

Industrial Risk Ins. v 715 Lexington Ave. LLC

2012 NY Slip Op 32839(U)

November 19, 2012

Sup Ct, New York County

Docket Number: 107757/09

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

Index Number : 107757/2009
INDUSTRIAL RISK INSURERS
vs.
715 LEXINGTON AVENUE
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. 107757/09
MOTION DATE 2/1/12
MOTION SEQ. NO. 006

The following papers, numbered 1 to 27, were read on this motion to/for Sj motion
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo y/c on No(s). 1-9
Answering Affidavits — Exhibits X motion No(s). 10-21
Replying Affidavits + opposition papers (?) X motion No(s). 22-27

FILED

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

NOV 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: 11/19/12

JOAN M. KENNEY, J.S.C.
J.S.C.

- 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
NEW YORK COUNTY: IAS PART 8
INDUSTRIAL RISK INSURER a/s/o NEW YORK
& COMPANY, INC.,

INDEX NO. 107757/09

Plaintiff,
-against-

715 LEXINGTON AVENUE LLC, ALES GROUP USA,
INC. and GATEWAY ENTERPRISES, INC.,

Defendants

GATEWAY ENTERPRISES, INC.,
Third-Party Plaintiff,

THIRD-PARTY
Index No. 590962/10

-against-

DGA SECURITY SYSTEMS, INC.,

Third-Party Defendant

DGA SECURITY SYSTEMS, INC.,
Fourth-Party Plaintiff,

FOURTH-PARTY
Index No. 590304/11

-against-

ARCTIC ELECTRIC CORP.,

Fourth-Party Defendant

LERNER NEW YORK, INC. d/b/a NEW YORK
& COMPANY,

Plaintiff,

Index No.: 108068/09

-against-

ALES GROUP, USA INC., GATEWAY
ENTERPRISES, INC. and JOHN DOES 1-99,

Defendants

JOAN M. KENNEY, J.:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

In this action for subrogation, motion sequence numbers 005, 006, 007, 008, 009, and 010 are consolidated for disposition.

Pursuant to a court order, dated July 16, 2010 and entered July 21, 2010 (Tingling, J.), *Industrial Risk Insurers a/s/o New York & Company, Inc. v 715 Lexington Avenue LLC, Ales Group USA, Inc and Gateway Enterprises Inc.* (index No. 107757/09) (Industrial Risk Action) and *Lerner New York, Inc. d/b/a New York & Company v Ales Group USA Inc., Gateway Enterprises Inc., and John Does 1-99* (index No. 108068) (Lerner Action) are consolidated for joint trial.

In motion sequence numbers 005, defendant Gateway Enterprises, Inc. (Gateway) moves

in the Lerner Action, pursuant to CPLR 3212, for an order dismissing the complaint as against it. Plaintiff Lerner New York, Inc. d/b/a New York & Company (Lerner) cross-moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor.

In motion sequence number 006, defendant Gateway Enterprises, Inc. (Gateway) moves in the Industrial Risk Action, pursuant to CPLR 3212, for an order dismissing the complaint as against it.

In motion sequence number 007, defendant Ales Group USA, Inc. s/h/a Ales Group, USA, Inc. (Ales), moves in the Industrial Risk and Lerner Actions, pursuant to CPLR 3212, for: (a) an order dismissing both complaints and all cross claims as against it, and (b) in the alternative, for an order granting summary judgment to Ales on its cross claims against Gateway.¹

In motion sequence number 008, third-party defendant DGA Security Systems, Inc., moves, pursuant to CPLR 3212, for an order dismissing third-party claims against it.

