

<b>Tanz v New York Fine Arts Gallery &amp; Framing, Inc.</b>
2021 NY Slip Op 30145(U)
January 15, 2021
Supreme Court, New York County
Docket Number: 158870/2018
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

JUDITH L. TANZ

INDEX NO. 158870/2018

- v -

MOT. DATE

MOT. SEQ. NO. 001

NEW YORK FINE ARTS GALLERY & FRAMING, INC. and INFINITY REAL ESTATE, LLC,

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

This is a personal injury action. Defendant New York Fine Arts Gallery & Framing ("NY Fine Arts") now moves for summary judgment seeking dismissal of plaintiff's action against it as well as the cross-claims by codefendant Infinity Real Estate, LLC ("Infinity"). Plaintiff and Infinity oppose the motion. Issue has been joined but note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

At her deposition, plaintiff testified that on March 8, 2018, her "foot got caught in [a] hole" in the sidewalk in front of the premises located at 1464 First Avenue, New York, New York (the "premises"). Plaintiff explained that the hole was "probably two inches, an inch to two inches, between the metal grate that covers the staircase and the sidewalk." Plaintiff further clarified that the hole was two inches in depth. Plaintiff identified that area where she fell in a photograph and circled the area of sidewalk where it meets the frame of two cellar doors leading to the basement of the premises.

Infinity owned the premises at the time of the alleged incident and NY Fine Arts leased the ground floor and a portion of the basement pursuant to a written agreement with a subsidiary of Infinity.

The subject lease provides in relevant part as follows:

ARTICLE 6 Repairs:

Tenant shall take good care of the Premises and the fixtures, glass, plate glass, doors, signs and equipment thereof and therein (including such portions of the Building Systems that are located within the Premises or are outside thereof but primarily service the Premises or were installed or altered by Tenant), and at its sole cost and expense shall make all repairs, restorations and replacements

Dated: 1/15/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

(hereinafter collectively referred to as "Repairs") as and when needed to preserve them in good working order and condition, whether or not such Repairs pertain to improvements in the Premises furnished or installed by Landlord, BUT excluding all structural repairs ... Landlord at its expense, shall make all Repairs, structural and otherwise, of which it shall have notice, necessary to keep in good order and repair of the exterior of the Building (excluding doors to and windows of the premises which shall be Tenant's responsibility) and the public portions of the Building and the structural components of the Building and Premises ...

ARTICLE 11 No Liability On Landlord:

Tenant agrees to indemnify, defend and save harmless, Landlord ... against any and all liability (statutory or otherwise), claims, suits, demands, damages, judgments, costs, fines, penalties, interest and expenses ... arising from, or in connection with, (i) any liability claim for any injury to, or death of, any person . . . , in or about the Premises other than any such liability or claim caused solely by Landlord or for which Landlord is otherwise responsible pursuant to the terms of this Lease ...

NY Fine Arts produced Abunaser Abdullah for a deposition, its owner. There is no dispute that NY Fine Arts did not have access to the basement through the cellar doors because there was a padlock on the doors and NY Fine Arts did not have the key. Abdullah testified that although he never used the cellar doors to access the basement, he knew about the hole or "minor crack" in the sidewalk which caused plaintiff's accident:

Q Let me show you Plaintiff's Exhibit 4 (which also depicts the area where plaintiff fell). I direct your attention to the left-hand side of the picture. Would you agree with me there appears to be a hole shown on the bottom part of that picture?

...

A I didn't see that because New York City has millions of holes like that. I can't compare how big or small.

Q I'm not asking how big or how small it is. Have you seen that hole shown in the picture before March 2018?

A It's a minor crack maybe, not a hole.

Q Have you noticed that minor crack shown in this picture before March 2018?

A Yes.

Q Do you recall the first time you noticed that particular feature shown in this picture?

A I don't remember the first time.

Q Did you notice it in January 2018?

A I don't remember.

Q Did you take notice of it in the fall of 2017?

A It is all the time like that. I don't know which month it was there.

