

Campisi v Slomin's, Inc.
2016 NY Slip Op 32280(U)
September 23, 2016
Supreme Court, Suffolk County
Docket Number: 36859-08
Judge: Denise F. Molia
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Index No.: 36859-08

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

DARIA CAMPISI,
Plaintiff,
- against -
SLOMIN'S, INC.,
Defendant.

SLOMIN'S INC.,
Third-Party Plaintiff,
- against -
CABLEVISION SYSTEMS CORP., and NAPCO
SECURITY TECHNOLOGIES, INC.,
Third-Party Defendants.

CASE DISPOSED: YES
MOTION R/D: 7/17/15
SUBMISSION DATE: 5/6/16
MOTION SEQUENCE NO.: 012 MG
013 MG
014 MG

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated June 2, 2015 (012); Affidavit dated June 2, 2015; Exhibits A through S annexed thereto; Defendant's Memorandum of Law; Notice of Motion dated July 7, 2015 (013); Affirmation dated July 7, 2015; Exhibits A through H annexed thereto; Notice of Motion dated July 24, 2015(014); Affirmation dated July 24, 2015; Exhibits A through I annexed thereto; Affirmation in Opposition dated August 13, 2015; Exhibits A through D annexed thereto; Reply Affidavit dated August 26, 2015; Affirmation dated August 25, 2015; Reply Affirmation dated August 26, 2015; Exhibits A through C annexed thereto; Reply Affirmation dated August 27, 2015; and upon due deliberation; it is

ORDERED, that the motion by defendant Slomin's, Inc. (012), pursuant to CPLR 3212,

RST

for an Order directing the entry of summary judgment in favor of defendant and dismissing the Amended Complaint; dismissing the third-party action as moot; and transferring Slomin's claims against Plaintiff, initially asserted in Suffolk County District Court, in the matter entitled Slomin's, Inc. v. Daria Campisi, appearing under Index Number CEC 08-13397, back to the Suffolk County District Court, First District, is granted; and it is further

ORDERED, that the motion by third-party defendant Cablevision Systems Corp. (013), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of CSC Holdings, LLC, incorrectly sued as Cablevision Systems Corp., and dismissing the Complaint, the third-party complaint, and all cross-claims asserted against movant, is granted; and it is further

ORDERED, that the motion by third-party defendant Napco Security Technologies, Inc. (014), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of Napco Security Technologies, Inc., and dismissing the Complaint, third-party complaint, and all cross-claims asserted against movant, is granted.

The instant action was brought by plaintiff to recover damages for injuries alleged to have been sustained as a result of an incident that occurred at her home on the evening of May 5, 2006. Defendant was a single woman who had moved into, and was residing in a townhouse located at 211 Towne House Village, Hauppauge, New York, since June 2004. In March 2006 plaintiff received a notice sent to all residents of her housing complex advising her that homes in the area had recently been broken into. Believing that someone had attempted to illegally enter her home, the plaintiff contacted Slomin's Inc. ("Slomin's"), to install an alarm system at the end of March 2006.

On March 20, 2016, upon plaintiff's purchase of an alarm system for her condominium, the plaintiff and Slomin's entered into a Standard Security Equipment Sale Agreement ("Sales Agreement"), a Standard Security Equipment Service Agreement ("Service Agreement"), and a Central Office Five Year Monitoring Agreement ("Monitoring Agreement"). Each of the contracts contain an exculpatory clause, a limitation of liability provision, an indemnification provision, and limit plaintiff's time within which to commence litigation to one year.

The exculpatory clause, at paragraph 9 of the Sales Agreement, provides:

SLOMIN'S and Buyer agree that the security equipment, once installed, becomes the personal property of Buyer, that the equipment is not permanently attached to the realty and shall not be deemed fixtures. Buyer agrees that SLOMIN'S is not an insurer and no insurance coverage is offered herein. The security equipment is designed to reduce certain risks of loss, though SLOMIN'S does not guarantee that no loss will occur. SLOMIN'S is not assuming liability, and, therefore shall not be liable to Buyer for any loss, personal injury or property damage sustained by Buyer as a result of burglar, theft, hold-up, fire, equipment failure, smoke, or any other causes, whatsoever, regardless of whether or not such

loss or damage was caused by or contributed to by SLOMIN'S negligence performance, failure to perform any obligation or strict products liability. Buyer releases SLOMIN'S from any claims for contribution, indemnity or subrogation.

A similar provision appears at paragraph 4 of the Service Agreement and paragraph 6 of the Monitoring Agreement.

The limitation of liability provision in each of the contracts limit the amount of Slomin's liability to \$250.00. The same provision offers plaintiff the opportunity to increase the amount of Slomin's liability by entering into a supplemental contract. The plaintiff did not exercise this option to increase the liability limit.

