Ahmed v 760 8th Ave. Rest., Inc.
2018 NY Slip Op 30176(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 160367/2013
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
--X

ZIYAAD AHMED,

Plaintiff,

-against-

760 8TH AVE. REST., INC. and IG GREENPOINT CORP,

Defendants.
--X

DECISION/ORDER

Index No.: 160367/2013

Mot. Seq. 001

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendant, IG Greenpoint Corp. ("IG Greenpoint") now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint ("Complaint") of plaintiff, Ziyaad Ahmed, as against it, and for summary judgment on its cross-claim for contractual indemnification against defendant 760 8th Ave. Rest., Inc. ("760 8th").

Factual Background

According to the Complaint, Plaintiff was injured when he slipped on a wet surface located on the floor of the restroom at the nightclub known as The Copacabana ("The Copa") (the "Premises"). 760 8th operated, managed and maintained The Copa. Plaintiff filed the instant action alleging his accident was caused by, *inter alia*, IG Greenpoint's negligence in its failure to maintain the Premises in a reasonable and safe condition. Thereafter, IG Greenpoint filed the cross-complaint for, among other things, contractual indemnification.

IG Greenpoint's Motion

In support of its motion for summary dismissal of the Complaint, IG Greenpoint argues that it was an out of possession owner. IG Greenpoint contends that it was the responsibility of

760 8th, through the terms of the lease and practice and protocol to maintain, inspect, monitor, and staff the bathrooms in The Copa during its business hours. In further support of its argument, IG Greenpoint submits the deposition testimony of Plaintiff, wherein he states that he observed a bathroom attendant whom he believed to be employed by The Copa stationed next to the sink (Shein Aff., Ex. I, Plaintiff Trans, 48:16-23) and that he fell right in front of the bathroom attendant (*id.* 49:12-18).

Moreover, IG Greenpoint argues that the deposition testimony of Glee Ballard ("Ballard"), the general manager of The Copa at the time of Plaintiff's accident, demonstrates that it was the responsibility of The Copa to inspect and maintain the bathrooms. Specifically, IG Greenpoint contends that bathrooms attendants employed at the Premises had the responsibility to clean the bathroom floor. IG Greenpoint also submits the deposition testimony and affidavit of Steven Maietta ("Maietta"), the commercial property manager for IG Greenpoint, wherein he states that IG Greenpoint has never had any responsibilities with respect to cleaning, maintaining, or inspecting the restrooms where Plaintiff's accident occurred and that it did not maintain any employees at the Premises. Moreover, IG Greenpoint argues that it did not have notice of the alleged defective condition. Further, IG Greenpoint argues that there is no evidence of a structural leak in the bathroom or any complaints of the same. IG Greenpoint also argues that Paragraph 30 of the subject lease[1] ("Lease"), states that the tenant of the Premises was obligated to maintain the Premises (*id.*, Ex. F, Agreement of Lease).

In support of the branch of its motion for summary judgment on its cross-claim for contractual indemnification, IG Greenpoint argues that 760 8th is contractually obligated to

---

[1] IG Greenpoint indicates that 760 8th is the successor-in-interest to Late Night Management, Inc. as the tenant of the Premises.

defend and to hold IG Greenpoint harmless from Plaintiff's claim, but that IG Greenpoint's tender of defense and indemnity to 760 8th went unanswered.

Plaintiff's Opposition

In opposition, Plaintiff initially argues that Paragraph 30 of the Lease requires that 760 8th "keep the demised premises clean and in order to the satisfaction to owner," indicating that IG Greenpoint did not entirely divest itself of control or authority as to keeping the subject premises clean and in order. Plaintiff further argues that Paragraph 13 of the Lease granted IG Greenpoint the right to enter the subject premises to perform any work that the tenant was required, but failed, to perform. Plaintiff also argues that the deposition testimony of Maietta demonstrates that IG Greenpoint's course of conduct established control over the subject premises. Finally, Plaintiff argues that IG Greenpoint failed to establish that it did not have constructive notice of the alleged defective condition, since it did not provide evidence demonstrating the last time the interior of the Premises was inspected.

IG Greenpoint's Reply

In reply, IG Greenpoint argues that Plaintiff's opposition is untimely, because on August 25, 2017, it consented to Plaintiff's counsel's request to adjourn the present motion to October 13, but Plaintiff's opposition was filed October 11, and is therefore in violation of CPLR 2214(b). Moreover, IG Greenpoint contends that the case law cited to by Plaintiff is inapposite.

Discussion

Plaintiff's Untimely Opposition

Initially, Plaintiff's untimely opposition papers are considered notwithstanding IG Greenpoint's objection. IG Greenpoint failed to show that it suffered any prejudice as a result of

the late papers (*see Walker v. Metro-N. Commuter R.R.*, 11 A.D.3d 339, 340 [1st Dept. 2004] ["The failure to comply with . . . [CPLR] 2214 may be excused in the absence of prejudice"]).

Summary Judgment

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.*).

Out-of-Possession Landlord

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision' " (*Bing v. 296 Third Ave. Grp., L.P.*, 94 A.D.3d 413, 414 [1st Dept. 2012], quoting *Ross v. Betty G. Reader Revocable Tr.*, 86 A.D.3d 419, 420 [1st Dept. 2011]).