Abdullah further admitted that he did not provide notice of any defective or dangerous condition with the sidewalk to Infinity. Abdullah explained that he "didn't see any problem there" and if he had, he would have "[c]all[ed] the landlord."

Meanwhile, Infinity produced Alex Landau, its employee, for a deposition. Landau testified that if a complaint was made regarding a broken sidewalk in front of the property, it would be owner's responsibility to fix it.

NY Fine Arts moves for summary judgment arguing that it did not owe plaintiff any duty to maintain the sidewalk where she fell. NY Fine Arts further seeks summary judgment on Infinity's crossclaims and as well as attorneys' fees and costs. Plaintiff contends that as a tenant, NY Fine Arts had a duty to keep the cellar doors in reasonably safe condition and a duty to repair pursuant to the lease. Infinity argues that "what is paramount here, is that NY Fine Arts failed to notify Infinity of the condition, or request that Infinity repair the condition". Infinity contends that NY Fine Arts breached the lease and is therefore liable for "[a]ll damages or injury to the Building or the Building Systems outside of the Premises...caused by or arising from acts or omissions of Tenant...including those which are structural, extraordinary".

### Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

NY Fine Arts' motion as to plaintiff's claims is granted. NY Fine Arts, as a tenant, owes a duty to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable (PJI 2:90). However, plaintiff's accident occurred on the sidewalk and involved a sidewalk defect where the sidewalk met the frame of the cellar doors to a portion of the basement which NY Fine Arts leased. There is no dispute on this record that NY Fine Arts did not have access to the basement through the cellar doors. Moreover, plaintiff's accident occurred on the sidewalk, which NY Fine Arts had no duty to maintain whether at common law or vis-à-vis the lease. Therefore, plaintiff's claims against NY Fine Arts must be severed and dismissed.

As for Infinity's crossclaim against NY Fine Arts, that also fails. NY Fine Arts was not responsible for structural defects just because it didn't give Infinity or its subsidiary notice of same. Rather, the lease merely provides that the owner is only responsible for repairs to structural defects upon notice from NY Fine Arts. Nor has the indemnity clause of the lease been triggered in favor of Infinity.

"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]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a

landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The subject indemnification clause merely requires NY Fine Arts to indemnify Infinity and/or its subsidiary for "damages or injury to the Building or the Building Systems outside of the Premises...**caused by or arising from acts or omissions of Tenant**" (emphasis added). It is undisputed that NY Fine Arts did not cause the defective/dangerous condition which caused plaintiff's accident. To the extent that Infinity argues that NY Fine Arts' failure to notify Infinity of the condition is an omission as that term is used in the lease, the court disagrees. A failure to notify is too attenuated from an act or omission causing the defect or from which the defect arose out of. Further, GOL § 5-322.1 would prohibit Infinity and its subsidiary from attempting to hold NY Fine Arts' harmless for its own failure to inspect the premises, an obligation which its employee acknowledged at his deposition, and otherwise such a responsibility is not embodied in the parties' lease which must be strictly construed against the drafter, here, Infinity's subsidiary.

For all of these reasons, plaintiff's claims and Infinity's crossclaims against NY Fine Arts are severed and dismissed.

As for NY Fine Arts' claim for attorneys fees from Infinity, movant argues that "[t]here is also an undeniable right to a defense, which has not been provided, which entitles the moving defendant to the reimbursement of all attorneys' fees and expenses, regardless of the outcome of the motion as it pertains to plaintiff's and the other parties' claims". However, movant has failed to point to any provision in the lease which provides for an award of attorneys fees in its favor and absent a contractual provision or statute to that effect, NY Fine Arts is not entitled to such an award. Therefore, that branch of the motion is denied.

## CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that NY Fine Arts' motion for summary judgment is granted to the extent that plaintiff's claims and Infinity's crossclaims against NY Fine Arts are severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/15/21  
New York, New York

So Ordered:

  
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**Hon. Lynn R. Kotler, J.S.C.**