Aysha Collection, Inc v Laser Hair Removal USA, Ltd.
2017 NY Slip Op 31319(U)
June 16, 2017
Supreme Court, New York County
Docket Number: 156300/2013
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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AYSHA COLLECTION, INC. and UTICA FIRST INSURANCE COMPANY a/s/o ASAR INDUSTRIES INC. and AYSHA COLLECTIONS INC.

Plaintiffs,

-against-

LASER HAIR REMOVAL USA, LTD., LASER HAIR REMOVAL, USA, II, LTD., and LASER HAIR REMOVAL USA, III, LTD.,

Defendants.

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LASER HAIR REMOVAL USA, LTD., LASER HAIR REMOVAL, USA, II, LTD., and LASER HAIR REMOVAL USA, III, LTD.,

Third-Party Plaintiffs,

-against-

109 W. 38 ST LLC and JULIA McINTOSH,

Third-Party Defendants.

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Index No.156300/2013

Seq. No. 005

Decision and Order

Kelly O'Neill Levy, J.:

Third-party defendant 109 W. 38 ST LLC ("109 West") moves pursuant to CPLR 3212 for an order granting summary judgment on the common-law negligence, indemnity and contribution claims brought against it by Laser Hair Removal USA, Ltd., Laser Hair Removal, USA, II, Ltd. ("Laser Hair Removal II"), and Laser Hair Removal USA, III, Ltd. (collectively, Laser Hair Removal")[1], as well as for summary judgment on its counterclaims for contractual indemnity and breach of contract made

[1] Laser Hair Removal II was the lessee of the subject premises, Suite 401, located at 109 West 38 Street in Manhattan, and the other Laser Hair Removal entities are related companies.

against Laser Hair Removal II. Plaintiff Aysha Collection, Inc. ("Aysha") cross-moves pursuant to CPLR 3212 for an order granting summary judgment on its negligence claim against Laser Hair Removal II. Co-plaintiffs Utica First Insurance Company a/s/o Asar Industries Inc. and Aysha Collections Inc. (together, "Utica First") support Aysha's cross-motion, and request that if Aysha is granted summary judgment, then Utica First, as subrogee, is likewise entitled to summary judgment on its subrogation claim. Laser Hair Removal opposes.

BACKGROUND

Plaintiff Aysha brought the primary action against Laser Hair Removal for property damages it allegedly incurred due to a flood on or about December 12, 2012 at 109 West 38th Street in Manhattan (the "building"). Utica First thereafter commenced a subrogation action against Laser Hair Removal II (Utica First Insurance Company et. al. v. Laser Hair Removal USA II, LTD, Index No. 158348/2013), which Justice Anil C. Singh consolidated with the primary action by order dated July 9, 2014. Prior to consolidation, Laser Hair Removal commenced a third-party action against 109 West, the owner of the building wherein the incident occurred, and Julie McIntosh[2], who rented a communal room from Laser Hair Removal II on the fourth floor of the building. By order dated June 30, 2016, this court granted on default Ms. McIntosh's motion for summary judgment dismissing the third-party complaint against her, and she is no longer a party to this action. The third-party claims that remain are against 109 West for common-law negligence, indemnity and contribution and against Laser Hair Removal for contractual indemnity and breach of contract. Plaintiff Aysha has made no claims against 109 West.

Aysha is a third-floor tenant in the building while Laser Hair Removal II was a fourth-floor tenant in the same building where it operated a salon at the time of the incident. Plaintiffs and 109 West

[2] Incorrectly sued as "Julia" McIntosh. See, e.g., Affidavit of Julia McIntosh in Support of Motion for Summary Judgment (Mot. Seq. 004).

contend that an employee or subtenant of Laser Hair Removal left a hairdressing sink faucet running which resulted in water overflowing, thereby causing flooding and subsequent property damage to Aysha on the floor below. Aysha was insured by Utica First at the time of the incident and submitted a claim for damages.

In opposition to the motion, Laser Hair Removal contends that there is only evidence that independent contractors, for whom it is not liable, were present at the time of the incident and that there is a question of fact as to whether a broken pipe caused the flood. The relevant testimony is as follows.