IG Greenpoint has established its *prima facie* entitlement to summary judgment by demonstrating that it was an out-of-possession landlord that relinquished control over the demised premises and was not obligated under its lease to repair or maintain the premises. IG Greenpoint did not have a contractual obligation to clean the premises under the Lease and, in fact, the Lease expressly states that 760 8th was required to keep the subject premises clean and

in order (Lease, ¶30). Further, the deposition testimony of Ballard concedes that 760 8th maintained the area where Plaintiff's accident took place. Ballard testified that it was the bathroom attendants' responsibility to ensure that the floor of the bathroom was clean (Shein Aff., Ex. H, Ballard Trans., 25:25-26:6) and to clean any water that was present on the bathroom floor (*id.*, 40:18-41:3). Ballard also testified that there was "general maintenance that went [in] the bathrooms throughout the night" to clean, including "keeping the floors tidy and making sure that they weren't wet" (*id.*, 27:7-20). Additionally, Maietta indicated that the property management company hired by IG Greenpoint did not provide any services, including plumbing, to 760 8th and that IG Greenpoint never had any responsibilities with respect to cleaning, maintaining or inspecting the restrooms located in the subject premises and that those responsibilities were the sole responsibility of the employees of The Copa (Shein Aff., Ex. I, Maietta Trans., 18:22-25; 19:11-16; Maietta Aff., ¶¶12-13). Maitta further affirms that the terms of the Lease do not require IG Greenpoint to clean, inspect or maintain the restrooms in the Copa (*id.*, ¶15).

Moreover, while IG Greenpoint had a limited right to re-enter the premises in any emergency at any time and at other reasonable times to make repairs not made by the tenant (Lease, ¶13), Plaintiff has not pleaded or identified any specific violation with respect to the wet floor that allegedly caused him to slip and fall. In any event, there is no evidence that the subject wet floor was a significant structural or design defect contrary to a specific statutory safety provision such that liability may be imposed upon IG Greenpoint as an out-of-possession landowner (*see Kittay v. Moskowitz*, 95 A.D.3d 451, 451 [1st Dept. 2012] [holding that notwithstanding lease provision permitting owner's reentry at reasonable times to perform repairs not made by the tenant, owner was not liable for plaintiff's decedent's injuries because

"the record does not establish that the basis of that liability is a significant structural or design defect that is contrary to a specific statutory safety provision"] [internal quotation marks omitted]; *see also Figueroa v. Skillman Realty Co.*, 154 A.D.3d 470 [1st Dept. 2017] [holding that the wet floor that plaintiff allegedly slipped on was not a significant structural or design defect contrary to a specific statutory safety provision]; *Garcia-Rosales v. 370 Seventh Ave. Assocs., LLC*, 88 A.D.3d 464, 465 [1st Dept. 2011]).

In opposition, Plaintiff fails to demonstrate that IG Greenpoint retained control over the Premises. Plaintiff's reliance on *Yehia v. Marphil Realty Corp.* is misplaced, since plaintiff in *Yahia* alleged the violation of various fire regulations and occupancy laws (130 A.D.3d 615, 617 [2d Dept. 2015]; *see Kittay*, 95 A.D.3d 451; *see also Denermark v. 2857 W. 8th St. Assoc.*, 111 A.D.3d 660, 661 [2d Dept. 2013]; *Roveto v. VHT Enters., Inc.*, 17 A.D.3d 341, 342 [2d Dept. 2005]). Moreover, the Lease here indicates that IG Greenpoint may enter the subject premises to perform work 760 8th was required to, but failed to perform, whereas in *Yehia*, the lease provision at issue gave the landowner the right to enter the premises to "make repairs and improvements to all parts of the building" (*Yehia*, 130 A.D.3d 617).

Plaintiff's further contention that *Gronski v. Cty. of Monroe* supports its argument that IG Greenpoint did not relinquish complete control over the subject premises also fails (18 N.Y.3d 374, 381 [2011]). In *Gronski*, the Court of Appeals found that defendant-landowner did not relinquish control over the subject premises as a matter of law, since it had, *inter alia*, the "ultimate approval authority over [defendant-tenant's] operating procedures" and "maintained both a visible and vocal presence at the [subject premises]" (*id.*). As addressed above, the course of conduct between IG Greenpoint and 760 8th does not rise to the level of control in *Gronski*.

Accordingly, the branch of IG Greenpoint's motion seeking summary dismissal of the Complaint is granted.

Contractual Indemnification

A party is entitled to full contractual indemnification provided that the " 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777 [1987], quoting *Margolin v. New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v. Port Auth. of N. Y. & N.J*, 3 N.Y.3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 403 [1st Dept. 2005]). The one seeking indemnity pursuant to a contract need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that " '[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' [citation omitted]" (*De La Rosa v. Philip Morris Mgt. Corp.*, 303 A.D.2d 190, 193 [1st Dept. 2003]; *Keena v. Gucci Shops*, 300 AD.2d 82, 82 [1st Dept. 2002]).

IG Greenpoint is entitled to defense and investigation costs in defending this matter. Paragraph 8 of the Lease states, in relevant part, that the "Tenant shall indemnify and save harmless Owner against and from all liabilities, . . . including reasonable attorneys fees." As addressed in the previous section, IG Greenpoint is not liable for Plaintiff's alleged accident. Further, 760 8th does not oppose IG Greenpoint's instant motion motion. Thus, the branch of IG Greenpoint's motion for summary judgment as to its claim for contractual indemnification is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of the motion of defendant, IG Greenpoint Corp. for summary judgment dismissing the complaint as against it is granted. It is further

ORDERED that the Clerk is to enter judgment accordingly; it is further

ORDERED that the action is severed and continues against remaining defendant; it is further

ORDERED that the branch of the motion of defendant, IG Greenpoint Corp for summary judgment on its cross-claim against 760 8th Ave. Rest., Inc. is granted. It is further

ORDERED that the parties shall appear for an in-court status conference on February 13, 2018 at 2:15 p.m. It is further

ORDERED that defendant, IG Greenpoint Corp. shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

Dated: January 31, 2018

Hon. Carol Robinson Edmead, J.S.C

HON. CAROL R. EDMEAD
J.S.C.