Rivera v 3821 Broadway LLC
2017 NY Slip Op 30839(U)
April 21, 2017
Supreme Court, New York County
Docket Number: 152233/2014
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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BRENDA RIVERA,

Plaintiff,

-against-

3821 BROADWAY LLC, ERIC FREELAND and
3817 BROADWAY PHARMACY LLC,

Defendants.

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Index No.152233/2014

Seq. No. 002 and 003

Decision and Order

3821 BROADWAY LLC,

Third-Party Plaintiff,

-against-

3817 BROADWAY PHARMACY LLC,

Third-Party Defendant.

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Kelly O'Neill Levy, J.:

Defendant/Third-Party Plaintiff 3821 Broadway LLC ("Broadway") and Defendant Eric Friedland s/h/a Eric Freeland, move under motion sequence 002, pursuant to CPLR 3212, for an order granting summary judgment on their claim for contractual indemnity against Defendant/Third-Party Defendant 3817 Broadway Pharmacy LLC ("Pharmacy"). Broadway made common-law indemnity and/or contribution claims against Pharmacy in its Answer to the Amended Complaint but does not include these claims in its summary judgment motion. Pharmacy moves under motion sequence 003, pursuant to CPLR 3212, for an order granting summary judgment on (1) the negligence claim brought against it by Plaintiff Brenda Rivera ("Plaintiff") and (2) the

contractual indemnity and common-law indemnity and/or contribution claims brought against it by Broadway. The motions are consolidated for disposition.

PROCEDURAL HISTORY AND BACKGROUND

Plaintiff commenced a personal injury action on March 12, 2014, seeking damages for personal injuries allegedly sustained in a slip and fall incident on February 20, 2014 at approximately 6:50 a.m. on a sidewalk adjacent to Pharmacy (also known as VIM Drugs). Plaintiff's complaint asserts a claim of negligence against defendants Broadway, the alleged owner of 3835 Broadway, New York, New York 10032 (the "premises"), and Eric Friedland, Broadway's manager (Friedland, together with Broadway, the "Broadway Defendants"). On April 9, 2014, Plaintiff amended her complaint to include defendant Pharmacy, the commercial tenant of the premises. On May 29, 2014, the Broadway Defendants served a third-party complaint against Pharmacy, seeking contractual indemnification for any damages assigned to Broadway Defendants in Plaintiff's personal injury action. Broadway Defendants move for summary judgment on their claim for contractual indemnification and Pharmacy moves for summary judgment as to the negligence, contractual indemnification, and common-law indemnification and/or contribution claims made against it.

With respect to Plaintiff's negligence claim, Plaintiff testified that her slip and fall resulted from ice on the sidewalk adjacent to Pharmacy. Plaintiff also submitted an expert affidavit from Certified Consulting Meteorologist Howard Altschule in support. Pharmacy contends that the expert's statements are speculative and conclusory and submits the affidavit of pharmacist Sanjay Hodarkar, who also exercised managerial duties at Pharmacy, in support of its motion for summary judgment.

With respect to Broadway Defendants' contractual indemnity claim, Pharmacy contends that it is not required to indemnify Broadway or Friedland because (1) Broadway Defendants have failed to establish that either of them is an "heir, distribute, executor, administrator, successor, or assign" to the lease entered into between Pharmacy, as tenant, and Lawrence Friedland and the Estate of Melvin Friedland, as owners; (2) the indemnification provision contained in the lease is void and unenforceable pursuant to General Obligations Law § 5-321; and (3) Plaintiff's accident did not trigger any duty to indemnify the owner under the lease because the accidence did not occur "in, on, or upon the demise premises" but rather on the sidewalk in front of the demise premises.

DISCUSSION

Plaintiff's Negligence Claim

On a plaintiff's motion for summary judgment in a slip-and-fall action, the defendant bears the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence. *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500 (1st Dep't 2008) (citing *Manning v. Americold Logistics, LLC*, 33 A.D.3d 427 [1st Dep't 2006]). Once the defendant establishes his prima facie case, the burden shifts to the plaintiff to raise a triable material issue of fact as to the creation of the defect or notice thereof. *Id.* (citing *Kesselman v. Lever House Rest.*, 29 A.D.3d 302-303-04 [1st Dep't 2006]). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Defendant Pharmacy offers the affidavit of Mr. Hodarkar in which he testifies that it was his custom and practice, from which he did not deviate, to inspect the sidewalk as to whether it was wet, snowy, or icy and direct the employees to spread salt on the sidewalk as needed, as well as to

personally check the weather forecast each evening for any rain, snow, or freezing temperatures expected overnight and direct that salt be applied as needed per the forecast. Mr. Hodarkar's testimony is sufficient to establish defendant's prima facie case and shift the burden to Plaintiff.

