SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

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ADZERE MUSTAFA,

Index No. 157718/2014
Mot. Seq. 05

Plaintiff,

-against-

1221 AVENUE HOLDINGS LLC, SIRIUS XM RADIO INC., ROCKEFELLER GROUP DEVELOPMENT CORPORATION, RD WEIS & COMPANY, INC. d/b/a RD WEIS COMPANIES, D.C. TILE & MARBLE, INC. d/b/a DC TILE and d/b/a DC TIME & MARBLE, DC TILE, and DC TIME & MARBLE, CROSS CONSULTING, INC, d/b/a CROSS NY, JK MOVING SERVICES, CLANCY-CULLEN STORAGE CO., INC. d/b/a CLANCY-CULLEN MOVING & STORAGE COMPANY, INC.

Defendants.

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SIRIUS XM RADIO, INC.,

Third-Party Plaintiff,

-against-

RD WEIS COMPANIES and PRITCHARD INDUSTRIES,

Third-Party Defendants,

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SIRIUS XM RADIO, INC.,

Second Third-Party Plaintiff,

-against-

JK MOVING SERVICES, BOLCOR COMMERCIAL FLOORING, DC TILE and DC TILE & MARBLE,

Second Third-Party Defendants,

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affirmation	144, 145
exhibits annexed (A through M)	146-158
Sirius XM Radio Inc. Affirmation in Opposition	171
exhibits annexed (A through D)	173-176
Plaintiff's Affirmation in Opposition	183
Replies	178, 186

Jaroslawicz & Jaros, LLC (Stephen J. Jacobson of counsel), for plaintiff Adzere Mustafa.

Gallo Vitucci Klar LLP, New York (Sarah Allison of counsel), for defendants DC Tile & Marble LLC i/s/h/a D.C. Tile & Marble, Inc. d/b/a DC Tile and d/b/a DC Time & Marble, DC Tile and DC Time & Marble and Second Third-Party Defendants DC Tile & Marble LLC i/s/h/a DC Tile and DC Tile & Marble.

Shafer Glazer LLP, New York (Nicole M. Snyder of counsel), for defendant/third-party plaintiff and second third-party plaintiff Sirius XM Radio Inc.

Gerald Lebovits, J.

This is an action to recover damages for personal injuries allegedly sustained by a building services worker on November 21, 2013, when, while working on the 37th floor of 1221 Avenue of the Americas (the Premises), she tripped on a piece of cardboard and/or Masonite and fell.

Defendant/second third-party defendant DC Tile & Marble LLC (i/s/h/a D.C. Tile & Marble, Inc. d/b/a DC Tile and d/b/a DC Time & Marble, DC Tile, and DC Time & Marble) (DC Tile), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, second third-party complaint, and all cross-claims and counterclaims brought against it.

BACKGROUND

On the day of the accident, the Premises was owned by 1221 Avenue Holdings, LLC (1221 Avenue) and managed by Rockefeller Group Development Corporation. The 37th floor of the Premises, where the accident occurred, was leased to Sirius XM Radio, Inc. (Sirius). Sirius hired RD Weis & Company, Inc (RD Weis) as the general contractor for a project that entailed the replacement of carpet and tile on the 36th and 37th floor. RD Weis subcontracted tile installation to DC Tile. Plaintiff Adzere Mustafa was employed by non-party Pritchard Industries, Inc. (Pritchard) as a building services worker at the Premises.

Plaintiff's Deposition Testimony

Plaintiff testified that, at the time of her accident, and for a few months before, she was assigned to the 37th floor. Her duties entailed vacuuming, dusting, and disposing of office garbage. At that time, new carpeting was being installed throughout the 37th floor. To protect the new carpet until all construction work was complete, the heavily travelled areas between the freight elevator and the passenger elevator were covered with "cardboard" or Masonite, that had been taped down over the new carpet (the Covering).

On the day of her accident, plaintiff was working on the 37th floor. To get to that floor, she would take the freight elevator, pass through two doors, then walk "ten or fifteen meters" to the closet where her cleaning cart was stored (plaintiff's tr at 29). After retrieving her cart, she would begin cleaning Sirius's office area, which consisted primarily of offices and cubicles. When her garbage bags were full, she would leave the office area and return to the freight elevators area to dispose of them. She would make this trip multiple times per shift.

Approximately three hours into her shift, while plaintiff was carrying empty boxes from the office area to the freight elevator area, she tripped on a piece of the Covering. She stated:

> "There was a cardboard on the floor, taped, and the cardboard was put in a certain way that it had created a crease or some sort of gap and that's where my foot got trapped and I fell"

(*id.* at 79). Specifically, her left foot became wedged underneath the board causing her to fall forward, striking her knee on the ground. Plaintiff reiterated that her accident took place in the office area, and not in the freight elevator area.

After the accident, plaintiff met with her supervisor, Mark Agron. Agron took her information and wrote a report (the Report), which plaintiff never saw.