Deposition Testimony of Leslaw Jarych (Handyman)

Leslaw Jarych, a handyman at the building, testified that in December 2012, after receiving a complaint from Aysha about water leaking from the ceiling in its third-floor unit, he went to the fourth floor above where he observed water overflowing from a hairdresser's sink in Laser Hair Removal II's premises. He turned off the faucet and found about half an inch to an inch of water on the floor, which he tried to clean up. He testified that he was told by the owner of the fourth-floor salon–not Joan Fasano[3]–that a new worker forgot to turn off the faucet. In addition, Mr. Jarych testified that while he had performed a repair on a "regular" sink on the fourth floor, he had not performed any repairs on the hairdresser's sink that had been overflowing and that no one had complained to him about that sink.

Deposition Testimony of Melvin Eason, Jr. (Maintenance Man)

Melvin Eason, Jr., who was employed as a maintenance man by various management companies that took care of the building, testified that there was no water issue on the third or fourth floor during the course of his shift when he conducted his check of the floors on the evening before the flood was discovered and that he learned of the incident when he went to the building later that day. He testified

[3] As discussed below, Joan Fasano is the principal of Laser Hair Removal.

that he was informed by "Lester" that water was overflowing from the sink in Suite 401 and that "Lester" turned it off by turning the knobs at the top of the sink.[4] Mr. Eason also testified that he had never observed anything wrong with the hairdresser's sink at issue and was never told of any complaints about that sink.

Deposition Testimony of Julie McIntosh

Julie McIntosh testified that in or about 2008, she began renting space from Laser Hair Removal II. She brought in her hairdresser's sink but did not pay for the installation; rather, the installation was done through Joan Fasano, the principal of Laser Hair Removal. On December 11, 2012, Ms. McIntosh entered Laser Hair Removal II's premises at approximately 7:25 p.m., dropped off her rent payment, browsed through the magazines in the reception area, and left. Additionally, Ms. McIntosh testified that she did not have any complaints about Suite 401.

Deposition Testimony of Joan Fasano

Joan Fasano, the aforementioned principal of Laser Hair Removal, testified that Laser Hair Removal II had no employees and that she and independent contractors hired by Laser Hair Removal II carried out the business of Laser Hair Removal. She testified that on either December 12, 2012 or December 13, 2012, someone, whom she could not remember, called her and told her that there was a water problem caused by a broken pipe and asked her to come over. She went to the building the following day and in the salon's communal room she saw a broken pipe and a sign on the wall that said, "Broken Pipe. Do Not Use." She did not know whether the broken pipe caused the flood. Ms. Fasano also testified that she was informed by Ms. McIntosh that maintenance people were going to install her hairdresser's sink.

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[4] The corroborative testimony of Mr. Jarych indicates that Mr. Eason, Jr. is referring to "Leslaw" Jarych when he mentioned "Lester."

ARGUMENTS

Plaintiffs and 109 West argue that in light of the above testimony there is sufficient evidence to establish that damage to the third floor was caused by a flood from a hairdresser's sink negligently left running, and that Ms. Fasano's testimony is insufficient to raise triable issues of fact.

In its opposition, Laser Hair Removal contends that there is no evidence as to who left the faucet running, and that there is only evidence that independent contractors, who rented space from Laser Hair Removal, were present the night the faucet was left on. Laser Hair Removal further argues that because Ms. Fasano testified that she saw a broken pipe and sign that said "Broken Pipe. Do Not Use" and because General Obligations Law 5-321 voids lease provisions whereby a landlord seeks to be indemnified for its own negligence, 109 West cannot be indemnified as it did not fix the broken pipe and there is a question of fact as to the causation of the flood.

Laser Hair Removal also argues that the motions must be denied because Aysha has failed to identify which Laser Hair Removal entity is negligent and also because 109 West is seeking contractual indemnification with some Laser Hair Removal entities with which it does not have a contractual relationship.

DISCUSSION

At the outset, the court addresses Laser Hair Removal's contention that the motion should be denied because the parties have failed to identify the proper entity. Aysha correctly argues in its affirmation in support that it identified Laser Hair Removal II as the allegedly negligent party. A review of Aysha's motion shows that it specifically moves pursuant to CPLR 3212 for summary judgment against "defendant LASER HAIR REMOVAL, USA, II, LTD" only. In addition, 109 West argues in its affirmation in support that its lease is with Laser Hair Removal II and that Laser Hair Removal II

breached its contract with 109 West. Thus, Laser Hair Removal's arguments that Aysha and 109 West's summary judgment motions should be denied for failure to identify the proper entity are unavailing.

