

Woltman v Securitas Sec. Servs. USA, Inc.
2021 NY Slip Op 31718(U)
May 19, 2021
Supreme Court, Kings County
Docket Number: 505951/2018
Judge: Francois A. Rivera
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of May 2021

HONORABLE FRANCOIS A. RIVERA

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JAMES WOLTMAN

Plaintiff

DECISION & ORDER

Index No. 505951/2018

- against -

SECURITAS SECURITY SERVICES USA, INC.,
GREAT BIG FOOD EVENTS LLC, ACP BK I LLC,
and EVEREST SCAFFOLDING INC.,

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By notice of motion filed on March 9, 2021 under motion sequence number six, defendant Securitas Security Services USA, Inc. (hereinafter Securitas) seeks an order: (1) granting it summary judgment dismissing the complaint, and (2) dismissing all cross-claims asserted against it pursuant to CPLR 3212, and (3) granting it costs, fees and disbursements. The motion is opposed.

By notice of motion filed on March 9, 2021 under motion sequence number seven, defendant ACP BK I LLC (hereinafter ACP) seeks an order granting it summary judgment: (1) dismissing the complaint, and (2) dismissing all cross-claims asserted against it; and (3) granting summary judgment in its favor on its cross-claims against co-defendant Great Big Food Events, LLC (hereinafter GBFE) pursuant to CPLR 3212; and

(4) granting it costs, fees and disbursements. The motion is opposed by James Woltman (hereinafter Woltman) and GBFE.

By notice of motion filed on March 12, 2021 under motion sequence number eight, defendant GBFE seeks an order granting it summary judgment: (1) dismissing the complaint by Woltman, and (2) dismissing all cross-claims asserted against it pursuant to CPLR 3212. The motion is opposed by Woltman and ACP.

BACKGROUND

On March 26, 2018, Woltman commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's office.

The verified complaint alleges the following salient facts, among others. On September 24, 2016, the defendants owned, operated, managed, controlled, maintained and supervised a premise located at 630 Flushing Avenue, Brooklyn, New York, which included a parking lot. On September 24, 2016, GBFE operated a food event at the subject premise and parking lot and invited members of the general public to the subject premise event called the Big Bacon Food Event. On that date Woltman was lawfully walking on the aforesaid premises and parking lot with the knowledge, permission, and consent of the defendants. While doing so, he was caused to be injured by a dangerous and defective condition and to sustain severe injuries (hereinafter the subject accident). The subject accident and the resulting injuries were caused by the joint, several and concurrent negligence of the defendants and their servants, agents, employees and

licensees in the ownership, operation, management, supervision, maintenance and control of the aforesaid premises, parking lot and its appurtenance.

On April 25, 2018, Everest Scaffolding Inc (hereinafter Everest) filed a verified answer.

On May 2, 2018, Securitas filed a verified answer with cross claims for common law and contractual indemnity and for contribution asserted against GBFE, ACP and Everest Scaffolding, Inc.

On May 2, 2018, GBFE filed a verified answer with cross claim for common law indemnification and contribution asserted against Securitas and Everest.

On or about November 6, 2018, a stipulation of discontinuance was executed by all parties dismissing all claims against Everest.

On May 13, 2021, at oral argument of motion sequence number six, seven and eight, Woltman withdrew his cross motion under sequence number nine without objection.

LAW AND APPLICATION

Securitas' Motion for Summary Judgment Dismissing the Complaint

Securitas seeks an order granting summary judgment in its favor and dismissing the complaint on all cross claims asserted against it. In support of its motion Securitas submitted the following documents, among others. Securitas submitted a videotape which captured the subject accident, excerpts of Woltman's deposition transcripts, the deposition transcript of its security officer, Joseph Halls; the deposition transcript of

Craig Taylor, a partner of GBFE; the deposition transcript of Jeffrey Rosenblum, the co-managing member of ACP, and a copy of its contract with ACP.

Securitas contends that on September 24, 2016, Woltman caused his own accident while he was attending The Great Big Bacon Picnic Event. The subject accident occurred at the entrance to a parking lot located at 630 Flushing Avenue, Brooklyn, New York (hereinafter the subject premise) when Woltman walked under the arm of a security parking gate (hereinafter the subject gate) while the arm was coming down. It is undisputed that ACP is the owner of the subject premise, that Securitas was retained by ACP to provide security services at the subject location, that Securitas was operating the subject gate on the date of the accident, and that GBFE leased space at the premises, including the parking lot, from ACP on the date of the accident to hold The Great Big Bacon Picnic festival. GBFE also hired the individuals who collected tickets and checked the wristbands of the attendees. These individuals were also responsible for directing pedestrian traffic and showing participants how to navigate the festival.

Woltman has claimed that the subject gate was dangerous and defective and that his injuries were due to the negligent acts and omissions of the defendants. Securitas contends that the subject gate was open, obvious and neither defective nor dangerous. Based on that, Securitas contends that it owed no duty to the plaintiff to correct or warn of any alleged defect or danger of the subject gate. Securitas further contends that the accident was caused by Woltman's decision to traverse a roadway meant exclusively for vehicles. Furthermore, it alleged that the arm of the subject gate came down

automatically and that Securitas could not stop the downward movement of the arm on the plaintiff.

Securitas' evidentiary submissions include the deposition testimony of Joseph Halls (hereinafter Halls), an employee. On the date of the subject accident Halls was allowing automobiles to enter by controlling the subject gate. Halls also testified that he was responsible for controlling pedestrian traffic near the vicinity of the security gate. Halls would allow the vehicle through by pressing on a remote device which would lift the arm of the gate to allow the vehicle to pass. The remote device had a button for lifting the gate arm up and a button for bringing the arm down. Halls initially testified that he could bring the arm up and bring the arm down using the remote device. He later changed his testimony to say that he could bring the arm up with the remote device but that he had no control over bringing it down. Rather, once he lifted the gate arm up it would automatically come down after a certain interval of time and the downward motion could not be stopped. No one testified as to how the sensors on the arm of the subject gate functioned or what triggered the automatic downward movement of the arm. Nor did anyone testify as to the period of time the gate arm was supposed to remain lifted before it automatically came down. The video provided of the subject accident showed the arm of the subject gate was in the upright position and remained upright for approximately seventeen seconds before it came down on top of Woltman.

Halls' testimony raised an issue of fact as to whether Securitas had the ability to control the downward motion of the gate arm. If Securitas could not control the downward motion, then the arm of the gate posed a danger to unsuspecting pedestrians

allowed to be nearby. If Securitas could control the downward motion, then Halls may have launched the instrument of harm when it brought the arm down while allowing pedestrians, including the plaintiff, to walk past. Consequently, Securitas did not make a prima facie showing that the condition of the subject gate was open, obvious and neither defective nor dangerous.

Hall's testimony also raised an issue of fact as to whether Securitas breached a duty of care in failing to keep pedestrian traffic away from the purportedly automatic downward motion of the gate arm. The video of the subject accident showed at least five people walking in the area near the subject security gate, an area that was not separated by any visible barriers. Securitas also failed to establish that it had no duty to warn the plaintiff of its inability to control or stop the downward motion of the subject gate. Accordingly, Securitas did not establish absence of genuine issue of material fact as to their liability so as to warrant granting of summary judgment in their favor. The motion is denied without reaching the sufficiency of the plaintiff's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Securitas' Motion for Summary Judgment Dismissing GBFE's Cross Claims

GBFE filed a verified answer with cross claim for common law indemnification and contribution asserted against Securitas. Securitas motion also seeks summary judgment dismissing GBFE's cross claims.

The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*Board of Mgrs. of the 125 N. 10th Condominium v*

125 North10, LLC, 150 AD3d 1063, 1064 [2nd Dept 2017], quoting *Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2nd Dept 2008]). The party seeking indemnification must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought and must not have committed actual wrongdoing itself (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077 [2nd Dept 2007], quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2nd Dept 2007]; see also *Dreyfus v MPCC Corp.*, 124 AD3d 830, 830 [2nd Dept 2015]).

A cause of action for contribution requires that the culpable parties must be subject to liability for damages for the same personal injury (*Nassau Roofing & Sheet Metal v Facilities Development Corporation*, 71 NY2d 599 [1988]). The parties need not be liable under the same theories or whether the party whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or even intentional tort-feasor (*id.*). Contribution is not founded upon, nor does it necessarily arise from contract and only a ratable or proportional reimbursement is sought (*McDermott v City of New York*, 50 NY2d 211 [1980]; *McFall v Compagnie Maritime Belge S.A.*, 304 NY 314 [1952]). Where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy (*Fox v County of Nassau*, 183 AD2d 746, 746 [2nd Dept 1992]). To sustain a

cause of action for contribution, the party seeking contribution is required to show that ... a duty was owed to the plaintiff as an injured party and that a breach of that duty contributed to the alleged injuries (*Eisman v Vil. Of E. Hills*, 149 AD3d 806, 808-809 [2nd Dept 2017] quoting, *Guerra v St Catherine of Sienna*, 79 AD3d 808 [2nd Dept 2010]). Thus, contribution is not available where the co-defendant owed no duty or breached no duty to either the party seeking contribution or to the plaintiff (*see Rodriguez v Suffolk*, 305 AD2d 574 [2nd Dept 2003]).

As previously indicated, Securitas failed to make a prima facie showing that it owed no duty to the plaintiff and that it was free of liability under common law negligence. Consequently, it has not established its entitlement to judgment dismissing GBFE's claims against it for contribution and common law indemnity.

ACP's Motion for Summary Judgment Dismissing the Complaint

ACP seeks an order granting summary judgment in its favor and dismissing the complaint and all cross claims asserted against it. ACP also seeks summary judgment in its favor on its cross claims asserted against GBFE for contractual indemnification and for failure to procure insurance. In support of its motion ACP has also submitted the following documents, among other. ACP submitted a videotape which captured the subject accident, excerpts of Woltman's deposition transcripts, the deposition transcript of its security officer Halls; the deposition transcript of Craig Taylor, a partner of GBFE; the deposition transcript of Jeffrey Rosenblum (hereinafter Rosenblum), the co-managing member of ACP, several photographs, a copy of its contract with Securitas and a copy of its license agreement with GBFE.

ACP contends that it owed no duty to the plaintiff relative to a condition on the premises. ACP also contends that the subject gate was open and obvious and not inherently dangerous and therefore it had no duty to warn the plaintiff about it. ACP also claims that it had no notice of the allegedly defective or dangerous condition.

A landowner has a duty to exercise reasonable care in maintaining its property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (*Genefar v Great Neck Park Dist.*, 156 AD3d 762, 763 [2nd Dept 2017]; see *Basso v Miller*, 40 NY2d 233 [1976]). The issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, but a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion ... on the basis of clear and undisputed evidence (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). Further, the law is clear that evidence that the dangerous condition was open and obvious cannot relieve the landowner of the burden to exercise reasonable care in maintaining the property in a safe condition (*Cupo v Karfunkel*, 1 AD3d 48, 52 [2nd Dept 2003]).

As the owner of the subject premise, ACP had a duty to keep the premises in a reasonably safe condition. For the reasons previously stated, the Court could not determine as a matter of law that the lifting and dropping of the subject security gate was controllable or automatic. Nor could the Court determine that its condition was open, obvious, and not inherently dangerous.

ACP has also claimed that it lacked notice of the dangerous and defective condition of the subject gate. In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed, and that the landowner affirmatively created the condition or had actual or constructive notice of its existence (*Steed v MVA Enters., LLC*, 136 AD3d 793, 794 [2nd Dept 2015]). Thus, in a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*Beri v Chung Fat Supermarket, Inc.*, 125 AD3d 587, 587 [2nd Dept 2016]). A defendant has constructive notice of a dangerous condition when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*Fortune v Western Beef, Inc.*, 178 AD3d 671, 672 [2nd Dept 2019]). To meet its initial burden on lack of constructive notice, ACP was required to offer some evidence as to when the subject gate was last inspected prior to the plaintiff's accident (*Jeremias v Lake Forest Estates*, 147 AD3d 742, 742 [2nd Dept 2017]).

Halls' testimony raised an issue of fact regarding whether the downward mechanism of the gate was controllable at any time prior to the subject accident. His testimony also established that the subject gate had malfunctioned and required servicing after the subject accident. ACP also submitted an affidavit from Rosenblum, its co-manager. Rosenblum averred that ACP was involved in a prior lawsuit involving an injury caused by another gate at the subject premise. Rosenblum offered no details as to

the manner of injury. ACP's evidentiary submission did not include any testimony regarding when the subject gate was last serviced or inspected prior to the subject accident. Accordingly, ACP failed to meet its initial burden on lack of constructive notice (*Jeremias*, 147 AD3d at 742).

