Miller v Carpentier Props. Corp.

2012 NY Slip Op 33122(U)

December 19, 2012

Supreme Court, Suffolk County

Docket Number: 26085/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Robert Miller,
Plaintiff,

-against-

Carpentier Properties Corp. f/k/a Carpentier Construction Corp., 780 Broadway, LLC and 770-780 Broadway LLC,
Defendants.

Carpentier Properties Corp. f/k/a Carpentier Construction Corp., 780 Broadway, LLC and 770-780 Broadway LLC,
Third-Party Plaintiffs,

-against-

Cabinetry By Castle, Inc.,
Third-Party Defendant.

Clerk of the Court

Index No.: 26085/2009

Motion Sequence No.: 001; MOT.D
Motion Date: 7/27/12
Submitted: 9/12/12

Motion Sequence No.: 002; XMG
Motion Date: 7/27/12
Submitted: 9/12/12

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Upon the following papers numbered 1 to 35 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Notice of Cross Motion and supporting papers, 18 - 20; 24 - 30; Answering Affidavits and supporting papers, 21 - 23; Replying Affidavits and supporting papers, 31 - 33; 34 - 35; it is

ORDERED that this motion by third-party defendant Cabinetry By Castle, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the third-party complaint is determined as set forth herein; and it is further

ORDERED that this cross motion by defendants/third-party plaintiffs for an order pursuant to CPLR 3212 (e) granting partial summary judgment in their favor on their third-party claim for breach of the lease provision requiring third-party defendant to purchase liability insurance naming defendants as additional insureds is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on April 10, 2008 while employed as a cabinet maker by third-party defendant Cabinetry By Castle, Inc. (Cabinetry). Plaintiff had just finished loading a customer's truck with furniture when he tripped over a raised concrete curb (wing wall) and fell into the loading dock area at premises located at 770-2 Broadway, Holbrook, New York. The premises was owned by defendant 770-780 Broadway LLC and leased by defendant Carpentier Properties Corp. to third-party defendant Cabinetry.

Plaintiff alleges that defendants were negligent in, among other things, causing, creating or permitting a dangerous condition to exist by allowing a raised concrete curb to project beyond the edge of the loading area, failing to paint or highlight the raised concrete curb, failing to repair and/or replace a railing around the loading area after having actual notice that it was missing, failing to install a chain at the end of the loading area, failing to provide safe walking areas, and failing to post warning signs.

Defendants commenced a third-party action against Cabinetry alleging a first cause of action for common-law indemnification, a second cause of action for contribution, a third cause of action for contractual indemnification, and a fourth cause of action to recover for breach of a lease provision requiring Cabinetry to have in effect a comprehensive general liability insurance policy naming defendants/third-party plaintiffs as additional insureds.

Third-party defendant Cabinetry now moves for summary judgment in its favor dismissing the third-party complaint on the grounds that the contractual indemnification provisions of the lease contravene General Obligations Law § 5-321, and that it cannot be found liable inasmuch as the responsibility for construction, maintenance and repair of the alleged defective conditions of the curb and railings remained solely with defendants under the lease terms. The submissions in support of the motion include the pleadings, plaintiff's bill of particulars and amended bill of particulars, a three-year lease agreement commencing December 1, 1998 between Carpentier Properties Corp. as landlord and Cabinetry as tenant, portions of the deposition transcripts of plaintiff, Richard

Carpentier and Michael Tutton on behalf of Cabinetry, and black and white photographs of the accident location identified by plaintiff at his deposition.

In opposition to the motion, defendants/third-party plaintiffs contend that the deposition testimony reveals differing versions of how plaintiff fell that raise issues of fact as to whether the condition of the railing was a factor in plaintiff's accident and whether Cabinetry was negligent in failing to provide plaintiff with a safe place to work by exposing him to the open and obvious tripping hazard of the curb when it failed to direct the truck to park directly in front of the garage door rather than parallel to it. They also contend that the indemnification clause is enforceable when read together with insurance procurement clause of the lease.

Plaintiff testified at his deposition on December 14, 2010 that he had been working for Cabinetry for 21 years, that Cabinetry had been at the subject location since 2000, and that the accident occurred on a sunny day at approximately 11:30 a.m. or 12 p.m. after he had finished loading the back of a truck together with Tutton. Plaintiff explained that the loading dock was within 20 to 30 feet of the garage door of the building and ran parallel to the building. The loading dock was a deep rectangular area of concrete, deeper near the garage door, and the side farthest from the building had a raised curb that angled down at the point that it met the apron of the garage driveway. The curb had a horizontal railing with vertical posts. The edge of the deep end of the loading dock, from the end of the metal railing to the garage door, had no railing or chain. Plaintiff also explained that the loading dock was not used as a loading dock and that a dumpster was located at the deep end of the loading dock near the garage door.