The Report

The Report, entitled "PII-NY Internal Workers' Compensation Incident Report," is dated November 21, 2013 (Sirius's affirmation in opposition, exhibit B). Notably, the Report is unsigned. In addition, though the Report was read into the record at plaintiff's deposition, it is otherwise unauthenticated by Agron or anyone with knowledge of the document. As relevant, the Report specifies the following:

> "[Plaintiff] was bringing the [illegible] with trash in the freight area on 37th floor were [sic] tenant had construction tools and plywood, and she [slipped] and fell on the piece of plywood."

The Report also notes that Agron prepared an email to Sirius regarding the incident (the Email). The Email simply reiterates the Report, though it indicates that plaintiff slipped on tile, rather than plywood (Sirius's affirmation in opposition, exhibit C, the Email).

Notably, at her deposition, plaintiff was shown the Report. She testified that it contained many inaccuracies. Specifically, plaintiff explained that she never told Agron that she fell in the freight area or that she tripped over plywood.

Deposition Testimony of Julio Mata (Sirius's Facilities Project Manager)

Julio Mata testified that, on the day of the accident he was the facilities project manager for Sirius. He was the project manager for the renovation project underway at the Premises at the time of plaintiff's accident. That project entailed, *inter alia,* the installation of "new stone flooring" and carpet on the 37th floor (Mata tr at 39)[1]. Mata's duties with respect to the project included the general monitoring of the trades and making sure that the work was completed in a timely and adequate manner.

Mata testified that the carpet installation was complete sometime in late October or early November of 2013, and that in early November of 2013, DC Tile began installing stone tiles in the passenger elevator area of the 37th floor. Mata was present when DC Tile performed its work. He explained that DC Tile would cut stone tiles in the freight elevator bank on the 37th floor and carry the cut tile by hand, through the two doors and down the hallway, to the passenger elevator bank, where they installed the tile.

Mata also testified that "R.D. Weis was ordered or instructed to make sure that they protect the carpet" after it was installed, so that other workers wouldn't damage it when they brought materials from the freight elevator to their work area (*id.* at 77). Four- or five-foot square Masonite boards were installed over the new carpet along the path from the freight elevators to the passenger elevators.

Mata initially testified that RD Weis directed DC Tile to install protective coverings (*id.* at 85). But Mata quickly clarified that RD Weiss used a company called Cross New York, Inc. (Cross) – and not DC Tile – to install the Covering (*id.* at 93). In addition, Mata explained that he personally witnessed Cross laborers installing Masonite at the Premises (*id.* at 93). Also, Mata reiterated that DC Tile did not perform any work other than installing the stone tiles (*id.* at 147).

Deposition Testimony of Daniel Courville (DC Tile's Principal)

Daniel Courville testified that, at the time of the accident, he owned DC Tile. In 2012, DC Tile entered into a master subcontract agreement (the MSA) with RD Weis for tile work, in general. RD Weis would then provide DC Tile with work orders that were governed by the terms of the MSA. The MSA was in effect at the time of the accident.

DC Tile received from RD Weis a work order for the project at the Premises (the Work Order) that entailed installing tile and stone on the 36th and 37th floors. Courville testified that

[1] The copy of Mata's transcript provided to the court is oddly formatted. Each page contains two to three conflicting page numbers. For clarity, the court's references are based on the bottommost page number, which consistently is listed as "Page __."

DC Tile's work on the 37th floor began on November 7, 2013, and lasted until November 13, 2013.[2] Every day, Courville and his workers would bring their tools and equipment up to the 37th floor via the freight elevator, and then carry the materials (by hand or dolly) from the freight elevator to their work area.

Courville explained that the Work Order did not contemplate the installation of any protective surfaces (such as Masonite) at the Project. Courville stated that "[it]'s not in our contract to protect floors unless it's specifically brought up [in the work order]" (Courville tr at 108). To that end, Courville testified that DC Tile did not install any protective coverings at the Premises, that Mata never directed him to protect the carpet on the 37th floor, and that no one, including RD Weis, ever tasked DC Tile with placing protective coverings on the carpet on the 37th floor (*id.* at 114).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DC Tile's Motion for Summary Judgment

DC Tile moves for summary judgment dismissing the complaint, the second third-party complaint, and all cross-claims and counterclaims against it on the grounds that it did not owe plaintiff any duty and that it did not install or maintain the object plaintiff tripped over, or otherwise cause or create the hazard. Only plaintiff and Sirius oppose the motion.

Negligence – Duty of Care

DC Tile argues that it is an independent contractor and, as such, it does not owe a duty of care to a non-contracting third-party, such as plaintiff. "A contractual obligation, standing alone, will not give rise to tort liability in favor of a noncontracting third party" (*Farrugia v 1440 Broadway Assoc.*, 163 AD3d 452, 457 [1st Dept 2018], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). There are three exceptions to this general rule: (1) where the

[2] During his deposition, Courville confirmed the November 13, 2013 date via a cellphone photograph he took of "[t]he finished floor" on the 37th floor, which contained a digital date-stamp indicating it was taken on that date (Courville tr at 34).

independent contractor negligently launched a force or instrument of harm; (2) where the plaintiff detrimentally relied on the continued performance of the independent contractor; and (3) where the independent contractor entirely displaced the owner's duty to safely maintain the accident location (*see Espinal*, 29 NY2d at 139-140).

