Choephel v A/R Retail LLC
2019 NY Slip Op 30364(U)
February 15, 2019
Supreme Court, New York County
Docket Number: 156398/2015
Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

TENZIN CHOEPHEL,
Plaintiff,

- against -

A/R RETAIL LLC AND THYSSENKRUPP ELEVATOR CORPORATION,
Defendants.

A/R RETAIL LLC,
Third-Party Plaintiff,

- against -

WHOLE FOODS MARKET GROUP, INC.
Third-Party Defendant.

INDEX NO. 156398/2015
MOTION DATE 01/16/2019
MOTION SEQ. NO. 003
MOTION CAL. NO

The following papers, numbered 1 to 26 were read on this motion and cross-motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6,7-8,9,10-11,12-13 14, 15-17, 18-19
Replying Affidavits	20-22, 23, 24-26

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that defendant A/R Retail LLC's (hereinafter, "A/R") motion seeking summary judgment dismissing plaintiff's claims, all cross-claims, and third-party cross-claims asserted against it, is denied. A/R's motion seeking summary judgment on A/R's cross-claims and third-party claims for contractual and common law indemnification against Thyssenkrupp Elevator Corporation (hereinafter, "TKE") and Whole Foods Market Group, Inc. (hereinafter, "WFM"), is granted only to the extent of awarding A/R conditional contractual indemnification against TKE. The remainder of the relief sought in A/R's motion is denied. TKE's cross-motion for summary judgment seeking dismissal of plaintiff's claims and A/R's cross-claims asserted against it, is denied.

This action arises out of an accident involving plaintiff Tenzin Choephel, a former WFM employee. On September 25, 2014 plaintiff backed into the hoistway doors of Elevator S56 on the C1 level of a Whole Food Store located in the Time Warner Center, at 10 Columbus Circle, New York, New York. He fell into an empty elevator shaft and injured both legs (*see* A/R's Affirmation in Support, Exh. D). Plaintiff commenced this action on June 25, 2015 (A/R's Affirmation in Support, Exh. A). TKE joined issue on August 11, 2015 and A/R joined issue on August 28, 2015 (A/R's Affirmation in Support, Exh. B). A/R filed a Third-Party Summons and Complaint asserting claims against WFM on May 24, 2016 (A/R's Affirmation in Support, Exh. C).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

WFM is plaintiff Tenzin Choephel's employer. TKE is the elevator maintenance company/manufacturer that had a service contract with A/R to maintain the elevators on WFM's leased premises, where the accident occurred. In its motion papers, A/R moves to dismiss plaintiff's complaint claiming that it had no actual or constructive notice that the elevator was defective. A/R also moves for indemnification from TKE (the elevator maintenance company responsible for maintaining the elevator) because A/R claims it was TKE's failure to maintain and fulfill its duties under its service contract that lead to plaintiff's accident, thereby triggering A/R's right to indemnity from TKE. A/R also seeks indemnity under its lease agreement with WFM claiming WFM failed to properly notify A/R of any defect that might have been present in the elevator which ultimately lead to this accident.

A/R seeks an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's claims, all cross-claims, and third party cross-claims asserted against it, and granting summary judgment on A/R's cross-claims and the third party claims for common law and contractual indemnification.

TKE opposes A/R's motion and cross-moves for summary judgment dismissing plaintiff's claims against it and A/R's cross-claims against it for contractual indemnity and common law indemnification.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept, 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

In support of its motion for summary judgment, A/R argues that it is entitled to summary judgment dismissing plaintiff's claims because it had no notice of the elevator defect that allegedly contributed to plaintiff's accident.

A property owner has a nondelegable duty to passengers to maintain building elevators in a reasonably safe manner. Liability exists when: (1) a property owner has actual or constructive notice about the elevators' condition; or (2) where despite having an exclusive maintenance and repair contract with an elevator company, it fails to notify said company about a known defect (*Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept, 2011]).

A/R cites deposition testimony in support of its contention that it is not liable under either prong of the *Isaac* test (A/R's Affirmation in Support, Exh. M at 36, 90-91; Exh. K at 28-43, 48-49, 60-62, 72-73, 101-05, 130-31; Exh. I at 130, and day 2 transcript at 86, 150; Exh. J at 74-77, 81, 86, 94, 114-15, 136-37, 183; Exh. N 65, 70, 128-30, 137; Exh. H 36-37; Exh. I at Day 2 Transcript at 152; Exh. at 18, 20, 30-31,37-38, 48-49, 52-53, 57-60, 78). A/R fails to address the property owner's *nondelegable* duty to passengers (*Isaac, supra*). A/R, as the property owner, may be found liable if the jury decides that