Plaintiff also testified that prior to his accident the truck was parked parallel to the loading dock curb with the back of the truck near the end of the raised curb. He stated that he turned away from the rear of the truck to walk towards the building and when his right foot hit the raised, angled, end portion of the curb, he tripped and fell onto the dumpster and then onto the ground in the loading dock area. Tutton testified at his deposition on June 27, 2011 that he is the president of Cabinetry and that on the date of plaintiff's accident, he was standing approximately two feet away from plaintiff and facing plaintiff when he observed plaintiff step backward, lose his balance and fall into the loading dock.

Plaintiff further testified that the portion of the railing and posts that extended to the angled edge of the curb were missing and argued that had they been present he would not have fallen. Tutton testified that the first and second vertical posts of the railing were bent towards the shallow end of the loading dock, no portion of the railing was missing, and that he first noticed the condition at the time of plaintiff's accident. According to Tutton, the landlord was responsible for repairing the railing and its posts and had done so many times prior to this incident. Tutton also testified that the curb and railing posts were never painted and that signs were never posted in said area.

Carpentier testified at his deposition on April 21, 2011that he is president of Carpentier Properties Corp., that on the date of the accident 770-780 Broadway LLC owned the subject premises, and that said premises was leased by Cabinetry pursuant to the subject lease. Tutton

testified that Cabinetry had been a tenant at the subject address for 10 or 11 years. Carpentier and Tutton testified at their depositions that the subject lease was extended and was in effect at the time of plaintiff's accident.

Carpentier testified that the steel pipe railing around the loading dock had been changed by himself or his repairman more than once prior to plaintiff's accident because the railing had been hit by a vehicle. In addition, he testified that the railing had been down for more than a month prior to plaintiff's accident, that he was aware that the top rail was missing and that the first vertical post was bent, and that he had been waiting for the repairman to fix it. Carpentier also testified that it was his responsibility to repair the railing pursuant to the terms of the lease.

The second paragraph of the lease indicates "That the Tenant shall take good care of the premises and shall, at the Tenant's own cost and expense make all repairs except structural repairs provided such structural repairs were not caused by negligence or carelessness of the Tenant, his agents, employees, licensees and invitees in which event the Tenant is to make such repairs at Tenant[']s own cost and expense on demand ..."

Paragraph 28 of the rider to the lease provides that "Tenant shall indemnify Landlord against and save Landlord harmless from any liability (including counsel fees and expenses) to and claim by or on behalf of any person, firm, governmental authority or corporation for personal injury, death or property damage or for any other cause (including, without limitation, those which may be based upon the negligence, active, passive or statutory, of Landlord) arising (a) from the use by Tenant of the demised premises or from any work or thing whatsoever done or omitted to be done by Tenant, its agents, contractors, employees, licensees or invitees, and (b) from any breach or default by Tenant of and under any of the terms, covenants and conditions of this Lease."

Paragraph 31 of the rider to the lease provides "That throughout the term hereof, the Tenant agrees to carry all necessary insurance in connection with his business to save the Landlord harmless from any damages whatsoever and the Tenant specifically agrees to take out, maintain and pay for public liability insurance protecting the Landlord as well as himself, to the extent of $1,000,000.00 single limit. If the Tenant fails to obtain such policies, the Landlord may obtain them and add the premium cost to the rent, next falling due, which amount shall be paid by the Tenant as additional rent."

A commercial lease negotiated between two sophisticated parties who include a broad indemnification provision, coupled with an insurance procurement requirement is enforceable under General Obligations Law § 5-321(*see* ***Great Northern Ins. Co. v Interior Constr. Corp.***, 7 NY3d 412, 857 NE2d 60, 823 NYS2d 765 [2006]; *see also* ***Mendieta v 333 Fifth Ave. Assn***, 65 AD3d 1097, 885 NYS2d 350 [2d Dept 2009]). Thus, it has been held that "[w]here . . . a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third-parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity" (***Great Northern Ins. Co. v. Interior Constr. Corp.***, *supra* at 7 NY3d 419, 823 NYS2d 765).

