Stockman v Barcelona Bar
2019 NY Slip Op 30334(U)
February 13, 2019
Supreme Court, New York County
Docket Number: 154890/2016
Judge: Carol R. Edmead

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

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JENNIFER STOCKMAN,

Plaintiff,

-against-

BARCELONA BAR and ATLANTIC WESTERLY COMPANY, LLC,

Defendants.

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DECISION AND ORDER
Index No.: 154890/2016
Motion Sequence 002

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

MEMORANDUM DECISION

In this negligence action, defendant Atlantic Westerly Company, LLC ("Atlantic Westerly"), moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint as against it as well as summary judgment dismissing the cross-claim against it by co-defendant Barcelona Bar. For the reasons set forth below, the Court grants Atlantic Westerly's motion in its entirety.

BACKGROUND FACTS

On the evening of July 19, 2015, Jennifer Stockman ("Plaintiff") allegedly tripped and fell while exiting a bar in midtown Manhattan owned and operated by defendant Barcelona Bar. The bar is located in a mixed-use building owned by Atlantic Westerly, who leased the store space for the bar to Barcelona Bar (NYSCEF doc no. 2, ¶ 9-10). Plaintiff had gone to meet friends at the bar for drinks and was walking out of the bar when the heel of her shoe became stuck in a crack in the entryway outside the front door (*id.* at ¶ 4). Plaintiff argues that the crack

in the entryway was a dangerous condition and defect that the defendants negligently failed to properly inspect and maintain, and defendants are therefore liable for her injuries. In its answer to Plaintiff's complaint, Barcelona Bar filed a cross-claim against Atlantic Westerly, alleging that any injuries suffered by Plaintiff were due to the negligence of Atlantic Westerly, and that Barcelona Bar was entitled to indemnification or contribution for any judgment rendered in favor of Plaintiff (*id.* at ¶ 18-19).

On June 22, 2018, Atlantic Westerly filed a motion for summary judgment pursuant to CPLR 3212, arguing that it is an out of possession landowner that had no duty of care to Plaintiff, and also had no notice of the defect on the premises (NYSCEF doc No. 29, ¶ 13). Atlantic Westerly also moved for summary judgment dismissing Barcelona Bar's cross-claim, and contends it is entitled to indemnification against Barcelona Bar, as the latter is responsible for repairs and maintenance under the lease and has a contractual duty to indemnify it (*Id.*). In opposition, Barcelona Bar argues that the lease in fact required Atlantic Westerly to maintain the premises, and that there are issues of fact regarding to whom indemnification is owed.

DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st

Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a *prima facie* showing, the court must deny the motion, *"'regardless of the sufficiency of the opposing papers'"* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is "required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, the defendant who moves for summary judgment must demonstrate "that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]). For out-of-possession property owners, it is well settled law that:

> "[a]n out-of-possession landlord is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision"

(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017]).

The out-of-possession landlord must have had either actual or constructive notice of the hazardous condition and have had a reasonable opportunity to repair the condition for liability to be imposed (*Federal Ins. Co. v Evans Constr. of N.Y. Corp.*, 257 AD2d 508, 509 [1st Dept 1999]). Generally, when the landlord has only a limited right to enter and inspect the premises from time to time, liability is extended only in situations where "the basis of the liability is a significant structural or design defect that is contrary to a specific safety provision" (*Kittay v Moskowitz* (95 AD3d 451 [1st Dept 2012]). When the accident does not stem from a structural or design defect, out-of-possession landlords can only be held liable by a contractual obligation beyond a mere right of reentry, or a record of their past course of conduct indicating that they acted to maintain the premises *(see Ritto v Goldberg,* 27 NY2d 887, 889 [1970]; *Dimas v 160 Water St. Assoc.,* 191 AD2d 290 [1993]; *Del Giacco v Noteworthy Co.,* 175 AD2d 516, 518 [1991])

In its motion for summary judgment, Atlantic Westerly has definitively established that it is an out-of-possession landlord. The lease between Atlantic Westerly and an earlier tenant that was later assigned to Barcelona Bar requires Barcelona Bar to "take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense make all non-structural repairs thereto as and when needed to preserve them in good working order and condition" (NYSCEF doc No. 45 at ¶ 4). The lease also notes that Atlantic Westerly "shall maintain and repair the public portions of the building, both exterior and interior" (*id.*). Photographic evidence plainly demonstrates that the area where Plaintiff fell is an entryway used for ingress and egress into the bar (NYSCEF doc No. 36) and is therefore an appurtenance to the premises (*see Pacific Coast Skills, LLC v 247 Realty, LLC,* 76 Ad3d 167,