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

The elements of a cause of action in negligence are (1) the existence of a duty; (2) a breach of this duty; and (3) injury as a result of the breach. *Rodriguez v. Budget Rent A Car Sys., Inc.*, 44 A.D.3d 216, 221 (1st Dep't 2007). Where a property owner moves for summary judgment in a premises liability action, the property owner bears the initial burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition. *Sheehan v. J.J. Stevens & Co.*, 39 A.D.3d 622 (2d Dep't 2007). To constitute constructive notice, the defective condition must be both visible and apparent and it must exist for a sufficient length of time prior to the accident to allow a property owner to discover and remedy it. *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836, 837 (1986).

109 West's Motion

Plaintiff Aysha has not made any claims for negligence against 109 West but defendants Laser Hair Removal assert in their third-party complaint that 109 West is negligent. The testimony of Mr. Jarych, Mr. Eason, and Ms. McIntosh is sufficient to establish that 109 West did not create or have actual or constructive notice of any defective condition that caused the flooding incident. *See Martinez v. Hunts Point Co-op. Market, Inc.*, 79 A.D.3d 569 (1st Dep't 2010). In *Martinez*, the First Department held that an out-of-possession landlord did not have actual or constructive notice of a condition that allegedly led to the injury of a tenant's employee where the general manager of the landlord had not observed damage to the defective mechanism and had not received any complaints prior to the date of the incident. Testimony from the landlord's general manger and from a vice president of the tenant that neither had observed damage to the mechanism at issue and had not received complaints as to same was sufficient to establish prima facie that the landlord did not have actual or constructive notice of the allegedly dangerous condition. The burden then shifted to the plaintiff to raise evidence sufficient to rebut the landlord's prima facie showing that it did not have actual or constructive notice. Upon the plaintiff's failure to do so, the *Martinez* court granted third-party defendant landlord's motion for summary judgement dismissing the complaint against it.

In the instant case, Mr. Jarych testified that while he had performed a repair on a regular sink on the fourth floor, no one had complained to him about the hairdresser's sink there. Mr. Eason testified that he had never observed anything wrong with the hairdresser's sink and was never told of any complaints about that sink. Ms. McIntosh testified that she had no complaints concerning Suite 401. Taking the evidence in the light most favorable to the third-party plaintiffs and assuming that Ms.

Fasano saw the broken pipe[5], her testimony neither establishes that the broken pipe was the cause of the flood nor that 109 West had notice of the broken pipe prior to the incident or that 109 West was the cause of the broken pipe before the incident. Furthermore, there is no evidence 109 West clogged the hairdresser's sink or failed to turn off its faucet, rather, the testimony indicates that an employee, subtenant, or independent contractor of Laser Hair Removal II neglected to turn off the faucet. *See Litwack v. Plaza Realty Investors, Inc.*, 11 N.Y.3d 820 (2008) (landlord not liable for damages resulting from toxic mold where tenant did not provide sufficient notice to landlord of conditions that could give rise to hazardous mold).

Laser Hair Removal further seeks common-law indemnification and/or contribution from 109 West. Common-law indemnification is a restitution concept which allows loss to be shifted from a party liable based upon its status to a party at fault because failure to do so would result in unjust enrichment. *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 375 (2011). It is well settled that those actively at fault in bringing about the damage shall bear the imposition of indemnification obligations. *Id.* Because common-law indemnification is predicated upon vicarious liability without actual fault by the indemnitee, *Aiello v. Burns Int'l Sec. Servs. Corp.*, 110 A.D.3d 234, 247 (1st Dep't 2013), the proposed indemnitee cannot obtain common-law indemnification unless it is found to be vicariously liable without evidence of any negligence or actual supervision on its own part. *McCarthy,* 17 N.Y.3d at 377–78.

A claim for common-law contribution requires that the party from which contribution is sought actually contributed to the alleged injuries by breaching a duty either to the injured party or to the party seeking contribution. *Jehle v. Adams Hotel Assocs.*, 264 A.D.2d 354, 355 (1st Dep't 1999).

[5] She is the only person to testify to that condition.

As discussed above, 109 West has proffered sufficient evidence to show it was not actively at fault, and Laser Hair Removal does not offer sufficient evidence to create a triable issue of fact regarding the negligence of 109 West. Furthermore, there is a question of fact as to whether Laser Hair Removal itself was negligent and thus at fault. Accordingly, 109 West's motion for summary judgment dismissing the third-party complaint it is granted.

109 West counterclaims for contractual indemnity from Laser Hair Removal II and further argues that Laser Hair Removal II breached its contract with 109 West because it failed to add 109 West as an insured.

