Drucker v Roosevelt Is. Operating Corp.
2017 NY Slip Op 30988(U)
May 11, 2017
Supreme Court, New York County
Docket Number: 162875/2014
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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DEBORAH DRUCKER,

Plaintiff,

DECISION/ORDER
Index No. 162875/2014

-against-

ROOSEVELT ISLAND OPERATING CORPORATION, HUDSON RELATED ASSOCIATES, LLC, SOUTHTOWN ASSOCIATES 2 LLC, CORNELL UNIVERSITY,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff Deborah J. Drucker commenced the instant action to recover damages for injuries she allegedly sustained when she slipped and fell on the sidewalk adjacent to premises owned by defendant Roosevelt Island Operating Corporation ("Roosevelt"). Roosevelt now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its cross-claims for contractual indemnification, common law indemnification and contribution against defendant Cornell University ("Cornell"). For the reasons set forth below, Roosevelt's motion is denied.

The relevant facts are as follows. Plaintiff commenced this action alleging that on February 20, 2014, she slipped and fell on black ice on the sidewalk adjacent to the rear of the building located at 465 Main Street, Roosevelt Island, New York (the "premises"). Plaintiff testified that her accident occurred as she walking to the "F" subway train line located on West Road where she observed snow accumulation that had been shoveled for pedestrians and foot traffic. She further testified that when she reached the sidewalk in the rear of 465 Main Street, she observed that a 1-foot wide area had been shoveled with snow on either side (hereinafter referred to as the "subject sidewalk").

The premises is owned by defendant Roosevelt. Roosevelt leased the building and premises to non-party Southtown Associates 2, LLC ("Southtown") pursuant to an Agreement of Lease dated December 21,

2001 (the "Lease"). The Lease defines the premises as encompassing the building, improvements and easements and includes a distance of 273.42 feet from Main Street to West Street. Pursuant to Section 11.2 of the Lease,

> Tenant, at Tenant's expense, shall be responsible for the maintenance, repair and replacement of paths and walkways within the Premises and for snow removal within the Premises (and, to the extent required by law, the repair, maintenance, replacement and/or snow removal, in respect of any sidewalks adjacent to the Premises, *but not including the East River promenade to the west of the Premises which is maintained by [Roosevelt] as a public facility.*)

(Emphasis added). Pursuant to Section 12.1 of the Lease,

> Tenant, at its sole cost and expense, throughout the Term, shall keep and maintain the Premises in good and safe order and condition, including, without limiting the generality of the foregoing, the Building, roofs, foundations and appurtenances thereto, all sidewalks, vaults, sidewalk hoists, railings, lawns, trees, shrubs, gutters and curbs contained in the Premises, or in front of or adjacent to the Premises, if any (*but not including the East River promenade to the west of the Premises which is maintained by [Roosevelt] as a public facility.*)

(Emphasis added). Further, pursuant to Section 12.2 of the Lease,

> Tenant, at its sole cost and expense, also shall repair, and keep clean and free from dirt, snow, ice, rubbish, obstructions and encumbrances, the Premises, including the sidewalks, vaults, sidewalk hoists, lawns, trees, shrubs, gutters, railings and curbs within the Premises, (or in front of or adjacent to the Premises, if any, to the extent required by law, *but not including the East River promenade to the west of the Premises which is maintained by [Roosevelt] as a public facility.*)

(Emphasis added). Pursuant to Article 19 of the Lease,

> Tenant shall indemnify and save harmless Landlord, [Roosevelt]…against and from all liabilities, suits, obligations, fines, damages, penalties, claims, costs, charges and expenses, including without limitation, reasonable architects' and attorneys' fees and disbursements, which may be imposed upon or asserted against or reasonably incurred by Landlord, [Roosevelt]…by reason of any of the following occurring during the Term unless caused by the negligence or wrongful acts of Landlord, [Roosevelt]…:
>
> > (b) Operation. Any use, non-use, possession, occupation, alteration, repair, condition, operation, maintenance or management of the Premises or any part thereof attributable to the negligent or wrongful acts of Tenant or its agents or employees, including without limitation, the AVAC, any street, alley, sidewalk, curb, vault or passageway comprising a part of the Premises or adjacent thereto;

(c) Acts of Tenants. Any act or failure to act on the part of Tenant or any Subtenant or any of its or their respective agents, contractors, servants, employees, licensees or invitees on or about the Premises;
(d) Injury. Any accident, injury (including death) or damage to any person or property occurring in, or about the Premises or any part thereof or in, on or about any street, alley, sidewalk, curb, vault or passageway comprising a part thereof or adjacent thereto, which accident, injury or damage is attributable to Tenant's acts or failure to act or its agents or employees.