If the purpose of the indemnity clause, however, is to exempt the landlord from liability to the victim for the landlord's own negligence, then the indemnity clause violates General Obligations Law § 5-321 (*see* ***Mendieta v 333 Fifth Ave. Assn***, 65 AD3d 1097, 885 NYS2d 350 [2d Dept 2009]; *see also* ***Castano v Zee-Jay Realty Co.***, 55 AD3d 770, 866 NYS2d 700 [2d Dept 2008]). Moreover, a landlord may not circumvent General Obligations Law § 5-321 merely by inserting a lease provision requiring the tenant to obtain insurance (*see* ***Breakaway Farm, Ltd. v Ward***, 15 AD3d 517, 789 NYS2d 730 [2d Dept 2005]; *see also* ***Graphic Arts Supply, Inc. v Raynor***, 91 AD2d 827, 458 NYS2d 115 [4th Dept 1982]).

Here, paragraph 28 of the rider to the lease is unenforceable pursuant to General Obligations Law § 5-321 because it attempts to relieve the landlord of its responsibility for damages caused as a result of its own negligence (*see* ***Ben Lee Distributors, Inc. v Halstead Harrison Partnership***, 72 AD3d 715, 899 NYS2d 301 [2d Dept 2010]; *see also* ***Rego v 55 Leone Lane, LLC.***, 56 AD3d 748, 871 NYS2d 169 [2d Dept 2008]; ***Wolfe v Long Is. Power Auth.***, 34 AD3d 575, 824 NYS2d 390 [2d Dept 2006]; ***Breakaway Farm, Ltd. v Ward***, 15 AD3d 517, 789 NYS2d 730). Therefore, that portion of the motion by third-party defendant Cabinetry for summary judgment dismissing the third-party claim for contractual indemnification is granted (*see* ***Hadzihasanovic v 155 East 72nd Street Corp.***, 70 AD3d 637, 896 NYS2d 83 [2d Dept 2010]).

The principle of common-law or implied indemnification permits a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party (*see* ***Arrendal v Trizechahn Corp.***, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81[2d Dept 2009]). An award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see* ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]; ***Coque v Wildflower Estates Developers, Inc.***, 31 AD3d 484, 818 NYS2d 546 [2d Dept 2006]).

The proffered deposition testimony raises factual issues as to whether the cause of plaintiff's fall was solely due to a structural defect not caused by the tenant Cabinetry for which the landlord would be responsible under the lease, or due to a structural defect caused by the tenant Cabinetry, or a result of the failure to make non-structural repairs, such as painting or placing warning signs, thereby precluding the award of summary judgment to third-party defendant Cabinetry dismissing the third-party claim for common-law indemnification as premature (*see* ***Powell v CVS Jerusalem N. Bellmore, LLC***, 71 AD3d 655, 896 NYS2d 139 [2d Dept 2010]; *see also* ***Watters v R.D. Branch Assocs., LP***, 30 AD3d 408, 816 NYS2d 193 [2d Dept 2006]). In addition, since there are issues of fact as to who was responsible for the accident, an award of summary judgment dismissing the third-party claim for contribution is denied (*see* ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]).

Moreover, third-party defendant Cabinetry failed to submit any proof demonstrating that it procured insurance that complied with the lease requirements. The subject lease required third-party defendant Cabinetry to "take out, maintain and pay for public liability insurance protecting the

Landlord as well as himself, to the extent of $1,000,000.00 single limit." Therefore, that portion of the motion by third-party defendant Cabinetry for summary judgment dismissing the fourth cause of action of the third-party complaint is denied (*see* ***Boxer v Metropolitan Transp. Auth.***, 52 AD3d 447, 859 NYS2d 709 [2d Dept 2008]; *see also* ***Chaehee Jung v Kum Gang, Inc.***, 22 AD3d 441, 806 NYS2d 62 [2d Dept 2005]).

Defendants/third-party plaintiffs cross-move for partial summary judgment on the fourth cause of action of the third-party complaint on the grounds that Cabinetry breached that portion of the lease that required it to purchase liability insurance naming defendants as additional insureds. They incorporate by reference all of the exhibits of the motion including the pleadings and the lease agreement. Third-party defendant Cabinetry opposes the cross motion as inadequate in that the affirmation in support fails to specify the lease provisions involved, fails to argue the manner of their applicability, and fails to cite any case law. In addressing the merits of the cross motion, Cabinetry contends that its president, Tutton, did purchase liability insurance through his carrier Pennsylvania Lumbermens Mutual Insurance Company with an additional insured endorsement for the landlord subject to conditions. Cabinetry notes that the additional insured endorsement (LUM125) clearly states that any coverage provided under the policy is excess to other available coverages. Cabinetry submits the declaration pages of the commercial general insurance policy issued to Cabinetry during the relevant period and additional insured endorsements of said policy.