Paragraph 45 of the Rider to the lease entitled Contractual Indemnification of Landlord states, in relevant part,

> "The Tenant hereby agrees to save the Landlord harmless and indemnified from and against all injury, loss, costs, claims, losses, liabilities, damages and expenses to any person or property, while on the demised premises or in the building in which the demised premises are situated, arising from, related to or connected with the conduct and operations of the business of the Tenant in the demised premises or caused by an act or omission of the Tenant, its agents, servants, contractors or employees. The tenant shall maintain with responsible insurance companies licensed to do business in the State of New York and approved by the Landlord and the Tenant (as their interests may appear) against all claims, demands or action for personal injury, death or property damage in an amount of not less than ONE MILLION DOLLARS ($1,000,000.00) for any one occurrence, made by or on behalf of any person or persons, firms or corporation, arising from, related to or connected with the conduct and operations of the business of the Tenant in the demised premises or caused by an act or omission of the Tenant, its agents, servants, contractors, or employees. Each such policy of insurance shall designate the Landlord as an additional named insured and shall be in a form satisfactory to the Landlord. … As used herein, the word "expense" includes attorneys' fees and disbursements." See Ex. E, Aff. In Supp.

On a claim for contractual indemnification, the language of the contract's provisions determines the right to contractual indemnity. *Carroll v. 1156 APF LLC*, 2011 WL 4443507 (Sup. Ct., New York County 2011) (citing *Smith v. Broadway 110 Devs., LLC*, 80 A.D.3d 490, 491 [1st Dep't 2011]). Additionally, an indemnitee must show that it is free from negligence, but it does not need to show that

the proposed indemnitor is negligent. *Id.* (citing *Uluturk v. City of New York*, 298 AD2d 233, 234 [1st Dep't 2002]).

As discussed above, there is no evidence that 109 West was negligent. Thus, 109 West is entitled to attorney's fees and disbursements from Laser Hair Removal II pursuant to the lease terms if (1) the claims at bar arose in connection with the conduct and operations of Laser Hair Removal II's business or (2) were caused by an act or omission of Laser Hair Removal II's agents, servants, contractors or employees. While the actual cause of the incident has not been affirmatively assigned to one of Laser Hair Removal II's "agents, servants, contractors or employees," the incident arose from a sink, the utilization of which is clearly connected to the conduct and operation of Laser Hair Removal II's business. *Contra Ali v. Sequins Intern.*, Inc., 31 Misc.3d 1244(A) (Sup. Ct., Queens County 2011) (where indemnity clause in lease relates to liability "arising out of or based upon, related to or in any way connected with the use or occupancy of the premises or the conduct or operation of the tenant's business," landlord not entitled to indemnification for amounts paid in connection with injury to pedestrian walking on defective sidewalk outside business).

109 West has failed to establish a prima facie entitlement to judgment on its claim against Laser Hair Removal II for breach of the requirement to add 109 West as an additional insured on its insurance policy. There is no allegation in an affidavit by a person with knowledge that Laser Hair Removal II failed to so add 109 West. The statement, made only by counsel in 109 West's affirmation, is of no probative value. *See Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 411 (1st Dep't 2010). Thus, the burden never shifted to Laser Hair Removal II to demonstrate otherwise or to show the existence of an issue of fact.

Aysha's Motion

Plaintiff Aysha cross-moves for summary judgment on its negligence claim against defendant Laser Hair Removal II. Aysha argues that it is entitled to summary judgment pursuant to the doctrine of res ipsa loquitur. For a plaintiff to establish a prima facie case of negligence pursuant to the doctrine of res ipsa loquitur, it must establish that:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Dermatossian v. New York City Transit Auth., 67 N.Y.2d 219, 226 (1986) (internal quotations omitted). If a plaintiff can establish all three elements of the doctrine of res ipsa loquitur, an inference of negligence is permitted but not compelled. *See Crockett v. Mid-City Mgmt. Corp.*, 27 A.D.3d 611, 612 (2d Dep't 2006). If there are questions of fact surrounding any of the three requirements for res ipsa loquitur, a denial of summary judgment is warranted. *See Morejon v. Rais Const. Co.*, 7 N.Y.3d 203, 212 (2006) ("If that evidence presents a question of fact as to the defendant's liability under the [three-part] test for res ipsa loquitur," summary judgment should be denied).

Without reaching the merits of the case concerning elements (1) and (3), the court finds that element (2) has not been established. While it is undisputed that Laser Hair Removal II occupied the fourth floor suite above Aysha's unit, and the testimony establishes that the source of water came from the suite, there remain questions of fact as to whether Laser Hair Removal II had (1) exclusive legal control over the Suite as it rented the space to other persons, and (2) exclusive sole custody and control of the hairdresser's sink given that it did not bring in the sink and there is a dispute as to who oversaw its installation.

