Hardie v 128 E. 86th St. Assoc., L.L.C.
2018 NY Slip Op 31480(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 161553/2015
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JAMES HARDIE,

Plaintiff,

Index No.: 161553/2015
Motion Seq. #001

-against-

Decision/Order

128 EAST 86TH STREET ASSOCIATES, L.L.C.
and GAMESTOP, INC.

Defendants.

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128 EAST 86TH STREET ASSOCIATES, L.L.C.,

Third-Party Plaintiff,

Third-Party Index No.:
595658/2017

-against-

GAMESTOP, INC.

Third-Party Defendant.

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PAUL A. GOETZ, J.S.C.;

In this trip and fall action, Gamestop, Inc. ["Gamestop"] moves to dismiss, pursuant to CPLR 3211(a)(7), all claims against it. Plaintiff James Hardie alleges that on March 16, 2015, he tripped and fell on metal doors leading to a basement vault in front of 128 East 86th Street in New York (*Amended Verified Complaint dated June 10, 2016*, ¶ *23*). Plaintiff avers that the doors were defective and contained a rusty hole (*id.*).

Gamestop argues that it cannot be held liable to plaintiff for his alleged injuries because co-defendant, 128 East 86th Street L.L.C., the landlord of the property, rather than Gamestop, the lessee, is responsible for the maintenance of the vault doors where plaintiff fell. Administrative Code ["Adm Code"] §19-152 provides that the owner of any real property is responsible for the repair of vault doors which are in "a dangerous or unsafe condition." Adm

Code §19-152 imposes a non-delegable duty on the owner of a property to maintain the sidewalk and vault doors in a safe condition (*Collado v. Cruz*, 81 A.D.3d 542, [1st Dep't 2011]). Thus, a commercial tenant is only liable to a third-party who injures himself on the vault doors of a premises if the tenant created the condition which caused the plaintiff's injuries (*id.*; *Langston v. Gonzalez*, 39 Misc 3d 371, 378 [Sup Ct 2013] ["the commercial tenant … could only be held liable to plaintiff if the store actually created the condition that caused the plaintiff's injuries… for example, [if it] left the cellar doors open, and the plaintiff fell into the cellar"]). Here, there is no indication that Gamestop created the rusty hole that allegedly caused plaintiff to fall. The vault was not part of the area leased to Gamestop (*Affirmation of Daniel Graham dated November 6, 2017* [*"Graham Aff'm"*], *Ex. H.*, ¶ 14 ["no vaults, vault space or area… is leased hereunder"]). Additionally, Gamestop did not use the cellar doors where plaintiff allegedly fell (*Affidavit of David Lynch, Director of Risk Management at Gamestop, dated November 3, 2017,* ¶ 3). Moreover, the very nature of the defect, a rusty hole, rather than, for example, an open vault door, shows that the defect was not created by Gamestop. Therefore, plaintiff's claims against Gamestop must be dismissed.

Gamestop likewise argues that 128 East 86th Street L.L.C.'s contribution claim should be dismissed because it did not breach any duty which contributed to plaintiff's injuries. "[T]wo 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" (C.P.L.R. 1401). A claim for contribution can only exist if the third-party defendant breached a duty "which contributed to or aggravated plaintiff's damages" (*Rehberger v. Garguilo & Orzechowski, LLP*, 118 A.D.3d 765, 766 [2d Dep't 2014] *quoting Rosner v. Paley*, 65 N.Y.2d 736, 738 [1985]; *see also Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*, 71 N.Y.2d 599, 603 [1988] [holding that contribution is appropriate only if the third-party breached a duty which "had a part in

causing or augmenting the injury for which contribution is sought"]). Thus, 128 East 86th Street L.L.C.'s contribution claim can only be upheld if Gamestop breached a duty which contributed to or aggravated plaintiff's damages (*id.*).

As discussed above, there is no indication that Gamestop breached a duty which contributed to or aggravated plaintiff's injuries. The vault doors on which plaintiff tripped were not part of the area leased to Gamestop (*Graham Aff'm, Ex. H.,* ¶ 14). Additionally, Gamestop did not use the cellar doors where plaintiff allegedly fell and there is nothing to indicate that Gamestop created the rusty hole (*Affidavit of David Lynch, Director of Risk Management at Gamestop, dated November 3, 2017,* ¶ 3). Since Gamestop was not responsible for remediating this defect, it cannot be held liable for contribution since its actions did not contribute to plaintiff's injuries. Although paragraph 4.1 of the lease requires Gamestop to make "non-structural" repairs to the sidewalk adjacent to the demised premises, the defect at issue here is a rusty hole in the vault doors, which is structural in nature (*Langston v. Gonzalez*, 39 Misc 3d 371, 383 [Sup Ct 2013]).

Gamestop also argues that the indemnification provision of the lease is not applicable here because the alleged injuries did not result due to its conduct. The lease provides that "[t]enant shall indemnify and save harmless [o]wner against and from all liabilities, obligations, damages… suffered or incurred **as a result of any breach by [t]enant… or the carelessness, negligence, or improper conduct of the [t]enant**" (*Graham Aff'm, Ex. H.,* ¶8) (*emphasis added*). In addition, the supplemental rider attached to the lease provides that "[t]enant will indemnify and save [l]andlord harmless from and against any and all liabilities… which may be imposed upon or incurred by or asserted against [l]andlord **by reason of… any work or thing done by [t]enant…[or] any use, non-use, by [t]enant** of the Demised Premises, yards or passageways to and from the Demised Premises to the existing building" (*Graham Aff'm, Ex. H.,*

¶47) (*emphasis added*). Here, as shown above, there is no indication that plaintiff was injured as a result of "any breach… carelessness, negligence, or improper conduct" or because of "any work or thing done by tenant or any use or non-use" on the part of Gamestop. The vault area was not part of the demised premises leased to Gamestop, Gamestop did not use the vault area, and the nature of the defect itself indicates that it was not created by Gamestop. Therefore, the indemnification provision is inapplicable here.

Gamestop further argues that pursuant to the lease, its obligation to procure insurance coverage for 128 East 86th Street L.L.C. for any personal injury incidents only applies to injuries which occur at the "demised premises" (*Graham Aff'm, Ex. H.*, ¶ 8). In response, 128 East 86th Street L.L.C.'s argues that since the lease provides that tenant shall take good care of the sidewalks adjacent to the demised premises and make all non-structural repairs thereto, the vault doors are, in effect, part of the "demised premises." The lease provides that "[t]enant agrees… to maintain general public liability insurance in standard form in favor of [o]wner and [t]enant against claims for bodily injury… occurring in or upon the demised premises" (*id.*). Here, the alleged injuries that plaintiff suffered occurred on the vault doors, which, pursuant to paragraph 14 of the lease, were not part of the demised premises (*Graham Aff'm, Ex. H.*, ¶ 14, ["no vaults, vault space or area… is leased hereunder"]). Gamestop's obligation to take good care of the sidewalk adjacent to the demised premises does not mean that the sidewalk or the vault doors are part of the demised premises. Thus, Gamestop was not obligated to provide insurance coverage on behalf of 128 East 86th Street L.L.C. for injuries occurring on the vault doors since they were not part of the demised premises pursuant to the parties' lease.

Accordingly, it is

ORDERED that the motion of defendant Gamestop to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED, that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) who are directed to mark the court's records to reflect the change in the caption herein;

and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (*accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: July 3, 2018

Hon. Paul A. Goetz