According to Plaintiff's deposition testimony, she was "between one to two feet" away from the pharmacy storefront. (Rivera, Tr. 60). She testifies that she "felt" ice "all around" her where the accident occurred and that she observed the ice prior to the accident. (Rivera, Tr. 67-68). In addition to Ms. Rivera's testimony, plaintiff offers the affidavit of Mr. Altschule, an expert meteorologist, which provides that "11 [inches] of pre-existing snow and ice was present on exposed, untreated and undisturbed surfaces."

Notwithstanding Mr. Hodarkar's testimony, Ms. Rivera's testimony coupled with Mr. Altschule's expert opinion noting the general existence of "exposed, untreated and undisturbed areas away from any objects" create triable material issues of fact as to whether Pharmacy undertook adequate snow removal efforts. *Siciliano v. Henry Modell & Co., Inc.*, 85 A.D.3d 534 (1st Dep't 2011) (plaintiff's testimony regarding her observation of a dangerous or defective condition on a store's outer door is sufficient to raise triable issue of fact even assuming defendant met prima facie burden); *contra Mermelstein v. East Winds Co.*, 136 A.D.3d 505 (1st Dep't 2016) (plaintiff's testimony was not sufficient to overcome defendant's prima facie showing and raise triable issue of fact where plaintiff's testimony contradicted earlier deposition testimony and was not accompanied by expert testimony).

Contractual Indemnity Claim

"The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract."

Suazo v. Maple Ridge Assocs., L.L.C., 85 A.D.3d 459, 460 (1st Dep't 2011). "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 facts and circumstances." *Id.* "A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous." *Id.* The intent to indemnify can be "unambiguously evinced" by the requirement to indemnify for "any" accident, as exists in the instant case. *See Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006). The indemnification clause in the lease provides, in relevant part, that "Tenant covenants and agrees to protect and save harmless Owner from and against any and all claims for injury to person or property by reason of any accident or happening in, on, or upon the demised premises."

As noted above, Pharmacy argues that Broadway Defendants are nevertheless not entitled to contractual indemnity on the grounds that (1) Broadway Defendants have failed to establish that either of them is an "heir, distribute, executor, administrator, successor, or assign" to the lease entered into between Pharmacy, as tenant, and Lawrence Friedland and the Estate of Melvin Friedland, as owners; (2) the indemnification provision contained in the lease is void and unenforceable pursuant to General Obligations Law § 5-321; and (3) Plaintiff's accident did not trigger any duty to indemnify the owner under the lease because the accidence did not occur "in, on, or upon the demise premises" but rather on the sidewalk in front of the demise premises. Each of these grounds will be discussed in turn.

Lease Parties

On October 31, 2011, Pharmacy, as lessee, and Lawrence Friedland and the Estate of Melvin Friedland, as owners and lessors, entered into a lease agreement. Pharmacy contends that

neither Broadway nor Eric Friedland are owners under the lease and therefore may not avail themselves of the contractual indemnity found in the lease.

Plaintiff alleges in her Amended Complaint that Broadway and Eric Friedland were the owners of the premises at the time of her accident. (¶¶ 4, 9). Broadway Defendants' Answer denies the allegation that Eric Friedland was an owner. (¶ 4). Eric Friedland states in an affidavit that he is the manager of Broadway.

Broadway Defendants' denial that Eric Friedland is an owner under the lease in conjunction with Eric Friedland's testimony that he is the manager of Broadway is sufficient to defeat Broadway Defendants' motion for summary judgment as to Eric Friedland only.

Turning to Broadway, in order to show its status as owner of the premises, Broadway offers (1) the above-mentioned affidavit of Eric Friedland which further states that Broadway became the owner of the premises on January 1, 2014; (2) the "Indenture" whereby title to the building was transferred to Broadway from the prior owners and (3) a letter dated January 24, 2014 sent to Pharmacy with the heading "Notice of Change of Ownership", along with a signed return receipt. This January 24, 2014 letter explained that Lawrence Friedland and the Estate of Melvin Friedland had transferred title to the premises to Broadway and that "[a]ll leases and security deposits are being transferred to the new owner".