In motion sequence numbers 009 and 010, in the Industrial Risk Action, defendant 715 Lexington Avenue LLC (715 Lexington) moves, pursuant to CPLR 3212, for: (a) an order dismissing the complaint and the cross-claims of Ales and DGA, and (b) granting summary judgment in favor of 715 Lexington on its claims against Ales for conditional order of indemnity including costs and

¹ Pursuant to a local rule, Ales may not move with one set of papers, seeking relief in both actions, because the Industrial Risk and Lerner Actions are only joined for trial and not fully consolidated (*see* the website of the New York County Supreme Court, Civil Branch, under "Courthouse Procedure," section "Motions/Proceedings on Notice," sub-section B, "Motions Made in More than one Case on a Single Set of Papers" [http://www.courts.state.ny.us/supctmanh/motions_on_notice.htm]). Accordingly, Ales motion is considered only as it pertains to the Industrial Risk Action.

attorneys' fees incurred by 715 Lexington in the defense of this action.²

BACKGROUND

715 Lexington is the owner, and nonparty Vornado Office Management LLC (Vornado) is the managing agent,³ of a three-story retail building located at 715 Lexington Avenue, New York, New York (the Building). Lerner, a women's apparel retailer, is a tenant occupying the basement, first, and second floors of the Building (Lerner Space). Plaintiff Industrial Risk Insurer (Industrial Risk) is the property insurance policy carrier and the subrogee for Lerner.

Ales d/b/a Phyto Universe, a cosmetic company, is a tenant occupying the third floor of the Building (Ales Space). Ales moved into the Building after Lerner. Ales retained nonparty SUK Design Group (SUK), an architectural company, to prepare plans for "build-out" of the Ales Space (the Project). SUK retained Gateway to act as the general contractor on the Project. DGA, a security contractor, was retained to install a security system (the Security System) for the Ales Space. DGA retained fourth party defendant Arctic Electric Corp (Arctic), an electrical sub-contractor for installation of the Security System.

On June 9, 2006, while work on the Project was ongoing, flooding occurred in the Ales Space. Water, which emanated from the pipes (the Pipes) located in a mechanical room of the Ales Space, penetrated into, and caused damage to, the Lerner Space (the Incident). The Pipes in question did not burst. Rather, water emanated from the Pipes' open valves.

² It appears that 715 Lexington seeks identical relief in motion sequence numbers 009 and 010.

³ It appears that 715 Lexington was organized by Vornado (Wallace Dep. Tr., at 130). Vornado Realty Trust is the general partner of Vornado Realty, LP, which, in turn, is a member of 715 Lexington (see Wallace Dep. Tr., Errata Sheet).

At the time of the Incident, an insurance policy issued by Industrial Risk to Lerner (the Policy) was in effect. Pursuant to the Policy, Industrial Risk paid Lerner \$185,000 for losses resulting from the Incident.

Industrial Risk Action

Industrial Risk is subrogated to the rights of Lerner as against 715 Lexington, Ales, and Gateway (together, Defendants), and seeks the award of \$185,000 as against Defendants. Industrial Risk asserts three causes of action: (1) as against Defendants, for negligence; (2) as against Defendants, for strict liability; and (3) as against 715 Lexington, for breach of a lease agreement.

715 Lexington cross-claimed against Ales and Gateway for common-law indemnification and contribution. Ales cross-claimed: (1) as against 715 Lexington and Gateway, for common-law indemnification; (2) as against Gateway, for contractual indemnification; and (3) as against Gateway, for indemnification pursuant to an insurance policy that Gateway was obligated to obtain. Gateway cross-claimed against 715 Lexington and Ales for contribution.

Gateway impleaded DGA. DGA counterclaimed against Gateway for indemnification and contribution. DGA cross-claimed against 715 Lexington and Ales for contribution and indemnification. DGA, in turn, impleaded Arctic, which has not appeared in this action. It appears that Arctic is no longer in business.

Lerner Action

In the amended complaint, Lerner alleges that, as a result of the Incident, it suffered property and merchandise damage in the amount of \$196,412.76, lost business due to the store closure from June 9, 2006 to June 17, 2000, and paid a deductible of \$36,412.76 to its insurer, Industrial Risk (02/08/12 Cowan Aff., exhibit 2, Amended Complaint, ¶¶ 11-14). Lerner alleges two causes of

action: (1) as against Ales, for negligence, and (2) as against Gateway, for negligence.

Ales cross-claimed against Gateway for common-law and contractual indemnification, as well as for indemnification under an insurance policy that Gateway was obligated to obtain (*id.*, exhibit 3, Ales Answer, ¶¶ 19-24). Gateway cross-claimed against Ales for contribution (*id.*, exhibit 4, Gateway Answer, ¶ 10).

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]).