Defendants/third-party plaintiffs argue that although the additional insured endorsements submitted by third-party defendant Cabinetry properly name the owner of the premises, 770-780 Broadway Ave., LLC, as an additional insured, the endorsements are undated such that it is unclear whether they were effective at the time of plaintiff's accident, and the endorsements indicate that additional insured coverage is excess, contrary to the requirements of the lease. In addition, defendants/third-party plaintiffs submit portions of the deposition transcripts of plaintiff and Carpentier, the complete deposition transcript of the deposition transcript of Michael Tutton, a copy of a certificate of liability insurance with Cabinetry as a named insured and 770-780 Broadway Ave., LLC, and as the certificate holder, and the declarations pages of the commercial general insurance policy issued to Cabinetry during the relevant period with additional insured endorsements.

In reply, third-party defendant Cabinetry argues that Tutton did obtain insurance and that the defendants were named as additional insureds.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with"(***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 739, 759 NYS2d 107 [2d Dept 2003]; *see* ***Kinney v G.W. Lisk Co., Inc.***, 76 NY2d 215, 557 NYS2d 283 [1990]; ***DiBuono v Abbey, LLC***, 83 AD3d 650, 652, 922 NYS2d 101 [2d Dept 2011]; ***Keelan v Sivan***, 234 AD2d 516, 517, 651 NYS2d 178 [2d Dept 1996]). A contractual provision that requires that a party be named as an additional insured in a liability policy has been interpreted to mean that the additional insured is insured for all liability arising out of the activities covered by the agreement (*see* ***Ceron v Rector***, 224 AD2d 475, 638

NYS2d 476 [2d Dept 1996]). "Additional insured" is a recognized term in insurance contracts, with an understanding crucial to our conclusion in this case. As cases have recognized, the "well-understood meaning" of the term is "an 'entity enjoying the same protection as the named insured'" (***Del Bello v General Acc. Ins. Co.***, 185 AD2d 691, 692, 585 NYS2d 918 [1992], quoting Rubin, Dictionary of Insurance Terms 7 [Barron's 1987]; *see* ***Pecker Iron Works of New York, Inc. v Traveler's Ins. Co.***, 99 NY2d 391, 393, 756 NYS2d 822 [2003]). Under the aforementioned terms of the lease, defendants signified, and third-party defendant Cabinetry agreed, that Cabinetry's carrier, not defendants', would provide defendants with primary coverage on the risk (*see* ***Pecker Iron Works of New York, Inc. v Traveler's Ins. Co.***, 99 NY2d 391, 393-394, 756 NYS2d 822; ***William Floyd School Dist. v Maxner***, 68 AD3d 982, 986, 892 NYS2d 115 [2d Dept 2009]). Although the additional insured endorsement submitted by third-party defendant Cabinetry indicates that 770-780 Broadway Ave., LLC was named as an additional insured to the commercial general liability policy that it obtained covering the subject premises, a related endorsement indicates that "[a]ny coverage provided hereunder shall be excess over other valid and collectible insurance available to the additional insured whether that other insurance is primary, excess, contingent or provided on any other basis."

Here, defendants/third-party plaintiffs made a *prima facie* showing of entitlement to judgment as a matter of law, and third-party defendant Cabinetry failed to present any evidence in opposition establishing its compliance with the terms of paragraph 31 of the rider to the lease obligating it to obtain liability insurance that provided primary coverage to defendants/third-party plaintiffs (*see* ***Boxer v Metropolitan Transp. Auth.***, 52 AD3d 447, 859 NYS2d 709 [2d Dept 2008]; ***Chaehee Jung v Kum Gang, Inc.***, 22 AD3d 441, 806 NYS2d 62 [2d Dept 2005]; ***Taylor v Gannett Co.***, 303 AD2d 397, 760 NYS2d 47 [2d Dept 2003]; *see also* ***Pecker Iron Works of New York, Inc. v Traveler's Ins. Co.***, 99 NY2d 391, 786 NE2d 863, 756 NYS2d 822 [2003]; ***William Floyd School Dist. v Maxner***, 68 AD3d 982, 892 NYS2d 115 [2d Dept 2009]). Therefore, defendants/third-party plaintiffs are entitled to summary judgment on that portion of their third-party complaint for breach of contract for failure to procure insurance as required by the lease (*see* ***Boxer v Metropolitan Transp. Auth.***, 52 AD3d 447, 859 NYS2d 709 [2d Dept 2008]; *see also* ***Inchaustegui v 666 5th Ave. Ltd. Partnership***, 52 AD3d 447, 725 NYS2d 627 [2001]; ***Taylor v Gannett Co.***, 303 AD2d 397, 760 NYS2d 47).

Dated: 12/19/2012

HON. WILLIAM B. REBOLINI, J.S.C.

______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION