Hip Wah Hing Realty Corp. v Starr Indem. & Liab. Co.
2021 NY Slip Op 32843(U)
December 9, 2021
Supreme Court, New York County
Docket Number: Index No. 657048/2019
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART IV
---X

HIP WAH HING REALTY CORP.

Plaintiff,

-against-

STARR INDEMNITY & LIABILITY COMPANY and
QINGHUA ZHOH d//b/a GIFT SHOP

Defendants.

---X

DECISION AND ORDER

Index No. 657048/2019

Mot. Seq. 002

HON. FRANK P. NERVO, J.S.C.

Plaintiff moves for summary judgment declaring that defendant Starr Indemnity owes it a duty to defendant and a duty to indemnify, as an additional insured on an insurance policy issued to plaintiff's commercial tenant, defendant Zhoh. Defendant Starr Indemnity opposes to the extent that it owes plaintiff a duty to indemnify; however, Starr Indemnity concedes it owes plaintiff a duty to defend.

As an initial matter, the Court notes that the moving papers do not comport with the Uniform Rules (*see e.g.* Uniform Rule 202.8-b, 22 NYCRR § 202.8-b). Notwithstanding, given the preference for adjudicating matters on the merits, the Court, in its discretion, will not deny the motion for failure to comply with the Uniform Rules.

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

"When a plaintiff moves for summary judgment, it is proper for the court to ... deny summary judgment if facts are alleged in opposition to the motion which, if true, constitute a meritorious defense" (*Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 NY2d 175 [1982]). However, a "feigned issue of fact" will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alverez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

Here, defendant Zhoh's use of the leased premises is as a gift shop, and plaintiff's lease with Zhoh provides that Zhoh shall be responsible for keeping

the sidewalk in front of the gift shop clean and free of debris, obstruction, and ice and snow (NYSCEF Doc. No. 33, Rider to Lease, at ¶ 11). The lease further provides that Zhoh shall procure insurance and shall name Hip Wah Hing as an additional insured. The policy at issue provides, in relevant part:

> Blanket Additional Insureds -Including Broad for Vendors- As Required by Contract
>
> WHO IS AN INSURED is amended to include as additional insured any person or organization whom you have agreed in a written contract, written agreement or written permit that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to:
>
> > i. "Bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in operations performed for that person or "your product" or premises owned or used by you.

(NYSCEF Doc. No. 34 at p. 79).

Where a sidewalk abuts the leased premises and is utilized as a means of egress to the leased premises, the tenant is deemed to "use" the sidewalk, and policies covering the tenant's "use" of the premises are triggered (*Wesco Ins. Co. v. Travelers Prop. Cas. Co. of Am.*, 188 AD3d 476 [1st Dept 2020]; *see also ZKZ Assoc. v. CNA Ins. Co.*, 89 NY2d 990 [1997]). This is precisely the case at bar.

In the underlying Chow action (Index No. 152210/2017), the Chow plaintiff alleged she was caused to trip and fall due to a defect with the sidewalk abutting the property owned by Hip Wah Hing and leased to Zhoh. There is no dispute that the portion of the sidewalk at issue is used as a means of egress for Zhoh's store and is thus part of the premises used by Zhoh (*id.*; *Public Serv. Mut. Ins. Co. v. Nova Cas. Co.*, 177 AD3d 472 [1st Dept 2019]). To the extent that defendant Starr Indemnity contends that the sidewalk is not part of the leased premises, or that a finding regarding same in the underlying matter is required before coverage may be determined, such claim is without merit as "the finding in the underlying personal injury action that the accident did not occur in the demised premises is not dispositive of the coverage issue" (*Public Serv. Mut. Ins. Co. v. Nova Cas. Co.*, 177 AD3d at 473 *quoting Paramount Ins. Co. v. Federal Ins. Co.*, 174 AD3d 476, 477 [1st Dept 2019]).

Consequently, plaintiff has established its entitlement to summary judgment (*see* NYSCEF Doc. No. 33 & 34). Defendant Starr Indemnity has failed to raise an issue of fact requiring trial sufficient to defeat the motion.

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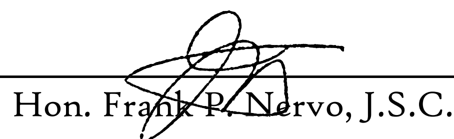
Accordingly, it is

ORDERED the motion is granted in its entirety; and it is further

ORDERED and ADJUDGED and DECLARED that plaintiff, Hip Wah Hing, shall have judgment in its favor as against defendant Starr Indemnity & Liability Company, and Starr Indemnity & Liability Company shall bear the costs to defend and indemnify Hip Wah Hing in the underlying matter captioned *Linda Chow v. Hip Wah Hing Realty Corp. et. al*. under New York Index No. 152210/2017, as an additional insured, in accordance with the Starr Indemnity policy number 1000365438151 and the lease agreement between Hip Wah Hing and Zhoh.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

DATED: DECEMBER 9, 2021 ENTER:



Hon. Frank P. Nervo, J.S.C.