Each of the contracts also require plaintiff to indemnify Slomin's from all claims, including a claim by plaintiff. Said provision appears at paragraph 8 of the Sales Agreement, paragraph 6 of the Service Agreement, and paragraph 17 of the Monitoring Agreement, and provides as follows:

INDEMNITY/WAIVER OF SUBROGATION RIGHTS/ ASSIGNMENTS: [Plaintiff] agrees to and shall indemnify and hold harmless SLOMIN'S, its employees, agents and subcontractors, from and against all claims, lawsuits, including those brought by third parties or [Plaintiff], including reasonable attorney's fees, and losses asserted against and alleged to be caused by SLOMIN'S performance, negligent performance or failure to perform its obligations. Parties agree that there are no third party beneficiaries of this contract. [Plaintiff] on its behalf and any insurance carrier waives any right of subrogation [Plaintiff's] insurance carrier may otherwise have against SLOMIN'S or its subcontractors arising out of this agreement or the relation of the parties hereto.

In addition, all three contracts contained the following recommendation (Sales Agreement at paragraph 1, Service Agreement at paragraph 11, and Monitoring Agreement at paragraph 11):

[Plaintiff] acknowledges that SLOMIN'S explained the difference between VOIP (Voice Over Internet Protocol) and standard telephone line service and that SLOMIN'S recommends use of standard telephone service and communication since VOIP may be less reliable and not compatible with the alarm system. [Plaintiff] acknowledges that if VOIP is used, it is at [her] sole risk.

Despite the recommendation set forth in the various agreements for use of a standard telephone service, the plaintiff chose to use her cable service. The alarm system was installed at the plaintiff's residence by a Slomin's installer on March 21, 2006. The defendant maintains that

its installer discussed said recommendation with the plaintiff. The plaintiff acknowledges that she received verbal instructions concerning use of the system from the installer, but denies that the installer discussed the recommendation for use of a standard telephone service. Campisi does not deny however, that she executed the above agreements and was provided with the User's Manual for the system. The plaintiff did not testify at her deposition that she asked any questions of the installer.

After plaintiff went to sleep on the evening of May 5, 2006, the alarm siren in her home went off, with indicators on the alarm pad flashing. Campisi shut and locked her bedroom door, leaving her without access to her cellular phone, which was in another room. When plaintiff attempted to call the police using her landline telephone, she was unable to secure a connection. Believing that the phone system had been disabled by intruders, she shouted for help from her second floor bedroom window, and then climbed out of the window, where she grabbed the window sill and hung down. Eventually she dropped down to the ground, feeling pain and making her way to a neighbor's home to summon the police and an ambulance. The plaintiff did not wait for the police to arrive prior to exiting her window and dropping to the ground.

The plaintiff did not make further payment to Slomin's after May 5, 2006. On August 19, 2008, Slomin's commenced an action against plaintiff in Suffolk County District Court for non-payment on her account and breach of contract. Plaintiff commenced the instant action against Slomin's on October 1, 2008, alleging a single cause of action sounding in negligence. Issue was joined on October 20, 2008. By Order dated July 27, 2009, plaintiff was granted leave to amend her Complaint to add a cause of action against Slomin's sounding in fraudulent inducement. Slomin's Answer was served on August 24, 2009. By Order dated March 23, 2012, the District Court action was removed and joined with the instant action. The defendant thereafter commenced a third-party action against Cablevision Systems, Corp., and NAPCO Security Technologies, Inc., alleging contribution and comparative negligence.

Slomin's has now moved for summary judgment, contending that the plaintiff has failed to introduce any evidence to support the allegations of negligence or fraudulent inducement contained in the Amended Complaint. Each of the third-party defendants has moved for summary judgment to dismiss the Third-Party Complaint.

It is well-established that when parties set down an agreement in a clear, complete, unambiguous document, the writing should be enforced according to its terms. W.W.W. Assocs. Inc. v. Giancontieri, 77 N.Y.2d 157, 162. Here, there is no dispute that the plaintiff executed and received copies of the Sales Agreement, Service Agreement, and Monitoring Agreement, and there is no allegation that said agreements were ambiguous and not written in plain language. It is also not disputed that each of the three agreements contained provisions contain an exculpatory clause, a limitation of liability provision, an indemnification provision, and a clause limiting plaintiff's time within which to commence litigation to one year. The contracts all also include a recommendation that a standard telephone line service be used in conjunction with the Slomin's system.

