Guoqiong Qu v China Buddhist Assn.
2017 NY Slip Op 30526(U)
March 21, 2017
Supreme Court, New York County
Docket Number: 108786/11
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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GUOQIONG QU and JIANPING QU,

Plaintiffs,

Index No. 108786/11

-against-

DECISION & ORDER

CHINA BUDDHIST ASSOCIATION, EAST WEST BANK, and UNITED COMMERCIAL BANK,

Defendants.

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CHINA BUDDHIST ASSOCIATION,

Third-Party Plaintiff

-against-

Third-Party
Index No. 590798/11

EAST WEST BANK and UNITED COMMERCIAL BANK,

Third-Party Defendant.

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EAST WEST BANK,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 590514/13

LIN'S ASSOCIATES, INC.,

Second Third-Party Defendant.

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GUOQIONG QU and JIANPING QU,

Plaintiffs,

-against-

Index No.: 156599/13

LIN'S ASSOCIATES, INC.,

Defendant.

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KELLY O'NEILL LEVY, J.:

Defendant third-party plaintiff China Buddhist Association (CBA) moves, pursuant to CPLR 3212 (a), for summary judgment on its claims against third-party defendant East West Bank (Bank) for contractual indemnification and for breach of contract in failing to procure required insurance coverage. This action arises from an accident in which, on August 14, 2009, plaintiff Guoqiong Qu allegedly tripped and fell on a raised portion of the sidewalk in front of a building located at 245 Canal Street in Manhattan (Building). CBA owns the Building. At the time of plaintiff's accident, Bank was a tenant in the Building.

In April 2001, CBA leased a portion of the Building to nonparty The Chinese American Bank, pursuant to a standard lease and a 12-page rider (Lease). The Lease term ran from April 1, 2001 through March 31, 2011. Paragraph 26 of the rider to the Lease provides, in relevant part:

> "Tenant shall . . . indemnify and save owner harmless from and against any and all claims arising f[ro]m any breach or default on the par[t] of tenant in performance of any covenant or agreement . . . to be performed pursuant to the terms of this lease . . . and from and against all costs, reasonable counsel fees expenses and liabilities incurred in or about any such claim or action or proceeding brought thereon; and in case any action or proceeding shall be brought against owner by reason of any such claim, tenant, upon notice from owner, shall resist or defend, at tenant's expense, such action or proceeding.
>
> [T]enant shall also indemnify the owner and the demised premises and hold them harmless from, shall defend owner and the demis[d] premise[s] at tenant's sole cost and expense against all claim[s] . . .
> (ii) Arising out of or in connection with any occurrence on or about the demise[d] premises or vaults;
> (iii) Arising out of or in connection with any default by tenant in any of tenant's obligations hereunder;
>
> * * *
>
> This indemnification shall include damage to property and/or injury to person."

Summers affirmation, exhibit A to exhibit P, ¶ 26.

With regard to insurance, the Lease provides, in relevant part:

> "For the protection of the landlord as co-insure[d], Tenant shall carry public liability insurance providing coverage of $1,000,000.00 per personal injuries and coverage of $250,000.00 for property damage."

Id., ¶ 11.

On May 14, 2007, nonparty United Commercial Bank (United) assumed the Lease for the remainder of its term pursuant to a 7-page Lease Assignment and Assumption Agreement (Assumption Agreement) to which CBA was also a party. The Assumption Agreement modified the Lease, in certain respects, including, insofar as is relevant here, an added provision that:

> "the Tenant shall be responsible for the removal of all ice, snow and rubbish on the sidewalk and street abutting in front of and/or around the demised premises and for sidewalk repairs or replacement if necessary. Tenant shall be responsible for all and any notice of violation arising from or about or concerning the sidewalk and the street abutting."

Summers affirmation, exhibit B to exhibit P, ¶ 7 (d).

Effective November 6, 2009, United was closed, and the United States Federal Deposit Insurance Corporation was appointed Receiver of all United branches. On even date, the Receiver entered into a Purchase and Assumption Agreement (PAA) with Bank, pursuant to which Bank was given the option to lease United's former branches, including the subject premises. The PAA provides that:

> "The Receiver hereby grants to [Bank] an exclusive option . . . to cause the Receiver to assign to [Bank] any or all leases for leased Bank Premises . . . to the extent such leases can be assigned . . . . If an assignment cannot be made of such leases, the Receiver may, in its discretion, enter into such subleases with [Bank] containing the same terms and conditions provided under such existing leases for such leased Bank Premises."

