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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 114338/2010
HSU, MICHAEL K.
vs.
MILLENNIUM PARTNERS LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: MAR 19 2012

_____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Michael K. Hsu,

Plaintiff (s),

-against-

Millennium Partners, LLC, Millennium Manageri, Inc., Millennium BPC Development, LLC, Millennium Partners Management, LLC, The Board of Managers of Millennium Point and The Ritz-Carlton Hotel Company, LLC,

Defendant (s).

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Millennium Partners, LLC, Millennium Manageri, Inc., Millennium BPC Development, LLC, Millennium Partners Management, LLC, The Board of Managers of Millennium Point and The Ritz-Carlton Hotel Company, LLC,

Third Party Plaintiffs,

-against-

Orion Mechanical Systems, Inc.

Third Party Defendant.

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DECISION AND ORDER
Index No.: 114338-10
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
590390-11

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Orion n/m (3212) (sep back) w/MEM affirm, MKM affid, exhs	1,2
Millennium opp w/SBC affirm, exhs	3
Orion reply w/MEM affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a personal injury action by Michael Hsu ("Hsu"). Issue was joined by

defendants Millennium Partners, LLC, Millennium Manageri, Inc., Millennium BPC Development, LLC, Millennium Partners Management, LLC, The Board of Managers of Millennium Point and The Ritz-Carlton Hotel Company, LLC ("Millennium"), all of which are jointly represented. Millennium has commenced a third party action against Orion Mechanical Systems, Inc. ("Orion") and Orion has answered. Orion now brings this pre-note of issue motion for summary judgment in its favor dismissing the third party complaint against it (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The motion is opposed only by the third party plaintiffs. Hsu has taken no position on the motion, though duly served.

Facts

The following facts are taken from Hsu's complaint:

Hsu was the resident of apartment 21A located at 10 West Street, New York, New York 10004 ("apartment"). He sustained personal injuries as a result of mold, fungus and allergen contaminants in his apartment after a pipe in his HVAC unit froze and burst. Hsu claims that he notified Millennium about a faulty latch on his bedroom window but that Millennium failed to make the needed repairs. Hsu claims that while he was away in January 2006 and during inclement weather, the latch on the window malfunctioned causing the window to fly open. Since it was very cold, the pipe in his bedroom HVAC froze and later burst open, causing a water incursion into his apartment. Hsu also alleges that although Millennium undertook remedial measures after the pipe burst, the steps they took were ineffective.

Hsu contends he later had a second leak in his apartment "due to a defective replacement pipe" installed by Orion and undertaken by Millennium as a remedial

measure. This second leak was slow and developed on or around November 2007. That leak went undetected for approximately five (5) days, allowing the growth of mold, fungus and other allergens in his apartment. He claims those contaminants caused injuries to his internal organs, and respiratory, neurological and gastrointestinal systems and that he is still suffering from those and other ailments.

In Millennium's complaint against Orion and in Orion's opposition to Millennium, certain other facts are set forth:

Following the January 2006 burst pipe incident, defendants' Regional Director of Residences sent Hsu a letter dated August 8, 2006. In that letter, defendant's regional director stated the following:

> "Recently management was notified by your insurance carrier that they would not be reimbursing the expense incurred as a result of the water leak and subsequent flood emergency from the burst pipe within your unit. As you are aware, management discovered that a window in your unit was open which created freezing conditions within your unit. As the heating valve was also shut off inside your unit, this resulted in the broken pipe and subsequent damages to other locations in the building ..."

In the Fall, defendants' Residence Liaison sent the residential unit owners at 10 West Street a notice about "preventative maintenance for AC/Heating Units within your home." The notice, dated October 4, 2006 ("service notice"), states that the condominium board "recommends" each owner have his or her HVAC unit serviced "to ensure that [the units] remain in proper working order." The service notice identifies Orion as "one option" to perform such service. A "Preventative Maintenance and Service Agreement" ("service agreement") was attached to the service notice. The

service agreement was prepared by Orion. The service agreement outlines the scope of the work, frequency of service and price structure. The service notice also provides that: "this agreement is between the residential unit owner and Orion Mechanical Systems. All payments will be made directly to Orion. There are other options available for preventative maintenance services. The Condominium Board, Residential Board and the Management Company can accept no liability for service provided or consequential damage." The rest of the service notice reminds the unit owner of the consequences of not properly maintaining his or her unit properly and cautions that "failure to maintain the unit can result in damage and costly repairs which would be the responsibility of the unit owner..."

After receiving a service estimate, and by agreement dated September 26, 2007, Hsu hired Orion to replace his HVAC unit at a cost of $5,650.00 plus tax. The work was scheduled to be performed while Hsu was away. According to the sworn of affidavit of Michael K. Matura, Orion's owner, the first step, installation of new isolation valves, took place on November 1, 2007. When Hsu returned to his apartment on November 11, 2007, he discovered a water leak that had caused his floor to buckle and other damage. Upon being notified of this condition, Orion immediately sent a technician to fix the unit, but the technician was turned away. Hsu then filed a claim with Orion's insurance provider sometime in November 2007 and Orion's insurance provider settled Hsu's claim by paying Hsu the sum of $120,000.00. In exchange, Hsu signed a release discharging Orion from:

> any and all claims, actions, demands, rights, damages, costs, loss of service, expenses, and compensation whatsoever, which the undersigned now has/have or

> which may hereinafter accrue on account of in or any way growing out of any and all known, unknown, foreseen or unforseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident/ incident, casualty or event which occurred on the 11th day of November in the Year 2007 at or near 10 West St. Apt 21A, New York, New York 10004.
> (*emphasis in original*)

The 3rd party action by Millennium against Orion is for "common law indemnity and/or contribution" (1st cause of action) and "judgment over" for the whole of any judgment or verdict against Millennium (2nd cause of action).

Arguments

Orion and Millennium have very different views about what may have caused the mold condition that Hsu claims exists in his apartment. Millennium denies that the mold, fungus and allergens later discovered were proximately caused by its failure to repair the allegedly defective window latch in or about January 2006. According to Millennium, it is the second leak, caused by Orion and discovered by Hsu in November 2007, that is the sole proximate cause of the moldy conditions. Thus, Millennium states that it was not negligent, but if the jury finds it is liable to plaintiff, then Orion must indemnify it for 100% of any damages awarded.

Millennium contends this motion for summary judgment is premature because there has been no discovery. Millennium argues that, given Hsu's claims of extensive physical injuries, Orion may have entered into this settlement agreement with Hsu in bad faith. Millennium argues it is not the "owner" of the premises (i.e. apartment 21A) but merely the managing agent, therefore, it is not vicariously liable for negligent acts by

Orion.

Orion argues that it is entitled to summary judgment dismissing Millennium's complaint against it because Hsu has released Orion and therefore, the provisions of GOL 15-108 apply. Orion points out that since there is no contractual agreement between itself and Millennium, Millennium cannot maintain a direct action for contractual indemnification against it.

Discussion

When a cause of action for indemnification is asserted, there must be a contract expressly providing for indemnification or an implied right of indemnification. Since there is no contract between Orion and Millennium, Millennium's claim can only be for implied or "common law" indemnification. Under principles of common law indemnification, "one who has been compelled to pay for the wrong of another [is permitted] to recover from the wrongdoer the damages it paid to the injured party" (D'Ambrosio v. City of New York, 55 N.Y.2d 454, 460, 450 [1982]; 17 Vista Fee Associates v. Teachers Ins. and Annuity Ass'n of America, 259 A.D.2d 75 [1st Dept 1999]). "[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee. . ." consequently, "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (Richards Plumbing & Heating Co., Inc. v. Washington Group Intern., Inc., 59 A.D.3d 311, 312 [1st Dept. 2009] internal citations omitted).

"[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee. . ." consequently, "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the

doctrine" (Richards Plumbing & Heating Co., Inc. v. Washington Group Intern., Inc., 59 A.D.3d 311, 312 [1st Dept. 2009] internal citations omitted). Given the facts of this case, Millennium does not qualify for common law indemnification. This is not a situation where Millennium could be found legally responsible though not actually negligent, i.e. vicariously liable because it did not hire Orion or have the typical kind of relationship that would lead to vicariously liability (compare Guzman v. Haven Plaza Housing Development Fund Co., Inc., 69 N.Y.2d 559 [1987]).

Although Millennium argues that the sole, proximate cause of Hsu's damages is Orion's negligence, this is a triable issue of fact. Typically, if a jury decides a party is not liable, then no damages are awarded. On the other hand, if the jury finds that co-defendants are liable to the plaintiff, Article 14 of the CPLR applies, allowing "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death" to "claim contribution among them. . ." CPLR § 1401, however, culls out an exception for situations falling under GOL § 15-108 where, as here, a defendant has settled with the plaintiff.

GOL § 15-508 [a] provides that when a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons "liable or claimed to be liable in tort for the same injury"or the same wrongful death, the release or covenant does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, "but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil

practice law and rules, whichever is the greatest." GOL § 15-508 [b] further provides that the "release be given in good faith by the injured person" and if it is, then the tortfeasor is released from liability to any other person for contribution under Article 14 of the CPLR and, conversely, the released tortfeasor cannot seek contribution from the others (GOL § 15-508 [b] and [c]). Thus, neither contribution nor common law indemnification is available to Millennium.

At trial, Millennium, as the non-settling party, will have the burden of establishing Orion's fault for purposes of apportionment (Schipani v. McLeod, 541 F3d 158 [C.A. 2 (NY) 2008]). There are specific jury instructions for that situation (PJI 2:275A Liability Over-- Apportionment of Fault--Effect of Release-- Before Trial). The instructions allow the jury to consider the nature and extent of the released tortfeasor's fault, though it is no longer --or never was-- a party to the action and then apportion the damages awarded (Driscoll v. New York City Transit Authority, 53 A.D.2d 391 [1st Dept 1976]). The payment made by the settling tortfeasor is applied (offset) against the amount of the verdict awarded against the non-settling defendant (Whalen v. Kawasaki Motors Corp., 92 N.Y.2d 288 [1998]).

Another argument advanced by Millennium is that GOL § 15-108 [b] imposes a requirement that the release be made in "good faith." Millennium seeks discovery to determine whether the release was entered into in good faith. Millennium argues that it has the right to challenge the release and if it can prove bad faith, then the release is ineffective (see Gregory v. Garrett Corp., 578 F.Supp. 890 [SDN.Y. 1983]).

The requirement of good faith is to insure that "the injured party will not collusively release one wrongdoer for a small amount in return for the promise of that

wrongdoer to cooperate improperly with the injured person in an attempt to extract from the remaining wrongdoers more than the equitable share of damages attributable to them" (Friend v. Dibble, 124 Misc.2d 151, 153 [Sup Ct., Sullivan Co. 1984]; also Franzek v. Calspan Corp., 78 A.D.2d 134 [2nd Dept 1980]; Torres v. State, 67 A.D.2d 814 [4th Dept. 1979]).

Assuming, without deciding, that Millennium has standing to challenge to the release, the only allegation made by Millennium that it may have been the product of bad faith, is that the $120,000 settlement is too low. The settlement was achieved by the insurance company and Hsu, after Hsu threatened legal action and there are no facts that Hsu colluded with Orion or even that the "low" settlement will prejudice Millennium in any way. The settlement amount does not cry out as being an unusually low amount and Millennium has failed to raise a triable issue of fact that it is.

Orion has met its burden of making a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Orion has established that Millennium's third-party action for contribution and judgment over is statutorily barred by GOL § 15–108 [b] (Williams v. New York City Transit Authority, 9 A.D.3d 308 [1st Dept 2004]). Orion has also proved that the settlement and release absolves Orion from any possible liability to plaintiff or Millennium. In opposition, Millennium has not demonstrated the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Santiago v. Filstein, 35 AD3d 184 [1st Dept 2006]). Hsu's claim against Millennium remains to be tried. At trial, Millennium may defend the

case upon the grounds that blame should be placed wholly or partially on the settling defendants and it will be given the opportunity to prove facts that require the jury to apportion damages between it and Orion (Blasch v. Chrysler Motors Corp., 93 A.D.2d 934 [3rd Dept. 1983]). The 3rd party action cannot proceed and must be dismissed. Therefore, Orion's motion for summary judgment is granted dismissing the third party complaint.

Conclusion

It is hereby

ORDERED that Orion's motion for summary judgment is granted for the reasons stated; and it is further

ORDERED that the clerk shall enter judgment in favor of 3rd party defendant Orion Mechanical Systems, Inc. against 3rd party defendants Millennium Partners, LLC, Millennium Manageri, Inc., Millennium BPC Development, LLC, Millennium Partners Management, LLC, The Board of Managers of Millennium Point and The Ritz-Carlton Hotel Company, LLC, dismissing the 3rd party complaint; and it is further

ORDERED that any relief not specifically addressed is hereby denied; and it is further

ORDERED this constitutes the decision and order of the court.

Dated: New York, New York
March 19, 2012

So Ordered:

Hon. Judith J. Gische, JSC