715 Lexington's Motion

Industrial Risk asserts three causes of action against 715 Lexington: (1) for negligence; (2) for strict liability; and (3) for breach of a lease agreement.

Negligence

"In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury" (*Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *aff'd* 89 NY2d 824 [1996]).

715 Lexington argues that it is an out of possession landowner and, as such, did not owe a

duty to Lerner.

In the bill of particulars, Industrial Risk states that the Incident occurred as follows: "Upon information and belief, [Gateway] was performing renovation work in the premises located on the third floor, which was to be occupied by [Ales]. As a result of work performed by Gateway, water was caused to emit from the premises, causing damage to the plaintiff's subrogor's premises" (*see* 10/06/11 Kazansky Aff., exhibit J, Plaintiff's Bill of Particulars, ¶ 8). Furthermore, Industrial Risk describes the acts of commission or omission by 715 Lexington constituting negligence as follows:

"[715 Lexington], its agents, servants and/or employees were negligent and careless in that they negligently and carelessly failed and neglected to maintain, inspect or repair the premises of the third floor of the [Building], such that water was caused to emit; they neglected to repair, replace and maintain the premises; they failed and neglected to inspect the system in the premises; they failed and neglected to supervise the work performed in the premises owned by [715 Lexington], such that water was caused to emit from the premises"

(Plaintiff's Bill of Particulars, ¶ 9).

Industrial Risk's claim that 715 Lexington negligently failed to maintain, inspect, or repair the Ales Space and the water system located within the Ales Space is undermined by the undisputed fact that the Incident was not caused by a defect. No issue of fact exists that the water escaped as a result of someone opening, or forgetting to close, a water valve, and not as a result of broken or burst pipes (*see* 10/06/11 LoGuercio Aff., ¶¶ 10-18; Gueli Dep. Tr., at 32, 95-96; Wallace Dep. Tr., at 163; *see also* exhibit S, NYPD Complaint Report, at 1 [the job supervisor discovered water pipes turned on]; *see also* exhibit T, 06/09/06 Vornado Security Report, at 2 ["Nature of Injury/Property Damage: water damage due to a valve being opened"]).

Andrew LoGuercio (LoGuercio), Vornado's engineer assigned to assist with engineering

issues at the Building, states in his affidavit that, on June 9, 2006, he was informed by a Gateway employee about flooding (*see* 10/06/11 Kazansky Aff., exhibit AA, 10/06/11 LoGuercio Aff., ¶¶ 4,9). LoGuercio states that when he arrived at the Building, he saw that water was escaping from a pipe within the Ales Space “due to an opened valve on the pipe” (*id.*, ¶ 10-12). He closed the valve, and the water flow stopped (*id.*, ¶ 13). LoGuercio continues, “Upon my inspection, there was no structural defect which caused the leak”, and “there was no damage to any structural portion of the building which caused the leak” (*id.*, ¶¶ 14, 15). “The leak was not the result of any defective condition which needed repairs” (*id.*, ¶ 16). Accordingly, Industrial Risk’s claim of 715 Lexington’s failure to properly maintain and repair the premises is inapplicable here, because the Incident was not caused by a defect that could have been repaired beforehand.

Even if the Incident can be attributed to a defective water valve or piping, the Ales Lease explicitly provides that 715 Lexington is not responsible “to maintain or repair the systems within [the Ales Space] that distribute within the [Ales Space] electricity or water” (Ales Lease, Article 9, § 9.1 [emphasis added]).

Industrial Risk’s other claim is that 715 Lexington “failed and neglected to supervise the work performed in the premises owned by [715 Lexington]” (Plaintiff’s Bill of Particulars, ¶ 9). The Project involved the build-out of the Ales Space. Under the Ales Lease, the Project was considered “Initial Alterations,” defined as “the Alterations to prepare the Premises for Tenant’s initial occupancy” (Ales Lease, § 8.1 [C]). The Ales Lease provided that “[i]n connection with the performance of the Initial Alterations, Landlord hereby approves the contractors, subcontractors and mechanics listed on Exhibit 8.9 attached hereto and made a part hereof” (Ales Lease, § 8.9; *see also* Exhibit 8.9 [containing lists of general contractors and subcontractors approved by 715 Lexington]).

