner who is "not affiliated in any way with any ownership interest in the subject building" – and thus not competent to establish the moving defendants' entitlement to summary judgment.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman, supra*).

Defendant Third Avenue had no duty to maintain or repair the trap door at issue. (*Michaelov v. 632 Kings Highway Realty Corp.*, 36 Misc. 3d 1228(A), 959 N.Y.S.2d 90 [Sup. Ct., Kings County 2012] [construing Standard Form of Store Lease identical to that at issue in the present case, and concluding that based on its terms the owner is an out-of-possession landlord without any obligation to repair the demised premises]). In the absence of a duty to make repairs, the reservation of a right to enter and make repairs is insufficient to impose liability, unless a duty to repair is imposed by statute. (*Alnashmi v. Certified Analytical*

Group, Inc., 89 A.D.3d 10, 929 N.Y.S.2d 620 [2d Dept. 2011].) However, liability may be imposed on an out-of-possession landlord when the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair, and, in the City of New York, a specific violation of the building code exists. *(Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 566, 516 N.Y.S.2d 451, 509 N.E.2d 51 [1987]*; Babich v. R.G.T. Rest. Corp.*, 7 A.D.3d 439, 440, 906 N.Y.S.2d 528 [1st Dept. 2010] [liability may be imposed only when there exists "a significant structural or design defect that is contrary to a specific statutory safety provision"].)

The deposition of the plaintiff dos not identify or assert any defect in the maintenance of the trap door itself, but indicates only that the alleged negligence was leaving the trap door in the open position. However, the bill of particulars alleges that the defendants collectively violated Real Property Law 234, New York City Health Code § 135.17, and New York City Admin Code §§ 27-109, 27-127 and 27-128. Real Property Law 234 concerns a reciprocal right to attorneys fees in landlord-tenant actions and has no application here, and New York City Admin Code § 27-109 is a general section dealing with the scope of the building code. A violation of former Administrative Code §§ 27-127 and 27-128 (both sections were repealed, effective July 1, 2008, and replaced by Administrative Code § 28301.1), standing alone, has been held to be insufficient to impose liability on an out-of-possession owner. (*Hinton v. City of New York*, 73A.D.3d 407, 408, 901 N.Y.S.2d 21 [1st Dept. 2010]; *Ram v. 64th Street-Third Ave. Assocs.*, LLC, 61 A.D.3d 596, 597, 878 N.Y.S.2d 27 [1st Dept. 2009] ["Administrative Code §§ 27-127 and 27-128 are general safety provisions that cannot support a claim of liability against an out-of-possession landlord based on a significant structural defect."]) A violation of New York City Health Code (24 RCNY) § 135.17 (c) (commercial premises shall be free from unsafe or hazardous conditions and from conditions which may endanger the life or health of employees and other persons) has also been held to be non-specific and not a sufficient predicate to impose liability on an out-of-possession owner. (*McDonald v. Riverbay Corp.*, 308 A.D.2d 345, 764 N.Y.S.2d 185

[1st Dept. 2003].)

Moreover, leaving open an interior trap door in commercial premises is not a structural or design defect for which an out-of-possession owner may be held liable. In *Yuying Qiu v. J&J Grocery & Deli Corp.*, (2014 N.Y. App. Div. LEXIS 2076, 2014 NY Slip Op 2150 [1st Dept. 2014]), the Court held:

> "Although the motion court properly found that the issue of whether a dangerous or defective condition exists which is sufficiently hazardous to create liability is generally a question of fact, to be resolved by a jury (Alexander v New York City Tr., 34 AD3d 312, 313, 824 N.Y.S.2d 262 [1st Dept 2006]), we find that the out-of-possession landlord was entitled to summary judgment where the plaintiff fell through an open trap door in the tenant's store. Even though the landlord reserved the right [*2] to reenter the leased premises for purposes of inspection and repair, the properly functioning trap door that was left open by someone within the tenant's control did not constitute " a significant structural or design defect'" (see Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414, 941 N.Y.S.2d 141 [1st Dept 2012], lv denied 19 NY3d 815, 979 N.E.2d 815, 955 N.Y.S.2d 554 [2012]; Baez v Barnard Coll., 71 AD3d 585, 898 N.Y.S.2d 29 [1st Dept 2010]) and plaintiff failed to show a violation of a specific statutory provision, as required to impose liability upon the out-of-possession landlord (see Centeno v 575 E. 137th St. Real Estate, Inc., 111 AD3d 531, 975 N.Y.S.2d 335 [1st Dept 2013]). A general "non-specific safety provision" such as Administrative Code of City of NY § 28-301.1 is insufficient to impose liability on an out-of-possession owner (see id.)."

The moving defendants are consequently entitled to summary judgment dismissing all claims and cross-claims against them.

The moving defendants have also established an entitlement to summary judgment on their claim for contractual indemnification. While defendant Samantha Deli argues that the managing agent was not competent to give testimony establishing the moving defendants' claims, that argument is unsupported by any persuasive authority. In addition, defendant Samantha Deli ignores the fact that a notice to admit was served, establishing the terms of the lease. The unambiguous language of the lease requires Samantha Deli to indemnify the owner and its agents from all claims arising out of the operation of the demised premises. Defendant Samantha Deli's argument that summary judgment cannot be awarded on the cause of action for contractual indemnification unless the moving defendants establish that they are free from negligence is

rejected, as the moving defendants have established that they are not liable as a matter of law.

Defendants Third Avenue and Park Avenue are not entitled to judgment as to common law indemnity as a matter of law. Common-law indemnity requires (1) proof of a proposed indemnitee's freedom from negligence, and (2) proof of some negligence that has contributed to causing a plaintiff's accident on the part of a proposed indemnitor. While the moving defendants' freedom from negligence has been established, at this juncture negligence on the part of defendant Samantha Deli has not been demonstrated. (*Priestly v. Montefiore Med. Ctr.*, 10 A.D.3d 493, 781 N.Y.S.2d 506 [1st Dept. 2004].) Nor have the moving defendants established breach of any duty under the lease to procure insurance. Indeed, it appears that defendant Samantha Deli in fact procured insurance coverage as required under the lease, as demonstrated by the declaration page of the policy submitted by the moving defendants themselves. (The reason why the insurer did not tender a defense to the moving defendants as additional insureds under the policy of insurance obtained by defendant Samantha Deli is not clear on the present record.)

Accordingly, it is hereby

ORDERED that the plaintiff's complaint against defendants THIRD AVENUE BRONX HOLDINGS LLC and PARK AVENUE SOUTH MANAGEMENT, LLC is dismissed on default, and it is further

ORDERED that defendant SAMANTHA DELI GROCERY CORP.'s cross claims against defendants THIRD AVENUE BRONX HOLDINGS LLC and PARK AVENUE SOUTH MANAGEMENT, LLC are dismissed, and it is further

ORDERED that defendant SAMANTHA DELI GROCERY CORP. is contractually bound to indemnify defendants THIRD AVENUE BRONX HOLDINGS LLC and PARK AVENUE SOUTH MANAGEMENT, LLC.

Dated: April 8 , 2014

SHARON A. M. AARONS, J.S.C.