the elevators were not sufficiently maintained because of its nondelegable duty. A/R cannot fully delegate its responsibility for maintaining and making safe the elevators on its premises, the determination of whether A/R fulfilled its nondelegable duty as part of its assessment of negligence in this case is an issue of fact to be determined by the jury at the time of trial (*see Isaac, supra*). A/R cannot be granted summary judgment on plaintiff's claims of negligence because there is no conclusive evidence that it fulfilled its nondelegable duty of care to make the elevator reasonably safe (*Thomassen v J & K Diner, Inc.*, 152 AD2d 421, 425 [2d Dept, 1989]); and *see Wynn ex rel. Wynn v T.R.I.P. Redevelopment Assoc.*, 296 AD2d 176 [3d Dept, 2002]).

A/R seeks summary judgment on its cross-claims against TKE and its third party claims asserted against WFM for contractual and common law indemnification. A/R also seeks summary judgment dismissing TKE's cross-claims and WFM's third-party cross-claims for contractual and common law indemnification.

The relevant portion of the lease between WFM and A/R states:

> Section 14.1. A. Tenant agrees to indemnify to the fullest extent permitted by law and save harmless Landlord, Landlord's employees, agents, affiliates, officers, partners, servants, assignees, Columbus and its members while in existence, and any holder of a mortgage on all or any portion of the Shopping Center (collectively, the "Indemnified Parties") Parties" from and against all claims, obligations, fines, liens, penalties, actions, damages, liabilities, costs, charges and expenses of whatever nature arising from any act, omission or negligence of Tenant, or Tenant's contractors, licensees, agents, servants, or employees, or arising from any accident, injury, or damage whatsoever caused to any person including death resulting therefrom, or to the property of any person, or from any violation of Legal Requirements including, without limitation, any law, regulation, or ordinance concerning trash, hazardous materials, or other pollutant occurring from and after the date that possession of the Demised Premises is delivered to Tenant and until the end of the Lease Term in or about Tenant's Demised Premises, or arising from any accident, injury or damage occurring outside of the Demised Premises but within the Shopping Center, where such accident, damage or injury results or is claimed to have resulted from an act or omission on the part of Tenant or Tenant's agents or employees. This indemnity and hold harmless agreement shall include indemnity against all costs, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof; and such indemnities shall expressly survive lease termination.
>
> B. Landlord agrees to indemnify to the fullest extent permitted by law and save harmless Tenant, Tenant's employees, agents, affiliates, officers, partners, servants, assignees from and against all claims, obligations, fines, liens, penalties, actions, damages, liabilities, costs, charges and expenses of whatever nature arising from any act,

omission or negligence of Landlord, or Landlord's contractors, licensees, agents, servants, or employees, or arising from any accident, injury, or damage whatsoever caused to any person including death resulting therefrom, or to the property of any person, or from any violation of Legal Requirements including, without limitation, any law, regulation, or ordinance concerning trash, hazardous materials, or other pollutant occurring from and after the date of this Lease and until the end of the Lease Term in or about the Project, where such accident, damage or injury results or is to have resulted from an act or omission on the part of Landlord or Landlord's agents or employees. This indemnity and hold harmless agreement shall include indemnity against all costs, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof; and such indemnities shall expressly survive lease termination.

(Exh. P at 34-35, *emphasis added*)

Contractual indemnification involves the parties agreeing to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff's injuries through its negligence. It is premature to conditionally grant summary judgment on a contractual indemnification claim or on a common law indemnification claim where there is a possible finding that the plaintiff's injuries can be attributed to the party seeking indemnification (*Picaso v 345 East 73 Owners Corp.*, 101 AD 3d 511, 956 NYS 2d 27 [NYAD 1st Dept, 2012]). Summary judgment is not granted on a claim of contractual indemnification or common law indemnification when the extent of each potentially liable party's negligence has yet to be determined (*Hughey v RHM-88, LLC*, 77 AD 3d 520, 912 NYS 2d 175 [NYAD 1st Dept, 2010]) and *Hernandez v Argo Corp.*, 95 AD 3d 782, 945 NYS 2d 662 [NYAD 1st Dept, 2012]).

The "arising from" language in the lease may be triggered by events that are not negligent in nature, which would result in WFM having to contractually indemnify A/R (*see K.L.M.N.I., Inc. v 483 Broadway Realty*, 117 AD3d 654 [1st Dept 2014]). However, the indemnity clauses in the lease are reciprocal and impose congruent, bilateral duties for A/R to indemnify its tenant, WFM (*see* Exh. P at 34-35).