Parties are permitted to contract for a shortened statute of limitations within which an action must be commenced. CPLR 201. An abbreviated period of limitation will be enforced

under the law “[a]bsent proof that the contract is one of adhesion or the product of overreaching” and unless there is a showing of fraud, duress, or misrepresentation with regard to the agreement to the shortened period. In re Inc. Vill. of Saltaire v. Zagata, 280 A.D.2d 547, 547-548. The subject contracts provided that “any action by [Plaintiff] against SLOMIN’S must be commenced within one year of the accrual of the cause of action or shall be barred. One year constitutes a reasonable period of limitation under the circumstances presented. (See, *e.g.*, Renee Knitwear Corp. v. ADT Sec. Sys., 277 A.D.2d 215, 216; Corbett v. Firstline Sec., Inc., 68 F.Supp.2d 124, 129 (E.D. N.Y. 2009). The plaintiff’s causes of action accrued on May 5, 2006, the date that she sustained her injuries. This action was commenced nearly two and one half years later on October 1, 2008. The causes of action are thereby rendered untimely under the agreement between the parties.

Aside from the statute of limitations issue, the plaintiff has not identified any factual evidence demonstrating that the alarm system was defective or negligently installed. The User’s Manual, provided to plaintiff at the time of installation, described the keypad indicator that would appear in the event of a communication failure, including a situation where the system was not able to report to the central station. When such an incident occurred, the keypad would light an indicator stating “TROUBLE !” and the keypad buzzer would emit a beep. Plaintiff has admitted that upon the sounding of the alarm siren on May 5, 2006, she saw such indicator. In fact, the Amended Complaint alleges that the alarm system sounded an alarm when the cable communication line failed and was not restored within several minutes. The defendant contends that this situation was one of the reasons that Slomin’s contracts recommend the use of a standard telephone line service as opposed to the cable service utilized by Campisi.

The plaintiff bears the burden of establishing that the defendant’s alleged negligence was the proximate cause of her injury. Boltax v. Joy Day Camp, 67 N.Y.2d 617, 619. There is no basis for liability where the act complained of by plaintiff is perpetrated by an intervening force (see, Seetram v. Vanderveer Assoc., 184 A.D.2d 687, 688. While ordinarily the issue of whether an intervening act is a normal or foreseeable consequence of the situation created by the defendant’s negligence would be an issue for trial, the issue of proximate cause, or lack thereof, can be established as a matter of law where only one conclusion may be drawn from the established facts. Howard v. Poseidon Pools, Inc., 72 N.Y.2d 972, 974.

Here, the plaintiff’s conduct in jumping out of a second story window is not a normal or foreseeable consequence of the sounding of an alarm system. The plaintiff locked her bedroom door. There is no testimony that she heard any evidence of intruders in the house, or that she could not have remained safely locked in her bedroom while awaiting the arrival of the police. She did not conduct any independent investigation when the alarm sounded; nor did she open the bedroom door, which was upstairs from the entry into her condominium unit, in an attempt to look for evidence of a break-in. She did however, call for help to her neighbors from her window. The plaintiff made a deliberate decision not to remain in her locked room to await the police, but to risk her safety by exiting a second story window, without sufficient reason to believe that she was faced with an emergency situation. Such decision by the plaintiff was an unforeseeable consequence that is not within the scope of risk created, and it was this action, and not the malfunctioning alarm system, that was the proximate cause of her injuries.

Similarly, there is no factual or legal support for the cause of action sounding in fraudulent inducement. To succeed on a claim for fraudulent inducement, the plaintiff must demonstrate (1) Slomin's made a misrepresentation of fact, (2) that was known by Slomin's to be false, (3) that such misrepresentation was made with the intent to induce plaintiff to rely on it, (4) that plaintiff's reliance upon the misrepresentation must be justifiable, and (5) Slomin's is liable for all harm caused to plaintiff. Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 421. The evidence presented to date does not support the allegation that Slomin's made a misrepresentation of fact regarding the effectiveness of its alarm system and how it would work in conjunction with the plaintiff's Optimum VoIP. In fact, the content of the three contracts and the information they contain belie plaintiff's claim. Allegations contradicted by documentary evidence are, as a matter of law, not entitled to consideration as a cognizable cause of action (see, DiDomenico v. Long Beach Plaza Corp., 60 A.D.3d 615, 617-618). Accordingly, the cause of action sounding in fraudulent misrepresentation is dismissed.

Based on the dismissal of the main action against the defendant, the third-party action is also dismissed as moot. The action originally commenced in the Suffolk County District Court, First District, and joined with the instant action, is hereby severed and continued and removed back to the Suffolk County District Court, First District.

The foregoing constitutes the Order of this Court.

Dated: September 23, 2016



Hon. Denise F. Molia, A.J.S.C.