Ales Lease, however, does not provide that 715 Lexington is responsible for supervision of work performed as part of the Initial Alterations.

Additionally, LoGuercio in his affidavit states that “[n]o one on behalf of 715 Lexington Avenue, LLC directed, supervised, or controlled any aspect of the build-out at 715 Lexington Avenue, New York, New York” (LoGuercio Aff., ¶ 8). Similarly, Richard Wallace (Wallace), Vornado’s property manager for the Building from 2005 to 2007, testified that Vornado’s involvement in the Project was limited only to those items that effected the common areas of the Building, access to the roof, and installation of Ales’s signage/sign (*see* 10/06/11 Kazansky Aff., exhibit M, Wallace Dep. Tr., at 31-32).

Accordingly, 715 Lexington has met its prima facie burden of showing that it was not responsible for maintenance and repair of the Ales Space and the water distribution system within the Ales Space, and it was also not responsible for supervision of Gateway’s or subcontractors’ work on the Project. In opposition, Industrial Risk contends that 715 Lexington’s negligence consisted of allowing the Ales Space to be improperly secured, or in permitting the keys to be used to gain access to the Premises and to cause the Incident. Industrial Risk, however, did not advance these theories of liability either in the complaint or in the bill of particulars.

Even if the court were to consider these news claims, 715 Lexington offered testimony of Wallace that (a) 715 Lexington did not provide any keys to the Building or the Ales Space to Gateway Construction (Wallace Dep. Tr., at 148, 154) and that (b) it was the contractor’s responsibility to lock and secure the Ales Space at the end of a workday (*id.* at 58).

Industrial Risk has failed to raise an issue of material fact with respect to its original claims stated in the complaint and the bill of particulars, as well as with respect to its new theories of

[and], at best, the proximate cause of the incident was the criminal intervening acts of unknown third parties” (*id.*).

However, Ales’s contention that there are several possible causes for the Incident does not entitle it to summary judgment. If Ales is indeed conceding that it failed to supervise the work of Gateway, then Ales needs to demonstrate that its failure did not proximately caused the Incident. If Ales claims that it adequately supervised Gateway,⁴ then Ales needs to show that the level of supervision that it provided was not a proximate cause of the Incident (*cf. Figueroa v Castillo*, 34 AD3d 353, 354 [1st Dept 2006] [on a motion for summary judgment in a motor vehicle accident case, defendant submitted deposition transcripts and medical reports, thereby establishing “additional contributing factors, interrupting the chain of causation between the subject accident and claimed injury”]; *see also Savastano v PM Amusements*, 47 AD3d 792, 793 [2d Dept 2008] [on a motion for summary judgment, defendants school district and amusement park established that any breach of a duty of care that they owed the infant plaintiff did not proximately caused his injury]).

Ales has not made a prima facie entitlement to judgment as a matter of law, and its motion is denied (*see e.g. Pirrelli v Long Is. R.R.*, 226 AD2d 166, 167 [1st Dept 1996]).

Ales is not moving, or presents no arguments, with respect to Industrial Risk’s cause of action for strict liability. However, on searching the record, pursuant to CPLR 3212 (b), the court finds no basis for the cause of action for strict liability, which is dismissed (*see JMD Holding Corp.*,

⁴ The record before the court reveals that Ales’s representative monitored the progress of the Project (*see e.g.* 10/06/11 Kazansky Aff., exhibits U-X, Project Meeting Minutes [showing that Ales’s representative was present at the Project progress meetings]). Wallace testified that, on his visits to the site of the Project, he observed a representative from Ales who appeared to supervise Gateway and oversee the course of the Project (Wallace Dep. Tr., at 54-55, 110-111). Wallace testified that Ales provided keys to the Building to Gateway (*id.* at 148, 154).

4 NY3d at 385).

Ales's request for indemnification as against Gateway is denied as premature.

Gateway's Motion in the Industrial Risk Action

Industrial Risk asserted two causes of action as against Ales: (1) negligence and (2) strict liability.