A party seeking common law indemnification cannot recover if it is negligent beyond strict statutory liability (*Gulotta v Bechtel Corporation*, 245 AD 2d 75, 664 NYS 2d 801 [NYAD 1st Dept, 1997] and *Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 95 AD3d 709, 710, 945 NYS 2d 62 [1st Dept 2012]. A party seeking common law indemnification is first required to prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident (*McCarthy v Turner Construction, Inc.*, 17 NY 3d 369, 953 NE 2d 794, 929 NYS 2d 556 [2011]).

In this case, A/R would first need to establish that it did not play a role in causing the accident before it can obtain contractual or common law indemnification from WFM. Summary judgment on A/R's third-party claim for contractual and common law indemnification against WFM cannot be granted at this juncture. Issues of fact as to the negligence of the parties for the underlying accident are yet to be determined.

The claims involving contractual indemnification under TKE's service contract with A/R requires consideration of the indemnity provisions in the service contract which states in relevant part:

> Section III Indemnification Agreement
>
> To the fullest extent permitted by law, Contractor agrees to indemnify, defend and hold harmless, A/R Retail, LLC, Related Urban Management, LLC, Related Management, L.P., The Related Companies L.P. and its Subsidiaries, Affiliates, Directors, Officers, Members, Managers Partners, Agents, Employees, Servants and Assignees, and such other entities hereafter referred to collectively as the "Indemnitees" from and against all liability losses, claims and demands on account of injury to persons, including death resulting therefrom, and damages to property, personal and advertising injury arising out of the performance, or lack of performance, use of or bringing onto the "Site" any hazardous or toxic materials, waste or substance, by Contractor, Contractor's Sub-Contractors their respective Employees and Agents, all to be referred as "Contractor Parties" in the performance of this Agreement and damage to property of "Contractor", except from and against such claims and demands which arise out of the sole negligence of all Indemnitees. Contractor shall at its own expense, defend any and all actions at law brought against all Indemnitees based thereon and shall pay all attorney's fees and all other expenses and promptly discharge any judgments arising there from.
>
> Contractor agrees to indemnify and hold harmless all Indemnitees, from and against all claims, obligations, fines, liens, penalties, actions, damages, liabilities, costs, charges, and expenses (including, without limitation, attorneys fees and disbursements) in connection with and/or arising from or out of performance of Contractor Parties under this agreement or due to any accident or event in or about the building, due to any fraudulent, wrongful, negligent, willful act, error, omission, breach of contract, or infringement of any patent right, by Contractor Parties. Contractor shall also indemnify all Indemnitees from and against any damage, loss claim, expense and liability or fine incurred or arising by reason of "Contractor's" breach of this Agreement and for any loss of funds due to such act.
>
> In the event any Indemnitee is made a party to any litigation commenced by or against any Contractor Party, or arising from the acts and/or omissions of any Contractor Party, then Contractor shall indemnify, defend and hold any Indemnitees harmless there from and shall pay all judgments claims, obligations, fines, liens, penalties, actions, damages, liabilities, costs, charges, and expenses (including without limitation, attorney's fees and disbursements) in connection with a litigation, unless it is

> determined that Owners was solely negligent or breached its obligations hereunder. The indemnity contained herein shall survive the termination of this Agreement. Contractor shall advise Owners promptly, in writing of the service upon any Contractor Party of any summons, notices, letters or other communications alleging any claim or liability against Indemnitees or with respect to the Building or its surrounding area, upon which any Contractor Party is supplying services. Indemnified parties are defended and indemnified for actions arising from Contractor's acts, actions, omissions, or neglect, but are not indemnified for their own acts, actions, omissions, neglects, or for unproven allegations. Both parties waive any claim for consequential damages.
>
> (Exh. R at 11-12, *emphasis added*)

A/R has established that it is entitled to conditional contractual indemnification from TKE. Conditional contractual indemnification is appropriate because the default presumption under the contract is that TKE is liable to A/R for indemnity unless it is determined that A/R was the only party responsible for an accident (*see* Exh. R, *supra*).

TKE argues that issues of fact exist on A/R's claim for contractual indemnification as to whether maintenance and possible misuse of pallet jacks by WFM caused the accident. In support of this argument, TKE refers to DOB and OSHA investigations of the accident which allegedly exculpate TKE (TKE's Affirmation in Opp. and in Support of Cross Motion, Exh. J, Y, N, P, K, L). This evidence does not conclusively establish that A/R was the sole negligent party responsible for the accident at issue.