In or around November 2004, Southtown assigned the Lease to Cornell pursuant to an Assignment and Assumption of Lease (the "Assignment and Assumption"). Pursuant to the Assignment and Assumption, Cornell was assigned "all of [Southtown's] right, title and interest in, to and under the Lease and all rights, claims and causes of action arising out of or related to the Lease arising on or after the date hereof" and Cornell "assume[d] and agree[d] to be bound by the obligations of [Southtown] pursuant to the Lease."

Plaintiff commenced the instant action against Roosevelt and Cornell asserting claims for negligence. Roosevelt then interposed an answer in which it, *inter alia*, asserted cross-claims against Cornell for common law indemnification, contractual indemnification and contribution. Roosevelt now moves for summary judgment on its cross-claims.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to that portion of Roosevelt's motion for summary judgment against Cornell on its cross-claim for contractual indemnification. A party is entitled to contractual indemnification when the

intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2nd Dept 2008).

In the instant action, Roosevelt has failed to establish its *prima facie* right to summary judgment against Cornell on its cross-claim for contractual indemnification on the ground that the Lease is ambiguous as to whether Roosevelt or Cornell was responsible for maintaining the subject sidewalk. Pursuant to the Lease, Cornell is responsible for maintaining the sidewalks on and adjacent to the premises "but not including the East River promenade to the west of the Premises which is maintained by [Roosevelt] as a public facility." However, it is undisputed by the parties that the Lease does not define "East River promenade." Further, the map of the premises provided by Roosevelt and the premises definition in the Lease does not definitively establish that the subject sidewalk is or is not part of the "East River promenade."

Moreover, the parties' reliance on *parol* evidence does not clarify the ambiguous term of the Lease but rather presents a triable issue of fact as to which entity was responsible for maintaining the subject sidewalk. Roosevelt provides the affidavit of Fernando Vargas, Roosevelt's grounds supervisor, who affirms that the subject sidewalk was part of the leased premises and that Cornell was responsible for its maintenance. Further, Cyril Opperman, Roosevelt's director of operations, testified that Roosevelt is not responsible for maintaining the subject sidewalk. However, Cornell provides the affidavit of Carlos Ramirez, Cornell's property manager for the premises, who affirms that the "site of plaintiff's accident, namely the buildings side sidewalk…, is outside the limits of the property leased by Cornell…[which] terminates at or before the low brick wall located behind the building known as 465 Main Street." Mr. Ramirez further affirms that "the sidewalk adjacent to the East River, the roadway known as West Road, and the sidewalk adjacent to West Road on the buildings side," allegedly where plaintiff's accident occurred, "are all the maintenance responsibility of [Roosevelt], as the area is to be maintained as a public facility." Additionally, Kevin Rakowsky, Cornell's director of housing, testified that it is not Cornell's responsibility to maintain the subject sidewalk because it is part of the "East River promenade."

Defendant Roosevelt's assertion that even if the lease term "East River promenade" is ambiguous and undefined in the Lease, Roosevelt is still entitled to summary judgment against Cornell on its cross-claim for contractual indemnification on the ground that Cornell undertook snow removal in the area of plaintiff's accident is without merit. Specifically, Roosevelt points to Mr. Rakowsky's testimony that in the years prior to February 2014, Cornell's employees occasionally did conduct snow removal on the subject sidewalk as a courtesy to Roosevelt and the testimony of Mr. Vargas that Roosevelt never undertook the maintenance, including the snow removal, of the subject sidewalk. However, the fact that Cornell may have occasionally conducted snow removal on the subject sidewalk is insufficient as a basis for granting Roosevelt summary judgment as Roosevelt has failed to establish that it does not have the obligation to conduct snow removal on the subject sidewalk pursuant to the Lease.

The court next turns to that portion of Roosevelt's motion for summary judgment on its cross-claim against Cornell for common law indemnification. A claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who "is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer." *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999).

Here, Roosevelt has failed to establish its *prima facie* right to summary judgment against Cornell on its cross-claim for common law indemnification as Roosevelt has not demonstrated that it was not guilty of any negligence or responsible for any wrongdoing with regard to plaintiff's accident. As explained above, Roosevelt has not established that it was not obligated under the Lease to maintain the subject sidewalk. Thus, it has not demonstrated that it will not be held responsible for plaintiff's accident.

Finally, the court turns to that portion of Roosevelt's motion for summary judgment against Cornell on its cross-claim for contribution. Under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401.

Here, Roosevelt has failed to establish its entitlement to summary judgment against Cornell on its cross-claim for contribution as it has not demonstrated, as a matter of law, that both Roosevelt and Cornell are subject to liability for damages for the injuries plaintiff sustained due to her slip and fall on the subject sidewalk.

Accordingly, Roosevelt's motion is denied. This constitutes the decision and order of the court.

DATE : 5/11/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.