In the bill of particulars, Industrial Risk claims that the Incident occurred as follows: Gateway "was performing renovation work in the premises located on the third floor. As a result of the work performed by Gateway[], water was caused to emit from the premises, causing damage to plaintiff's subrogor's property" (10/17/11 Naples Aff., exhibit C, Plaintiff's Verified Bill of Particulars, ¶ 4). The bill of particulars further states that the acts or omissions constituting the negligence claimed and the manner that said acts caused the Incident are as follows:

"Gateway[], its agents, servants and/or employees were negligent and careless in that they performed renovation work on the third floor of the [Building], such that water was caused to emit from the water system, causing damage to the plaintiff's subrogor's property"

(*id.*, ¶ 5).

Gateway argues that plaintiff has failed to identify who perpetrated the Incident, and that there are multiple theories as to how the Incident happened. However, as previously stated, in order to make a prima facie entitlement to judgment as a matter of law, Gateway needs to show one the following: that it did not owe a duty of care to Lerner; that it did not breach this duty; or that such breach was not a substantial cause of the resulting injury (*see e.g. Savastano*, 47AD3d at 792-793).

At the same time, Gateway contends that it was not charged with the responsibility of closing the job site at the end of a work day prior to the Incident. In support, Gateway cites the deposition

of its president, Robert Gueli (Gueli). Gueli testified, "I don't believe it was our responsibility to lock the premises" (Gueli Dep. Tr., at 39), and that he was informed that individuals or entities hired directly by Ales would remain on premises after Gateway and its subcontractors left at the end of a workday (*id.* at 36). However, Gueli also testified that in June of 2006, "Gateway would lock the premises at the end of the workday" (*id.* at 39). Similarly, Wallace testified that it was Gateway's responsibility to lock and secure the Ales Space (Wallace Dep. Tr., at 58). Accordingly, an issue of fact exists as to whether before the Incident, it was Gateway's responsibility to lock the Ales Space at the end of a workday. Hence, Gateway's motion to dismiss the cause of action for negligence is denied.

Gateway is not moving, or presents no arguments, with respect to Industrial Risk's cause of action for strict liability. However, on searching the record, pursuant to CPLR 3212 (b), the court finds no basis for the cause of action for strict liability, which is dismissed (*see JMD Holding Corp.*, 4 NY3d at 385).

DGA's Motion

In the third-party action, Gateway seeks indemnification or contribution from DGA.

Indemnification

The right to indemnification can be premised on a contract, such as an indemnification agreement, or arise by operation of law (*see e.g. Broyhill Furniture Indus., Inc. v Hudson Furniture Galleries, LLC*, 61 AD3d 554, 556 [1st Dept 2009]). At common law, a party can seek indemnification only if it was not negligent and its liability is vicarious (*id.*). "[I]t follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*id.*, quoting *Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d

891, 895 [1st Dept 2003]; *see also Consolidated Rail Corp. v Hunts Point Term. Produce Coop. Assn., Inc.*, 11 AD3d 341, 342 [1st Dept 2004]).

As to common law indemnification, even if Gateway is found not negligent, its liability would not be vicarious. Hence, no common law indemnification as against DGA lies.

As to contractually-based indemnification, DGA's agreement was with Ales, not with Gateway (*see* 10/06/11 Kazansky Aff., exhibit BB). Hence, there is no basis for contractual indemnification as well. Gateway's claim for indemnification from DGA is dismissed.

Contribution

CPLR 1401, in relevant part, provides that:

two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought ... against the person from whom contribution is sought.

"[A]ppportionment rights among wrongdoers arise when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured person" (*Garrett v Holiday Inns*, 58 NY2d 253, 258 [1983] [internal quotation marks and citation omitted]).

DGA offered testimony of Feliks Gordon, who with his helper performed the alarm system installation at the Ales Space (Gordon Dep. Tr., at 21-23). Gordon unequivocally testified that he worked for only two separate days on the Project, and that each time he left at around 3:30 P.M. when all of the people present at the job site would exit the Building (*see id.* at 55, 78). He stated that neither he, nor his helper, was ever left alone at the Ales Space, and that he left the job site when he was asked to do so by the general contractor at the end of the day (*id.* at 52-53). It appears that Gordon worked on the Project only once before the Incident (*id.* at 21-23, 46, 47). Hence, DGA

made a prima facie showing that its employees working on the Project did not participate in the Incident.