ACP's Motion for Summary Judgment Dismissing Securitas' Cross Claims

ACP has also moved for summary judgment dismissing Securitas cross claims. Securitas filed a verified answer with cross claims for common law indemnification and contribution asserted against ACP.

As previously indicated, ACP failed to make a prima facie showing that it owed no duty to the plaintiff and that it was free of liability under common law negligence. Consequently, it has not established its entitlement to judgment dismissing Securitas' claims against it for contribution and common law indemnity.

ACP's Motion for Summary Judgment on its Cross Claims Against GBFE

ACP seeks summary judgment on its cross claims asserted against GBFE for contractual indemnification and for failure to procure insurance. ACP annexed its contract with GBFE. According to the contract, GBFE was required to indemnify ACP for all claims of injury to third parties resulting from GBFE's use of the premises unless the claim arose from the negligence of ACP. Inasmuch as ACP has not made a prima facie showing of its freedom of liability in causing the subject accident, summary judgment on its cross claim against GBFE for contractual indemnity is premature (*Mesler v Podd LLC*, 89 AD3d 1533, 1535 [4th Dept 2011]).

CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor (*Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2nd Dept 2018]). Contrary to the requirements of CPLR 2214 (a), ACP offered no testimony, documents, or law to support its cross claim against GBFE for failure to procure insurance.

GBFE's Motion for Summary Judgment Dismissing the Complaint

GBFE seeks an order granting summary judgment in its favor and dismissing the complaint and all cross claims asserted against it. It is undisputed that GBFE did not own, operate, or maintain the subject parking gate. The subject gate was on the property owned by ACP and the subject gate was operated by Securitas. GBFE contends that the plaintiff presented no evidence that it was negligent or played any role in causing the subject accident. GBFE also contends that the condition of the subject gate was open, obvious, and not inherently dangerous and that it had no notice of the allegedly dangerous condition of the subject gate. The Court has already addressed the contention that the subject gate was open, obvious, and not inherently dangerous.

According to Halls' deposition testimony GBFE was partially responsible for directing pedestrian traffic at the event and preventing pedestrians from walking into the roadway where this accident occurred. Hall's testimony raises a triable issue of fact as to whether GBFE had assumed a duty to ensure that pedestrians, such as the plaintiff, walked onto the sidewalk as opposed to the traffic lane where this accident occurred. The video of the subject accident shows that pedestrians were walking in the roadway,

including the area where the accident occurred. Consequently, GBFE's evidentiary submission did not eliminate all material issues of fact regarding its freedom from liability in causing the subject accident.

GBFE's for Summary Judgment Dismissing all Cross Claims

Both ACP and Securitas filed a verified answer containing cross claims for common law indemnification, contractual indemnification and contribution asserted against GBFE. GBFE's motion also sought an order dismissing all cross claims asserted against it.

As previously indicated, GBFE has failed to make a prima facie showing that it was free of liability under common law negligence. Consequently, it has not established its entitlement to judgment dismissing the claims of ACP and Securitas for contribution and common law indemnity.

With regard to ACP's cross claims against GBFE for contractual indemnity, by the terms of their contract, GBFE was required to indemnify ACP for all claims of injury to third parties resulting from GBFE's use of the premises unless the claim arose from the negligence of ACP. Inasmuch as neither ACP nor GBFE has made a prima facie showing of freedom of liability in causing the subject accident, GBFE's motion for summary judgment dismissing ACP's cross claim asserted against it for contractual indemnity is premature (*Mesler*, 89 AD3d at 1535).

CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor (*Abizadeh*, 159 AD3d at 857). Contrary to the

requirements of CPLR 2214 (a), GBFE offered no argument to support its motion to dismiss Securitas’s cross claim for contractual indemnity.

CONCLUSION

The motion by Securitas Security Services USA, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross-claims asserted against it is denied.

The motion by ACP BK I LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross claims asserted against it is denied.

The motion by ACP BK I LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor on its cross claims asserted against co-defendant Great Big Food Events, LLC is denied.

The motion by Great Big Food Events, LLC for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and all cross claims asserted against it is denied.

The foregoing constitutes the decision and order of this Court.

ENTER

Francis A. Rivera X
J.S.C.