Campagna affirmation, exhibit A at 20. Bank exercised its option effective February 5, 2010,

entering into an "Omnibus Assignment of Leases" (Omnibus Agreement) with the Receiver, pursuant to which Bank "assume[d] and agree[d] to . . . perform all of the terms, covenants, conditions and provisions of the Leases." Summers affirmation, exhibit DD, § E (1). The leases referred to in the Omnibus Assignment are described in Exhibit A attached thereto. The pertinent listing refers to the Lease, naming CBA as the landlord and the Lease term as running from April 1, 2001 to March 31, 2011.

Discussion

A party moving for summary judgment pursuant to CPLR § 3212 must make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant does so, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). "Mere conclusions expressions of hope, allegations or assertions are insufficient to raise a triable issue of fact." *Plantamura v. Penske Truck Leasing, Inc.*, 246 AD2d 347, 348 (1st Dep't 1998)(citing *Zuckerman*). *See also Marden v. Maurice Villency, Inc.*, 29 AD3d 402, 403 (1st Dep't 2006).

CBA argues that, by virtue of assuming the Lease and occupying the premises, Bank necessarily also assumed the obligations set forth in the Assumption Agreement. Bank, which admitted in its November 21, 2013 response to CBA's notice to admit, that it occupied the

premises pursuant to the Lease and the Assumption Agreement, together (*see* Summers affirmation, exhibit Q, ¶ 6), nonetheless disagrees.

Bank's argument that the Receiver assigned it only the Lease, and not the Assumption Agreement, is untenable because the Receiver's authority to assign leases is necessarily limited to leases pursuant to which a failed bank occupied its premises at the time that it was closed. Indeed, the PAA provides that Bank's option to cause the Receiver to assign to it any leases for bank premises is limited to such premises as "have been continuously occupied by [Bank] from [the closing of United] to the date [Bank] elects to accept an assignment of the leases with respect thereto." Campagna affirmation, exhibit A at 20. The lease governing the subject premises, at the time that United was closed and Bank commenced its occupancy of the premises, was the Lease, as modified by the Assumption Agreement.

Bank contends that disputed factual issues bar granting CBA's motion, but Bank fails to adduce any such disputes. For example, Bank states that "[q]uestions remain regarding what insurance [it] would have to procure" (Campagna affirmation at 9), but it fails to specify what those questions might be. The requirement of insurance in the Lease is set forth above. The Assumption Agreement modifies that requirement by adding a requirement that Bank purchase rental insurance, naming CBA as an additional insured. *See* Summers affirmation, exhibit B to exhibit P, ¶ 7 (c). Similarly, Bank questions which lease applies (the Lease, as modified by the Assumption Agreement, applies), and whether CBA or Bank was responsible for repairs to the sidewalk (the Assumption Agreement places that responsibility on Bank). Finally, Bank notes that CBA received a notice of violation concerning the sidewalk in front of the Building from the

New York City Department of Transportation on May 27, 2009, and questions whether CBA assumed responsibility for repairing that part of the sidewalk by hiring a contractor to perform such work, and whether CBA acted reasonably in not requiring the work to be finished before the date of plaintiff's accident. It is undisputed, however, that: (1) the work referred to by Bank was contracted for by nonparty Mr. Shen, the upstairs tenant in the Building, who also leased space in the adjoining building; (2) the sidewalk work performed for Mr. Shen was limited to the sidewalk in front of the adjoining building (*see* Summers affirmation, exhibit BB at 9-10 and 24); and (3) CBA contracted for work to be done on the sidewalk in front of the Building but that work was not performed until October 2009.[1]

Accordingly, it is hereby

ORDERED that the motion of defendant/third-party plaintiff China Buddhist Association for summary judgment is granted conditionally to the extent that, if plaintiff recovers from said defendant/third-party plaintiff, the latter shall have judgment over against third-party defendant East West Bank for the same amount.

This constitutes the decision and order of the court.

Dated: March 21, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY, J.S.C.

[1] Jin Di Lin, the principal of the company that performed all the repairs discussed here, testified at his deposition that he was unable to get an earlier permit from the Department of Transportation to perform work on the subject sidewalk, because, during summer school vacations, the immediate area is too crowded with pedestrians.