In opposition, Gateway has failed to present a testimony of a witness with personal knowledge of facts. Gueli was not present at the work site when DGA worked there. There are no deposition transcripts or affidavits from Gateway's supervisors who were at the work site when DGA worked on the Project. "Mere conclusory allegations regarding the existence of questions of fact are insufficient to defeat a motion for summary judgment" (*Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327, 327 [1st Dept 1989]). Hence, Gateway has failed to raise an issue of fact as to whether DGA stayed unsupervised after work hours and, hence, could have participated in the Incident. Gateway's claim for contribution against DGA is dismissed.

Gateway's Motion in the Lerner Action

Lerner asserts against Gateway one cause of action for negligence (*see* Lerner Complaint, ¶¶ 18-19).

Gateway first argues that Lerner's request to amend the complaint, with respect to adding Gateway as a defendant, should have been denied as untimely. However, by order dated and entered March 10, 2011 (motion seq. no. 003), the court has already ruled on this issue, and Lerner's request to amend the complaint was granted. There is no evidence that Gateway appealed this order or moved to renew or reargue. Hence, Gateway may no longer revisit the March 10, 2011 Order.

As in the Industrial Risk Action, Gateway argues that plaintiff has failed to identify who perpetrated the Incident, and that there are multiple theories as to how the Incident happened. In order to make a prima facie entitlement to judgment as a matter of law, Gateway needs to show one the following: that it did not owe a duty of care to Lerner; that it did not breach this duty; or that such

breach was not a substantial cause of the resulting injury (*see e.g. Savastano*, 47AD3d at 792-793). Gateway has failed to do so, and its motion is denied.

Lerner's Cross Motion in the Lerner Action

Ales and Gateway argue that Lerner's cross motion is untimely. By order dated August 5, 2011, this court ordered, among other things, that all CPLR 3212 and 3211 motions in the Lerner Action be served and filed on or before October 17, 2011 (*see* 02/15/12 Naples Aff., exhibit A). The court ordered that all of the dates stated in the order were final and were not to be adjourned (*id.*). Lerner's cross motion was filed on February 9, 2012.

A party that seeks to file an untimely cross motion must make a showing of "good cause" for the delay (*see e.g. Colon v City of New York*, 15 AD3d 173, 173 [1st Dept 2005]). "[G]ood cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy ..." (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Additionally, "an untimely ... cross motion for summary judgment may be considered by the court where ... a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

Lerner offers no explanation for making its cross motion nearly four months after the deadline set by the court. Additionally, Lerner's motion is premised on the doctrine of *res ipsa loquitur*, which is not a ground that is nearly identical to Gateway's main motion. The court also notes that Lerner did not assert this doctrine in the amended complaint. Hence, Lerner has failed to make a showing of "good cause" for its significant delay, and its cross motion is denied.

For the foregoing reasons, it is hereby

ORDERED that in *Industrial Risk Insurers v 715 Lexington Avenue LLC*, (index No. 107757/09):

(1) the motion of defendant 715 Lexington Avenue LLC for summary judgment (mot. seq. nos. 009 and 010) is granted to the extent that causes of action for negligence and strict liability as against this defendant are dismissed, and the motion is otherwise denied;

(2) the motion of defendant Ales Group USA, Inc. (mot. seq. no. 007) is granted to the extent that the cause of action for strict liability as against this defendant is dismissed, and the motion is otherwise denied;

(3) the motion of defendant Gateway Enterprises, Inc. (mot. seq. no. 006) is granted to the extent that the cause of action for strict liability as against this defendant is dismissed, and the motion is otherwise denied; and

(4) the motion of third-party defendant DGA Security Systems, Inc. (mot. seq. no. 008) for summary judgment is granted, and the third-party complaint as against this third-party defendant is dismissed;

and it is further

ORDERED that in *Lerner New York Inc. v Ales Group, USA Inc.* (index No. 108068/09), the motion of defendant Gateway Enterprises, Inc. (mot. seq. no. 005) for summary judgment is denied, and the cross motion of plaintiff Lerner New York, Inc for summary judgment is denied.

Dated: 11/19/12

FILED
NOV 23 2012
NEW YORK
COUNTY CLERK'S OFFICE

ENTER: 
Joan M. Kenney, J.S.C.