Pharmacy argues that the Indenture does not sufficiently establish that Broadway is entitled to enforce the terms of the lease. Moreover, Pharmacy contends that the Indenture and the related Recording and Endorsement Cover Page were not previously produced and consequently were not the subject of discovery of depositions in this matter. Pharmacy argues that to the extent Broadway

seeks to rely on the Indenture, discovery as to the creation and meaning of the Indenture is necessary.

Pharmacy's arguments are unavailing. In *Tehan v. Thos. C. Peters Printing Co., Inc.*, the Fourth Department explained that "[i]t is clearly the law of this State that a successor-in-interest to real property takes the premises subject to the conditions as to the tenancy, including any waiver of rights, that his predecessor in title has established if the successor-in-interest has notice of the existence of the leasehold and of the waiver." 71. A.D.2d 101, 104 (1979). At issue in *Tehan* was whether the new owner of a commercial building was required to accept late payment of rent from tenants when the prior owner waived compliance with the lease's on-time payment requirements; this indicates that the *Tehan* Court assumed in the first instance that a new owner is a successor-in-interest to the lease with a tenant. Indeed, pursuant to Real Property Law Section 223, "[t]he grantee of leased real property . . . has the same remedies . . . for the nonperformance of any agreement contained in the assigned lease . . .". *Tower Mineola Ltd. Partnership v. Potomac Ins. Co. of Illinois*, 836 N.Y.S.2d 504 (Sup. Ct. NY County 2007) ("Real Property Law § 223 gives the grantee or assignee of the landlord of property the same rights and remedies against the tenant for nonperformance of the agreements contained in the lease as the original landlord would have had"); *see also 815 Park Owners, Inc. v. West LB Admin., Inc.*, 119 Misc.2d 671 (Civil Court, NY County, 1983) ("It is a well established principal [sic] than an owner's rights and remedies run with the land and may be assumed by a new owner.").

Enforceability of Indemnification Clause

General Obligations Law § 5-321 provides:

> "Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for

> injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

Pharmacy contends that the indemnification provision in the lease is unenforceable because it violates General Obligations Law § 5-321 by failing to exclude the landlord's negligence from the tenant's indemnification obligation. Pharmacy further argues that the instant indemnification provision does not include carve out language such as "to the fullest extent permitted by law," which courts have found sufficient to save an otherwise unlawful indemnification provision. *See, e.g, Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204, 210 (2008) (explaining that the phrase "to the fullest extent permitted by law" limits rather than expands a promisor's indemnification obligation).

In *Great Northern Insurance Co.*, the Court of Appeals explains the general rule that an indemnification provision that requires a lessor to be indemnified for its own negligence is void as against public policy, but then explains that such an indemnification provision is nevertheless enforceable and lawful where the lease contains a requirement that the tenant name the landlord as an additional insured on the tenant's liability insurance policy. *See Great Northern Insurance Co.* at 418-419 ("[[T]he landlord] is not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance.") (citing *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 161, [1977]); *contra Oduro v. Bronxdale Outer, Inc.*, 130 A.D.3d 432, 433 (1st Dep't 2015) (the First Department rejected an owner's contention that an indemnification policy covering owner's negligence was enforceable given existence of insurance policy where lease did

not require comprehensive insurance policy but rather required insurance policy only with respect to the building's plate glass windows).

In the case at bar, because the insurance provision requires comprehensive liability coverage, including public liability and water damage insurance, the indemnification provision does not run afoul of General Obligations Law § 5-321.

Demise Premises

The lease provides in relevant part:

> "Tenant covenants and agrees to protect and save harmless Owner from and against any and all claims for injury to person or property by reason of any accident or happening in, on, or upon the demise premises."

Pharmacy contends that the sidewalk where the incident occurred falls outside the "demise premises" language in the lease because, for example, parts of the lease mention both "the demised premises" and "the sidewalks adjacent thereto". In contrast, Broadway argues that the sidewalk is within the "demise premises."