173 [1st Dept 2010]). Barcelona Bar argues in its opposition that the entryway is a public part of the building and therefore under the control of Atlantic Westerly, but this is unpersuasive as the entryway is clearly not part of the public sidewalk but is a recessed landing that is appurtenant to the premises. It is no more of a "public space" than the interior of the bar itself. Barcelona Bar also independently repaired the concrete landing in the entryway where Plaintiff fell two years after the accident, without seeking permission or funding from Atlantic Westerly (NYSCEF doc No. 37 at 59-62). While evidence of subsequent repairs and remedial measures is generally not discoverable or admissible in a negligence case, an exception applies when, as here, there is a factual issue of maintenance or control (*see Cacciolo v Port Auth. of N.Y. and N.J., 186 AD2d 528, 588; Klatz v Armor Elevator Co., 93 AD2d* 633). Therefore, Barcelona Bar's subsequent repair is admissible here to show it recognized its responsibility to maintain the entryway under the lease.

Although Atlantic Westerly did retain a limited right of reentry under the lease, as discussed, liability would still only extend if Plaintiff's injuries stemmed from a design or structural defect that violated a specific statute. Here, Plaintiff's complaint alleges that both defendants are liable only under common-law negligence; no statutory violation is implicated. Given that Plaintiff only alleges negligence, Atlantic Westerly's right of reentry under the lease is inconsequential. As this is a common law negligence claim, Atlantic Westerly could only be liable here if it owed some sort of duty to Plaintiff. It is true that property owners owe a duty to maintain and repair public sidewalks adjacent to their property (New York City Administrative Code ¶ 7-210). However, as established, Plaintiff's accident occurred not on the public sidewalk but in an entryway that was recessed from the sidewalk. Atlantic Westerly's expert engineer also

testified that the concrete landing is within the building line and while it provides exit from the bar to the sidewalk, it is not part of the sidewalk itself (NYSCEF doc No. 51, ¶ 7-8). Barcelona Bar hired an expert engineer of its own, who found that the entryway was a "ramp" that was a load-bearing, structural part of the building that was exterior and accessible to the public (NYSCEF doc No. 59, ¶ 9-10). This finding, however, does not challenge Atlantic Westerly's determination that the entryway/"ramp" is still a part of the "premises" under the lease and not part of the building exterior or the sidewalk, as accessibility to the public has no bearing on the matter. Barcelona Bar cites no evidence suggesting that entryways are considered an exterior part of buildings and therefore not part of the "premises" occupied by tenants in commercial leases. Furthermore, as discussed above, Barcelona Bar has effectively conceded the fact that it took control over maintenance of the entryway by independently deciding to have it repaired. Given that Atlantic Westerly has established it was an out-of-possession landlord with no duty to maintain the premises and had no duty to Plaintiff, summary judgment must be granted.

Regarding Atlantic Westerly's request for indemnification, the Court notes that "[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 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). The one seeking indemnity pursuant to a contract "need only establish that it was free from any negligence" and was held liable solely due to vicarious liability, and "'[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 AD2d 190, 193 [1st Dept 2003]; *Keena v. Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]). The lease between Atlantic Westerly and Barcelona Bar clearly states that:

> "Tenant will indemnify Landlord and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon or at the leased premises or any part thereof, or the sidewalks and streets surrounding same, or occasioned wholly or in part by any act or omission of Tenant, agents, contractors, employees or servants. In case Landlord shall, without fault on its part, be made a party to any litigation commenced by or against Tenant, then Tenant shall protect and hold Landlord harmless and shall pay all costs, expenses and reasonable attorney's fees incurred or paid by Landlord in connection with such litigation."

(NYSCEF Doc No. 45, ¶ 43).

Here, Atlantic Westerly has established it is free from negligence, and is not liable for Plaintiff's accident as an out-of-possession landlord. Furthermore, there is no reciprocal provision of the lease indicating a circumstance wherein the landlord will indemnify the tenant. Therefore, Barcelona Bar's cross-claim for indemnification from Atlantic Westerly is dismissed as moot, and Atlantic Westerly is further entitled to an order of indemnification from Barcelona Bar regardless of the outcome of Plaintiff's Complaint against Barcelona Bar.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant Atlantic Westerly's motion for summary judgment is granted in its entirety; and it is further

ORDERED that the Clerk is to enter judgment accordingly and the action is severed and proceeds against the remaining defendant; and it is further

ORDERED that issue of the amount of reasonable attorneys fees, costs and expenses owed to Defendant Atlantic Westerly by Defendant Barcelona Bar shall by determined by the Referee, or Special Referee, or another person designated by the parties to serve as referee, upon the filing of a stipulation of the parties, as permitted by CPLR 4317; and it is further

ORDERED the movant shall move pursuant to CPLR 4403 within 30 days of receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for Defendant Atlantic Westerly shall serve a copy of this decision, along with notice of entry, on all parties and the Special Referee Clerk, Room 119, within 15 days of entry to arrange a date for the reference to a Special Referee.

Dated: February 13, 2019

Hon. Carol R. Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.