Generally speaking, a principal is liable for the acts of an employee, but not those of an independent contractor, due to the lack of control that a principal typically has over the manner in which an independent contractor works.[3] *See, e.g., Goodwin v. Comcast Corp.*, 42 A.D.3d 322, 322 (1st Dep't 2007). Distinguishing between an independent contractor and an employee requires a case by case analysis and typically turns on questions of fact. *See, e.g., Anikushina v. Moodie*, 58 A.D.3d 501, 504 (1st Dep't 2009) (citing *Lazo v. Mak's Trading Co.*, 199 A.D.2d 165, 166 [1st Dep't 1993]). A critical part of the fact analysis is a determination of who controls the methods and means by which work is performed. *Id; see also Goodwin* at 322 ("Control of the method and means by which work is to be performed, therefore, is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability").

The Third Department has twice analyzed whether hairdressers renting space in a salon are correctly categorized as employees or independent contractors. In *Conway v. Rossi*, a hairdresser was found to be an independent contractor and not an employee of the salon where (1) the hairdresser paid a monthly fee to the salon owner, (2) the salon owner did not receive any portion of the fees paid by the hairdresser's clients, (3) the hairdresser purchased her own supplies, (4) the hairdresser maintained her own appointment book and set her own hours, (5) the hairdresser maintained her own health benefits and (6) the salon owner did not supervise or the control the hairdresser's work. *Conway v. Rossi*, 192 A.D.2d 855 (3d Dep't 1993). In contrast, in *In re Atelek* the Third Department determined that the salon exercised sufficient control over the hairdressers' work such that they were deemed employees,

[3]There are three categories of exceptions to the rule which impose liability on a principal for acts of an independent contractor: (1) the principal is negligent in selecting, instructing or supervising the independent contractor; (2) the independent contractor is retained to do work that is inherently dangerous; and (3) the principal bears a specific non-delegable duty. *See Nelson v. E&M 2710 Clarendon LLC*, 129 A.D.3d 568 (1st Dep't 2015). The parties have not provided any evidence or arguments suggesting that one of the exceptions is applicable to the instant case.

notwithstanding the independent contractor agreements the hairdressers had signed with the salon. The court noted that the hairdressers provided their own tools but the salon provided a sink, chair, hair dryers, towels and additional products and supplies. Additionally, the hairdressers paid the salon 60% of their daily sales, and such sales were initially deposited into the salon's cash register before the hairdressers were provided their percentage at the end of each week. Further, the hairdressers were not required to have their own clients; rather, walk-in clients were assigned to available hairdressers, and the salon sometimes ran promotions to bring in new clients.

The record in the instant case contains significant questions of fact regarding whether the individuals who worked out of Laser Hair Removal II are properly categorized as employees or independent contractors, and thus, whether the second prong of the res ipsa loquitur test is met. For instance, Ms. Fasano testified that she did not tell Norma Bermuda, one of the alleged independent contractors retained by Laser Hair Removal II, what hours she was to work or be available at the salon. However, Ms. Fasano would sometimes call Ms. Bermuda in to the salon if there was a customer in need of services. Ms. Fasano also testified that she provided equipment to Ms. Bermuda, and that she and Ms. Bermuda split Ms. Bermuda's profits evenly, regardless of whether they were Ms. Bermuda's private customers or Laser Hair Removal II's customers. Ms. McIntosh testified that some individuals working at Laser Hair Removal II received salaries, and that one individual by the name of "Rosario" was self-employed and paid a salary to Ms. Fasano. Ms. McIntosh also testified that she believed two individuals were employed by Ms. Fasano–saying "They would tell me. They worked off a salary"–and that all others paid rent.

CONCLUSION AND ORDER

For the reasons stated above, material questions of fact are yet to be resolved and Aysha's motion for summary judgment is denied. Utica First's request to extend summary judgment on its subrogation claim is denied. Accordingly, it is hereby

ORDERED that 109 W. 38 ST LLC's motion for summary judgment is granted to the extent that the third-party complaint against it is dismissed and its counterclaim for contractual indemnity is granted only; and it is further

ORDERED that plaintiff Aysha Collection, Inc.'s motion for summary judgment is denied.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 16, 2017 ENTER:

Kelley O'Neill Levy

J.S.C.