

Rasporskaya v Kimco Realty Servs., Inc.

2019 NY Slip Op 31394(U)

May 14, 2019

Supreme Court, New York County

Docket Number: 160912/2014

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

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INDEX NO. 160912/2014

STELLA RASPORSKAYA, GENNADIY RASPORSKAY,

MOTION DATE 05/02/2019

Plaintiff,

MOTION SEQ. NO. 003

- v -

KIMCO REALTY SERVICES, INC., KIMCO REALTY CORP., J.P.
MORGAN CHASE & CO., J.P MORGAN CHASE BANK, N.A.
D/B/A CHASE, ATLANTIC HYLAN CORP.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 184, 185, 186

were read on this motion to/for JUDGMENT - SUMMARY

In this trip and fall action, defendants Kimco Realty Services, Inc., Kimco Realty Corporation and Hylan Plaza 1339 LLC f/k/a Atlantic Hylan Corp. (“Hylan”) move pursuant to CPLR 3212 for an order (i) dismissing plaintiff’s complaint and any cross-claims against defendant Kimco Realty Services, Inc. and (ii) granting defendants Kimco Realty Corporation and Hylan summary judgment on their cross-claim for contractual indemnification against J.P. Morgan Chase & Co. and J.P. Morgan Chase Bank, N.A. (d/b/a Chase)¹ or (iii) alternatively, granting summary judgment for common law indemnification in favor of the defendants Hylan and Kimco Realty Corp. against defendants J.P. Morgan Chase & Co. and J.P. Morgan Chase Bank, N.A. (d/b/a Chase); and (iv) upon granting contractual or common law indemnification, directing an inquest on damages.

¹ Plaintiffs improperly identified defendant JPMorgan Chase Bank, N.A. in the complaint as J.P. Morgan Chase & Co. and J.P. Morgan Chase Bank, N.A. (d/b/a Chase). The parties do not seem to dispute that JPMorgan Chase Bank, N.A., which has appeared in this action, is the proper party to this action and is the successor in interest of Washington Mutual Bank under the lease. Accordingly, the court will consider the cross-claims asserted by moving defendants against the improperly identified defendants to have been made against appearing defendant JPMorgan Chase Bank, N.A.

With respect to the motion to dismiss the claims against defendant Kimco Realty Services, Inc., moving defendants submit an affidavit from their Vice President Paul Dooley, who is familiar with their business practices, stating that defendant Kimco Realty Services, Inc. did not own or maintain any common areas at the Hylan Plaza shopping center where plaintiff's accident occurred. (Affidavit of Paul Dooley sworn to on March 5, 2019). This is sufficient to meet defendant Kimco Realty Services, Inc.'s prima facie burden on summary judgment of showing that it bears no responsibility for plaintiff's accident. Since no party has opposed this branch of the motion, it will be granted and defendant Kimco Realty Services, Inc. will be dismissed from the action.

With respect to the cross-claim for contractual indemnification, "[a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Campos v. 68 East 86th Street Owners*, 117 A.D.3d 593, 595 (1st Dep't 2014). When a party has no legal duty to indemnify, a contract which assumes that obligation must be strictly construed and any ambiguity as to the meaning of a lease prepared by the landlord should be resolved in favor of the lessee. *Id.* Further, "[c]ourts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an 'unmistakable intent' to indemnify." *Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006).

Here, plaintiff claims that as she was walking back from the ATM to her car, she tripped and fell while stepping off the fourth median furthest away from the ATM. (Affirmation of Loretta A. Redmond dated March 7, 2019, Exh. L (S. Rasporskaya Dep. Tr. 73:1-10)). Although it is disputed whether this area is part of the leased premises, plaintiff's claim clearly falls within

the first indemnification provision contained in paragraph 11(A) of the lease, which states that the tenant must indemnify the landlord for any expenses and damages that are claimed to have been caused by the tenant, no matter where occurring. (Redmond Aff., Exh. O at Exh. A, p. 11). Moreover, this broadly worded provision reflects the “unmistakable intent” of the parties to indemnify the moving defendants for their own negligence. *Great Northern Ins. Co.*, 7 N.Y.3d at 417. Although the next clause (ii) in this paragraph provides that the landlord is not entitled to indemnification for its own negligence, this qualification is only applicable to any claims occurring on the Leased Premises. (Redmond Aff., Exh. O at Exh. A, p. 11). Here, the indemnification provision is triggered by plaintiff’s claims against JPMorgan Chase Bank, N.A., and not by the location of the accident.

Finally, this indemnification provision does not run afoul of General Obligations Law § 5-321, which provides that any agreement which exempts a lessor from liability for injuries caused by its own negligence is unenforceable. The lease at issue, which was negotiated between two sophisticated parties, also requires the tenant to obtain liability insurance coverage naming the landlord as an additional insured. (Redmond Aff., Exh. O at Exh. A, ¶ 11(B)). Under these circumstances, General Obligations Law § 5-321 does not preclude a landlord’s indemnification claim where the parties use insurance to allocate the risk of liability to third parties between themselves. *Great Northern Ins. Co.*, 7 N.Y.3d at 419.

Accordingly, it is

ORDERED that the motion is granted to the extent that all claims against defendant Kimco Realty Services, Inc. are dismissed and defendants Kimco Realty Corp. and Hylan are entitled to summary judgment on their cross-claim for contractual indemnification against defendant JPMorgan Chase Bank, N.A., and is otherwise denied; and it is further

ORDERED that the computation of damages on the cross-claim shall be determined after trial or other final resolution of this action.

5/14/19
DATE
NYC


PAUL A. GOETZ, J.S.D.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

OTHER

APPLICATION:

SETTLE ORDER

GRANTED IN PART

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE