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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Index Number : 113137/2008
ANABLE, RICHARD
vs.
PUBLIC STORAGE PROPERTIES
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 determined in accordance with the accompanying decision/order.



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

Dated: 5/17/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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RICHARD ANABLE,

Plaintiff,

- against-

PUBLIC STORAGE PROPERTIES XIV, INC., PUBLIC STORAGE PROPERTIES XIV, LTD., PUBLIC STORAGE, INC., AND STURGARD STORAGE CENTERS, LLC,

Defendants.

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PUBLIC STORAGE, AS SUCCESSOR IN INTEREST TO PUBLIC STORAGE, INC., AND STURGARD STORAGE CENTERS, LLC ,

Third-Party Plaintiffs,

- against-

ECOLAB, INC.,

Third-Party Defendant.

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Index No.: 113137/08
Submission Date: 2/1/2012

**DECISION AND ORDER**

Third-Party Index No.: 590908/10



| For Plaintiff: | For Defendants/Third-Party Plaintiffs: | For Ecolab, Inc.: |
|---|---|---|
| Talisman & Delorez, P.C. | Cullen and Dykman, LLP | Dobis, Russell & Peterson, P.C. |
| 409 Fulton Street | 177 Montague Street | 7 Elk Street, Lower Level |
| Brooklyn, NY 11201 | Brooklyn, NY 11201 | New York, NY 10007 |

Papers considered in review of this motion for summary judgment:

Notice of Motion . . . . . 1
Aff in Opp . . . . . 2
Reply Aff. . . . . 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, third-party defendant Ecolab, Inc. ("Ecolab") moves for summary judgment dismissing the third-party complaint.

On November 6, 2007, plaintiff Richard Anable ("Anable"), an Ecolab employee, was injured when, in the course of his employment with Ecolab, he opened the roll-down door of a self-storage unit rented by Ecolab from the owners of a storage facility, defendants Shurgard Storage Centers, LLC ("Shurgard") and Public Storage.

The lease agreement for the subject self-storage unit provided, in relevant part,

> Owner does not have any obligation to carry insurance on Occupant's property stored in the Storage Unit. If Occupant wishes to have his property covered by insurance, Occupant must obtain separate coverage. Owner will not be responsible or otherwise liable, directly or indirectly, for loss or damage to the property of Occupant due to any cause, including fire, explosion, theft, vandalism, wind or water damage, any defect, whether known or subsequently created or discovered, in the Storage Unit, or acts or omissions of any third party, regardless of whether such loss or damage may be caused or contributed to by the negligence of Owner, its agents or employees.
>
> Owner shall not be liable for any injury sustained by Occupant or others from any defects, known or subsequently discovered or created, in the Storage Unit or Self-Storage Center, or caused by any condition existing near or about the Storage Unit or the Self-Storage Center, or resulting from the acts or omissions of Occupant.
>
> Occupant agrees to indemnify and hold Owner harmless from and against any and all claims, damages, costs and expenses, including attorneys' fees arising from or in connection with Occupant's use of the Storage Unit, Occupant's presence on the Self-Storage Center premises or anything done in the Storage Unit or Self-Storage Center by Occupant or Occupant's agents, employees or invitees resulting in damage or injury to person or property of Occupant or of any other party or to any Storage Unit or part of the Self-Storage Center.

The Agreement also gave the Customer the option of participating in the customer storage insurance program, whereby the Customer could purchase insurance from the Owner for theft coverage.

According to Public Storage district manager Frank Ward, occupants of the storage units did not owe any duty to make repairs on the units. Rather, Public Storage was responsible for all repairs.

Anable commenced an action against Public Storage and Shurgard seeking to recover damages for the injuries he sustained to his shoulder, alleging that the roll-down door was a hazardous condition of which Shurgard and Public Storage had notice.[1]

Public Storage and Shurgard then commenced a third-party action against Ecolab, claiming that pursuant to the lease agreement for the subject storage unit, they were not liable for any injury sustained by Ecolab from any defects known or subsequently discovered or created. They further alleged that pursuant to the lease's indemnification clause, Ecolab agreed to indemnify and hold them harmless from and against any and all claims, damages, costs and expenses arising from or in connection with Ecolab's use of the storage unit, including anything done resulting in damage or injury to Ecolab. They asserted claims for (1) contractual indemnity for any judgment against Public Storage and Shurgard and all attorneys fees, costs and disbursements; (2) contractual indemnity for their costs incurred in the main action and third party action; (3) negligence, claiming that the dangerous condition was created and permitted to exist by Ecolab; and (4) negligence, claiming that if Anable sustained damages by reason other than his own carelessness and

[1]Anable received workers' compensation benefits from Ecolab's carrier for this injury.

negligence, then the damages were caused by Ecolab's negligence, carelessness or breach of law, contract statute or ordinance.

Ecolab now moves for summary judgment dismissing the third party complaint, alleging that (1) it owed no duty to maintain the roll-down door on premises owned and operated by Shurgard and Public Storage and there is no evidence that any negligence on its part caused the defects in the roll-down door; (2) the indemnification language in the lease is unenforceable pursuant to General Obligations Law §5-321; and (3) because the indemnity language is unenforceable and Anable did not suffer a grave injury, all third party claims against Ecolab are barred by Workers Compensation Law §11.

In opposition, Shurgard and Public Storage argue, *inter alia*, that (1) no evidence was presented that Shurgard and Public Storage had notice of any problem with the subject roll-down door; (2) the lease was the subject of arms length negotiations by sophisticated parties and contained insurance provisions and thus, falls under an exception to General Obligations Law §5-321; (3) Workers Compensation Law §11 does not bar the claim because Ecolab entered into a written contract to indemnify Shurgard and Public Storage; and (4) because Ecolab employees undertook to make repairs to the subject door in the time period prior to the subject accident, Ecolab undertook a duty of care, launched a force or instrument of harm and thus, may be liable for the dangerous condition of the door that caused Anable's injuries.

In reply, Ecolab first argues that the insurance provisions in the lease do not bring the lease under the exception to General Obligations Law §5-321 because they only contemplate insurance in regard to the renter's property in the unit, not liability insurance for the benefit of the public. Further, no evidence has been presented that this was an arms length negotiation by sophisticated parties. Rather, the lease was a pre-printed form drafted by Shurgard with no negotiation.

Ecolab further contends that the claims are barred by Workers' Compensation Law §11 even if there was a valid indemnity agreement because the only claims that are excepted from being barred by that section are claims for contribution and indemnification based on a valid written contract. Therefore, the negligence claims are barred even if the indemnification provision is valid. Regardless, the indemnification claims are barred because the indemnity provisions are void under General Obligations Law §5-321.

Finally, Ecolab maintains that regardless of any alleged factual disputes in this case, the negligence claims asserted against it must be dismissed pursuant to Workers' Compensation Law §11 because there was no grave injury in this case.

**Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the

opposing party who must then demonstrate 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).

Contractual Indemnification Claims

General Obligations Law §5-321 provides, "every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable."

If the purpose of an indemnification clause in a lease is to exempt the landlord from liability to the victim for its own negligence, it violates General Obligations Law § 5-321. However, a lease negotiated between two sophisticated parties which includes a broad indemnification provision, coupled with an insurance procurement requirement, is enforceable. In other words, where a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law §5-321 does not prohibit indemnification. *Gary v. Flair Beverage Corp.*, 60 A.D.3d 413 (1st Dept. 2009); *Mendieta v 333 Fifth Ave. Assn.*, 65 A.D.3d 1097 (2nd Dept. 2009).

Here, there was no agreement to use insurance to allocate the risk of liability to third parties between Public Storage/Shurgard and Ecolab. The only mention of insurance in the agreement was in the option given to Ecolab to obtain insurance against theft of its property stored in the storage unit. There was no mention of procurement of liability insurance. Further, the terms of the lease agreement purport to excuse Public Storage and Shurgard from liability for any claims. Therefore, the broad indemnification provision in the lease, which is not limited to Ecolab's acts or omissions, fails to make exceptions for Public Storage or Shurgard's negligence, and does not allocate the risk of liability to third parties between Public Storage/Shurgard and Ecolab, is unenforceable pursuant to General Obligations Law § 5-321. *See Hadzihasanovic v 155 E. 72nd St. Corp.*, 70 A.D.3d 637 (2nd Dept. 2010); *Colosi v. RATL, LLC*, 7 A.D.3d 558 (2nd Dept. 2004). As such, the two contractual indemnification claims asserted against Ecolab are dismissed.

Negligence Claims

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Wayburn v. Madison Land Ltd. P'ship*, 282 A.D.2d 301 (1st Dept. 2001). Here, the evidence presented establishes that Ecolab owed no duty to repair the subject roll-down door, rather, Public Storage/Shurgard was responsible for making repairs to the storage units.

Public Storage/Shurgard attempt to raise an issue of fact by arguing that Ecolab assumed a duty of care, which it then breached, by launching a force or instrument of harm when it undertook to put the storage unit door back on its track on several occasions prior to the incident. However, no evidence has been presented to establish that by doing so, Ecolab in any way launched a force or instrument of harm, or caused or created any defect in the subject roll down door. *See generally Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 (2002). Therefore, the two negligence claims asserted against Ecolab are dismissed.

In accordance with the foregoing, it is hereby

ORDERED that third-party defendant Ecolab, Inc.'s motion for summary judgment dismissing the third-party complaint is granted, the third-party complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
May 17, 2012

ENTER:



Saliann Scarpulla, J.S.C.