In *Medina v. JP Morgan Chase Bank, N.A.*, the plaintiff allegedly tripped and fell due to a raised brick on the sidewalk. 953 N.Y.S.2d 551, 35 Misc.3d 1236(A) (N.Y. Sup. Ct. 2012). The owner sought contractual indemnification from the tenant. Pursuant to the lease, the tenant "is to indemnify, to protect, to defend, and to save [the owner] from and against all claims . . . in connection with any liability or claim for any injury to any person or persons occurring in, on, or about the premises from [tenant's] negligence." Furthermore, tenant is to "maintain and repair the storefront of the premises and the sidewalks adjacent to the premises, but not replace the sidewalks." The *Medina* court noted that the "ultimate issue" in determining whether the owner is entitled to contractual indemnification is whether the plaintiff's injury occurred "in, on, or about"

the premises," i.e., whether "the sidewalk adjacent to [the tenant's] building is part of the premises leased by" the tenant from the owner. The court explained that a phrase such as "in, on or about" is not "to be read as limited in its spatial description to in the demised premises, for then the words 'or about' would have no meaning." (citing *Pritchard v. Suburban Carting Corp.*, 90 A.D.3d 729, 731 [2d Dep't 2011]). The court further reasoned that "this phrase of art is frequently used synonymously to mean around or on the outside of." (internal quotation marks omitted) (citing *Pritchard* at 731). As in the instant case, the lease in *Medina* also specifically mentioned "the sidewalks adjacent to the premises" (internal quotations omitted), yet the *Medina* court still held that "in, on or about" the premises encompassed the adjacent sidewalk. *See Medina* at 2, 5.

Here, "in, on, or upon" is likewise a phrase of art, and, in order to retain the meaningfulness of the words "or upon," "upon" should be construed to mean "around" or "on the outside of" the building. *See Verhill v. Falanga*, 2013 WL 6121875 (Richmond County Sup. Ct. 2013) (explaining that the phrase "in or on" is "frequently used synonymously to mean around or on the outside of, and as such covers sidewalks which are adjacent to leased buildings") (internal quotation marks omitted) (citing *Pritchard* at 731). *See also Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153 (1977); *contra Acadia Construction Corp. v. ZHN Contracting Corp.*, 144 A.D.3d 1059 (2nd Dep't 2016) (explaining that "the 'on or about' language in the subject lease [did not apply] to the inside of the plaintiff's neighboring building"). Thus, Plaintiff's accident occurred upon the premises, and Pharmacy must indemnify Broadway for damages in Plaintiff's case.

Common-Law Indemnity and/or Contribution

Pharmacy further seeks summary judgment against Broadway Defendants' claim for common-law indemnification and/or contribution from Pharmacy. Common-law indemnification is

a restitution concept which allows loss to be shifted from a party liable based upon its status to a party at fault because failure to do so would result in unjust enrichment. *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 375 (2011). It is well settled that those actively at fault in bringing about the damage shall bear the imposition of indemnification obligations. *Id.* Because common-law indemnification is predicated upon vicarious liability without actual fault by the indemnitee, *Aiello v. Burns Int'l Sec. Servs. Corp.*, 110 A.D.3d 234, 247 (1st Dep't 2013), the proposed indemnitee cannot obtain common-law indemnification unless it is found to be vicariously liable without evidence of any negligence or actual supervision on its own part. *McCarthy v. Turner Const., Inc.*, at 377–78. Similarly, a claim for common-law contribution requires that the party from which contribution is sought actually contributed to the alleged injuries by breaching a duty either to the injured party or to the party seeking contribution. *Jehle v. Adams Hotel Assocs.*, 264 A.D.2d 354, 355 (1st Dep't 1999).

As previously decided herein, Plaintiff has raised a sufficient question of material fact regarding Pharmacy's negligence and Pharmacy's summary judgment motion with respect to Plaintiff's negligence claim has been denied. It follows that Pharmacy's claim for summary judgment with respect to common-law indemnification and/or contribution must also be denied.

CONCLUSION

For the reasons stated above, the court finds that Plaintiff met her prima facie burden to show that triable material issues of fact exist. Pharmacy must contractually indemnify Broadway for damages in Plaintiff's case but is not required to contractually indemnify Eric Friedland. Pharmacy's claim for summary judgment on common-law indemnification and/or contribution must also be denied because Plaintiff has raised an issue of fact regarding Pharmacy's negligence.

Accordingly, it is hereby

ORDERED that 3817 Broadway Pharmacy LLC's motion for an order granting summary judgment dismissing the negligence claim against it (mot. seq. 003) is denied; and it is further,

ORDERED that 3821 Broadway LLC and Eric Friedland s/h/a Eric Freeland's motion for and order granting summary judgment on the contractual indemnity claim (mot. seq. 002) is denied as to Eric Friedland s/h/a Eric Freeland and granted as to 3821 Broadway LLC; and it is further,

ORDERED that 3817 Broadway Pharmacy LLC's motion for and order granting summary judgment dismissing 3821 Broadway LLC's cross-claim for contractual indemnity is denied.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: April 21, 2017 ENTER:

Kelly O'Neill Levy

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