TKE fails to defeat A/R's motion for summary judgment on contractual indemnity because TKE has not established that A/R is the only party responsible for the accident.

Likewise, TKE fails to defeat A/R's motion for summary judgment concerning common law indemnity claims against it because TKE has not established that it was not negligent. A party moving for common law indemnification must first prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident (*McCarthy v Turner Construction, Inc.*, *supra*).

Defendant TKE bears the burden of proof on its cross-motion for summary judgment by showing that it either lacked notice of the condition of the elevator's doors, or that as the elevator's exclusive maintenance contractor, it used reasonable care to discover and correct the dangerous condition (*Griffiths v Durst Org., Inc.*, 143 AD3d 610, 39 NYS 3d 458 [1st Dept, 2016]; and *Scafe v Schindler El. Corp.*, 111 AD3d 556, 975 NYS 2d 399 [1st Dept, 2013]). TKE argues that plaintiff cannot demonstrate that it had actual or constructive notice of a relevant elevator defect. Plaintiff has raised an issue of material fact by providing deposition testimony which shows that TKE had notice of such a defect (*see* NYSCEF Doc. No. 179 at 35-36, 38-39, 39-40).

TKE's argument that there is no evidence that a dangerous condition existed at the time plaintiff's accident occurred because maintenance was performed one day prior to it is unavailing. TKE offers no evidence of what kind of work was actually done the day before the accident (*see* TKE's Cross Motion, Exh. U).

TKE's argument that the accident occurred in a way that takes the whole incident outside of the scope of the indemnity provisions of the agreement with A/R is unavailing. TKE claims the doors were not designed to be rammed by a pallet jack and therefore there is no type of maintenance or fault of maintenance that could have affected the outcome of this incident. TKE failed to provide conclusive evidence that the elevator was, in fact, rammed by a pallet jack, causing it to fail during the accident. The surveillance video of the accident at issue does not clearly show the pallet jack ramming into elevator S56 (*see* NYSCEF Doc. No. 168).

TKE further argues that the elevator at issue was being misused to carry freight which takes this incident outside the scope of the indemnity provisions of its contract with A/R. TKE contends that it should not be liable for plaintiff's accident because he misused the pallet jack and there was no malfeasance on the part of TKE. This argument does not account for the broad "arising from" language in the indemnity provisions of the service contract between A/R and TKE which state that TKE will indemnify A/R even for incidents which do not involve any malfeasance on TKE's part (*see* Exh. R at 11-12).

TKE has not provided evidence that establishes a prima facie basis for summary judgment. There remain issues of fact to be determined which preclude summary judgment. It is not the function of the Court on summary judgment to make credibility determinations or findings of fact, but rather to identify material issues of fact or point to the lack thereof (*Vega v Restani Const. Corp.*, 18 NY 3d 499, 965 NE 2d 240, 942 NYS 2d 13 [2012]).

TKE's cross-motion for summary judgment seeking dismissal of plaintiff's claims against it is denied. Issues of fact remain as to whether or not TKE was negligent.

TKE's cross-motion to dismiss A/R's claims against it for contractual indemnity, is denied. The terms of the service contract between A/R and TKE state that A/R will not be indemnified if "it is determined that [A/R] was solely negligent or breached its obligations hereunder" (Exh. R at 12). This means that the jury would first need to decide whether A/R is solely responsible for the accident, before contractual indemnification can be determined as to TKE.

A/R is granted conditional contractual indemnification because under the contract between A/R and TKE, TKE has to indemnify A/R for claims against A/R arising from the acts of TKE.

Accordingly, it is Ordered that A/R Retail LLC's motion seeking summary judgment dismissing plaintiff's claims, all cross-claims and third-party cross-claims asserted against it is denied, and it is further,

ORDERED that A/R Retail LLC's motion seeking summary judgment on its cross-claims and third-party claims for contractual and common law indemnification asserted against Thyssenkrupp Elevator Corporation and Whole Foods Market Group, Inc. is granted only to the extent of awarding A/R Retail LLC conditional contractual indemnification against Thyssenkrupp Elevator Corporation, and it is further,

ORDERED that A/R Retail LLC is granted conditional contractual indemnification on its cross-claims asserted against Thyssenkrupp Elevator Corporation, and it is further,

ORDERED that the remainder of the relief sought in A/R Retail LLC's motion is denied, and it is further,

ORDERED that Thyssenkrupp Elevator Corporation's cross-motion for summary judgment seeking dismissal of plaintiff's claims and A/R Retail LLC's cross-claims asserted against it, is denied.

ENTER: MANUEL J. MENDEZ J.S.C.

Dated: February 15, 2019

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X** **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**