

PEDRO MORAN-ALVARADO v. NEVADA COURT REALTY LLC

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

A-3443-12T3

PEDRO MORAN-ALVARADO,¹ Plaintiff,

v.

NEVADA COURT REALTY, LLC, and DUNKIN DONUTS, Defendants.

NEVADA COURT REALTY, LLC,

Third-Party Plaintiff-Appellant,

v.

EZ DONUTS, T/A DUNKIN' DONUTS, NEVADA MALL LAUNDROMAT and
TRAVELERS INSURANCE COMPANY,

Third-Party Defendants-Respondents,

and

M&M LANDSCAPING, Third-Party Defendant.

PEDRO MORAN-ALVARADO, Plaintiff,

v.

NEVADA COURT REALTY, LLC, and DUNKIN DONUTS, Defendants.

NEVADA COURT REALTY, LLC, Third-Party Plaintiff-Respondent,

v.

EZ DONUTS, T/A DUNKIN' DONUTS, NEVADA MALL LAUNDROMAT and M&M LANDSCAPING,

Third-Party Defendants,

and

TRAVELERS INSURANCE COMPANY,

Third-Party Defendant-Appellant.

June 27, 2014

Before Judges Simonelli, Fasciale and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9756-10.

Lane M. Ferdinand argued the cause for appellant (A-2630-12)/respondent (A-3443-12) Nevada Court Realty, LLC.

John M. Bowens argued the cause for appellant Travelers Insurance Company in A-3443-12 (Schenck, Price, Smith & King, LLP, attorneys; Mr. Bowens and Cynthia L. Flanagan, on the brief).

Gary N. Coutu argued the cause for respondent EZ Donuts, Inc. in A-2630-12 (Law Offices of William E. Staehle, attorneys; Michael A. Mourtzanakis, on the brief).

PER CURIAM

In these matters, which we consolidate for purposes of this opinion only, defendant/third-party plaintiff Nevada Court Realty, LLC (Nevada Court) owned and operated a strip mall in Newark and leased a portion of the premises to third-party defendant EZ Donuts, Inc. (EZ Donuts). Plaintiff Pedro Moran-Alvarado (plaintiff) filed a complaint against Nevada Court and EZ Donuts for injuries he allegedly sustained from a fall on snow and/or ice at the strip mall. Nevada Court filed a third-party claim against EZ Donuts for contractual indemnification and a third-party claim for insurance coverage against EZ Donuts' insurance carrier, third-party defendant Travelers Insurance Company (Travelers).

Nevada Court appeals from the April 13, 2012 Law Division order, which granted summary judgment to EZ Donuts and dismissed the contractual indemnification claim with prejudice. Travelers appeals from the January 25, 2013 order, which granted summary judgment to Nevada Court and required Travelers to provide insurance coverage to Nevada Court. We reverse both orders and remand for further proceedings.

Nevada Court's contractual indemnification and insurance coverage claims stem from its lease with EZ Donuts. The lease defined the leased "premises" as follows:

Approximately 2072 square feet inclusive of [EZ Donuts'] pro rata portion of the common auxiliary space which is part of [EZ Donuts'] building and the improvements on or to be built thereon (said premises, including the sidewalks, common auxiliary space, and said improvements are herein collectively called "Demised Premises" or "Premises") together with any and all easements, appurtenances, rights and privileges now or hereafter belonging thereto, including the right and easement to use the Common Area in common with other tenants of the Shopping Center.

The lease required EZ Donuts to maintain the premises. The indemnification provision is as follows:

[EZ Donuts] agrees to indemnify and save harmless [Nevada Court] from and against all liability, damage, penalties, judgments, or claims whatsoever by anyone in or about the Premises, except for the [willful] acts of [Nevada Court]. . . . This paragraph shall not apply if the liability arises from [Nevada Court's willful] failure to perform any covenants under this Lease to be performed by [Nevada Court].

. . . .

[Nevada Court] or its agents shall not be liable for any . . . injury or damage to persons or property resulting from any cause of whatsoever nature, . . . unless caused by or due to the gross negligence or willful misconduct of [Nevada Court]. [EZ Donuts] shall indemnify and save harmless [Nevada Court] against and from all liabilities, obligations, damages, penalties, claims, costs and expenses . . . paid, suffered or incurred as a result of any breach by [EZ Donuts] . . . or the carelessness, negligence or improper conduct of [EZ Donuts], . . . unless said liabilities, obligations, damages, penalties, claims, costs and expenses, . . . result from the gross negligence or willful misconduct of [Nevada Court]. . . . In case any action or proceeding is brought against [Nevada Court] by reason of any such claim and [Nevada Court] has not been grossly negligent or guilty of willful misconduct, [EZ Donuts] . . . will . . . defend such action or proceeding by counsel approved by [Nevada Court.]

[Nevada Court] is exempt from any and all liability for any damage or injury to person or property caused by or resulting from . . . ice or snow . . . unless said damage or injury be caused by or due to the gross negligence of [Nevada Court].

The lease also required EZ Donuts to obtain liability insurance "for and relating to the Premises," and name Nevada Court as an additional insured. Travelers issued a policy endorsement naming Nevada Court as an additional insured "but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [EZ Donuts]."

On December 24, 2008, plaintiff allegedly sustained injuries from slipping on snow and/or ice at the strip mall. He filed a complaint in November 2010. In April 2011, Nevada Court settled with plaintiff for \$85,000 without admitting negligence. Nevada Court and EZ Donuts then filed motions for summary judgment, which the trial court denied on February 10, 2012.²

Both parties subsequently filed motions for reconsideration. Prior to disposition of the reconsideration motions, plaintiff testified at his deposition that he "fell close to the grate or manhole. It's only about 6 meters away from [EZ] Donuts" (emphasis added).³ EZ Donuts argued that the indemnification provision did not apply because plaintiff fell in the parking lot, for which Nevada Court was purportedly responsible. Nevada Court argued that the indemnification provision applied because plaintiff was EZ Donuts' customer and fell about the premises en route to EZ Donuts near its entrance.

In granting summary judgment to EZ Donuts, the judge found that the indemnification clause was inoperative because there was no finding that any party was negligent. The judge also found it was unfair to bind EZ Donuts to the settlement between plaintiff and Nevada Court because EZ Donuts purportedly had no opportunity to mitigate its damages by contending that the settlement amount was unreasonable.

The judge also granted summary judgment to Nevada Court requiring Travelers to indemnify Nevada Court for the amount of the settlement with plaintiff. In failing to recognize that Travelers' indemnification exposure was coextensive with the scope of EZ Donuts' liability, the judge concluded that the lease had no bearing on Travelers' obligation to provide coverage under the additional insured policy endorsement.

On appeal, Nevada Court argues that the judge erred by granting summary judgment to EZ Donuts. Nevada Court maintains that the judge operated under the wrong premise by concluding that EZ Donuts' obligation to indemnify Nevada Court was triggered by a finding of negligence. It also contends the judge erred by finding that the settlement between plaintiff and Nevada Court deprived EZ Donuts of the opportunity to mitigate its damages thereby prejudicing EZ Donuts in its defense of Nevada Court's claim for contractual indemnification.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. *Nicholas v. Mynster*, 213 N.J.463, 477-78 (2013). Thus, we consider, as the trial judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007) (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J.520, 526 (1995)). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." *Massachi v. AHL Servs., Inc.*, 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. *Nicholas*, supra, 213 N.J. at 478.

Here, genuine issues of material fact defeat summary judgment to EZ Donuts. EZ Donuts' contractual indemnification obligations, and the amount of any indemnification payment under the lease, are dependent on resolution of factual disputes, such as: whether the accident occurred on or about the premises; the negligence percentage of the parties, including whether Nevada Court was solely, willfully, or grossly negligent; and whether the amount of the settlement was reasonable in light of the injuries plaintiff sustained. These disputed factual issues should be resolved in Nevada Court's third-party action against EZ Donuts.

Plaintiff alleged in his complaint that he sustained injuries as a result of the negligence of Nevada Court and EZ Donuts. Presumably these parties allowed dangerous conditions to exist on or about the "premises." The lease with EZ Donuts defines the premises, in part, as "the sidewalks, common auxiliary space, . . . and all easements, appurtenances, . . . including the right and easement to use the common area in common with other tenants of the shopping center." Although, there was no finding made regarding whether plaintiff fell on or about the "premises," we must give Nevada Court the benefit of all reasonable inferences at this point. Plaintiff gave deposition testimony that he fell "close" to a "grate or manhole." On this record, it is unknown whether this ambiguous description constitutes on or about the "premises." The location of the fall is important because if it's on or about the "premises," then EZ Donuts arguably may have an obligation under the terms of the lease to provide contractual indemnification to Nevada Court. EZ Donuts contends that the accident happened in the parking lot, not on the "premises".⁴ Nevada Court disputes EZ Donuts' contention. The judge made no findings about the location of the fall. Rather, the judge focused on the lack of negligence findings due to Nevada

Court's settlement with plaintiff. This rationale essentially amounted to a ruling that EZ Donuts was otherwise entitled to summary judgment as a consequence of Nevada Court's settlement with plaintiff.

Pursuant to the lease, EZ Donuts must indemnify Nevada for EZ Donut's negligence, except if the liability arises from Nevada Court's sole, willful, or gross negligence. Assuming the accident happened on the "premises," before EZ Donuts must indemnify Nevada Court under the lease, there must be a determination made regarding the liability of the parties. Then, depending on that outcome, the judge can mold EZ Donuts' contractual liability exposure accordingly. To hold that the indemnification is inoperative because Nevada Court and plaintiff settled without resolving the apportionment of negligence would discourage settlements between injured plaintiffs and landlord/owners. Nevada Court simply capped its damages by settling with plaintiff; the settlement does not automatically eliminate EZ Donuts' potential contractual liability exposure. Finally, EZ Donuts can mitigate its damages during the trial by contending that the settlement amount was unreasonable.

On Travelers' appeal from the order requiring it to indemnify Nevada Court for the settlement with plaintiff, Travelers argues primarily that: (1) the additional insured endorsement does not provide coverage to Nevada Court for Nevada Court's own negligence; and (2) the judge erred by concluding that there was insurance coverage "irrespective of the involvement of EZ [Donuts]." We conclude that the judge granted summary judgment to Nevada Court prematurely.

Travelers indemnification exposure is coextensive with the scope of EZ Donuts' liability. EZ Donuts' obligation to contractually indemnify Nevada Court is based on the lease. Under the lease, EZ Donuts must indemnify Nevada Court for EZ Donut's liability, not Nevada Court's liability (that is, so long as the accident was not the result of Nevada Court's sole, gross, or willful negligence). Travelers' obligation to indemnify Nevada Court for the amount of the settlement with plaintiff depends then on the liability apportionment to be determined after the trial in the contractual indemnification dispute between Nevada Court and EZ Donuts.

We have already addressed whether a tenant's insurance company is under a duty to provide indemnification to a landlord, as an additional insured, for an accident that occurred as a result of the landlord's sole negligence. In *Pennsville Shopping Center Corp. v. American Motorists Insurance Co.*, 315 N.J. Super.519, 521 (App. Div. 1998), certif. denied, 157 N.J.647 (1999), the tenant agreed to "indemnify [its] landlord from loss or liability for damages 'occurring on the demised premises except [for those] due to landlord's negligence.'" There, the tenant's customer sustained injuries as a result of a pothole in a parking lot. *Ibid.* The tenant bore no responsibility for the dangerous condition. *Id.* at 523. We held that the obligation of the tenant's insurance company to provide coverage to a named additional insured landlord "must be . . . coextensive with the scope of [the] tenant's own liability." *Ibid.*

Here, EZ Donuts must indemnify Nevada Court for any claims or damages occurring in or about the leased "premises." Summary judgment to EZ Donuts and Nevada Court was improper at this stage because: (1) there are disputed factual issues regarding whether the accident occurred on or about the leased "premises"; and (2) if yes, then whether the accident occurred due to Nevada Court's sole, gross, or willful negligence. Nevada Court would only be entitled to indemnification and insurance coverage for EZ Donuts' percentage. *Id.* at 523.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

1 Plaintiff is also referred to as Pedro Moran-Alvarado.

2 The parties have not provided the record of these summary judgment motions.

3 The parties dispute whether the location of the accident was on or about the "premises," an issue the judge did not specifically address.

4 Counsel for EZ Donuts produced a certification containing inadmissible hearsay from plaintiff's counsel stating that plaintiff "told me that . . . he fell on route to enter [EZ Donuts]."