Initially it is noted that in their oppositions, plaintiff and Sirius address only the first exception and raise no arguments with respect to the remaining two. Thus, the only question before the court is whether DC Tile launched the instrument of harm – i.e. the Covering. DC Tile has established its entitlement to summary judgment dismissing the complaint as against it, as it has sufficiently set forth that it did not install the Covering.

The record establishes that DC Tile was not hired to install carpet protection at the Premises, and that it did not typically do so in the regular course of its work (see Courville tr at 108, 114). In addition, Mata testified that DC Tile installed tile at the Premises and did not perform any other work (Mata tr at 147). Moreover, Mata testified that he personally witnessed Cross workers installing the protective coverings on the 37th floor (*id.* at 93).

In opposition, plaintiff argues that a question of fact exists as to who installed the Covering because Mata initially testified that DC Tile had done so (Mata tr at 85). However, as noted above, Mata quickly and definitively corrected himself, identifying Cross as the installer (Mata tr at 93). Accordingly, plaintiff's reliance on Mata's initial, immediately disavowed, statement is unpersuasive and does not give rise to a question of fact.

Plaintiff also argues that a question of fact exists because no party has affirmatively admitted to installing the Covering. This argument fails "to point to any evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, plaintiff has failed to raise a question of fact sufficient to establish that DC Tile had a duty of care as to plaintiff.

In its opposition, Sirius argues that questions of fact remain regarding whether DC Tile left tile and/or plywood in the freight area, creating a hazardous condition and, therefore, launching the instrument of harm that caused plaintiff's accident (*see Perry-Renwick v Giovanni Macchia Landscaping & Gardening, Inc.*, 136 AD3d 772, 773 [2d Dept 2016]). Sirius relies solely on the Report and the Email, which essentially reiterates the Report.

Notably, the Report is unsigned by plaintiff. In addition, neither the Report, nor the Email, are certified or authenticated by Agron or anyone at Pritchard.[3] "Records without proper certification may be considered in opposition to a motion for summary judgment, but only when they are not the sole basis for the court's determination" (*Erkan v McDonald's Corp.*, 146 AD3d 466, 468 [1st Dept 2017]). Sirius cites to no additional evidence supporting the Report's version of events. Therefore, these documents "are the *only* evidence to challenge details of plaintiff's

[3] In a notice to admit, Sirius requested that Pritchard authenticate the Email (Sirius affirmation in opposition, exhibit C, at 2). In its response, Pritchard did not admit or deny the Email's authenticity (*id.*, exhibit D). Aside from this, the record is devoid of any attempt to authenticate either document.

version of the accident and therefore should not be considered" (*id.* at 468 [emphasis in original]).

Here, plaintiff testified that she did not trip on tile or plywood in the freight area, but on taped-down "cardboard" in the office area (plaintiff's tr at 79). As plaintiff's testimony about the nature of her accident is effectively unrebutted, Sirius has failed to raise a question of fact as to the cause or location of plaintiff's accident that would give rise to liability on the part of DC Tile.

Thus, DC Tile is entitled to summary judgment dismissing the complaint as against it.

Contribution and Common-Law Indemnification

DC Tile also seeks the dismissal of all contribution and common-law indemnification claims against it, including those found in the second-third party complaint.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003] [internal quotation marks and citations omitted]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]); *accord Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

Here, DC Tile owed no duty of care to plaintiff, and did not launch the force or instrument of harm that injured her. Accordingly, DC Tile cannot be guilty of some negligence that contributed to plaintiff's accident. Thus, DC Tile is entitled to summary judgment dismissing all second third-party claims, cross-claims and counterclaims for contribution and common-law negligence as against it.

Contractual Indemnification

DC Tile moves for summary judgment dismissing all contractual indemnification claims made against it. According to DC Tile, the only parties that make such a claim against them are Sirius and co-second third-party defendant JK Moving Services (JKM).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *accord Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d at 65; *accord Murphy v WFP 245 Park Co., L.P.*, 8 AD3d 161, 162 [1st Dept 2004]). Unless the indemnification clause explicitly requires a finding of negligence on behalf of the indemnitor, "[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia,* 259 AD2d at 65).

Notably, DC Tile does not have a contract with Sirius. However, the DC Tile/RD Weis master subcontractor agreement (the MSA) contains an indemnification provision that provides, as follows:

> "To the fullest extent permitted by law, [DC Tile] shall indemnify, defend and hold harmless [RD Weis], Owner, and their respective officers . . . from and against all claims . . . arising out of or resulting from, or alleged to arise out of or arise from, the performance of [DC Tile's] work under the Subcontract, and any Work Order . . . but only to the extent attributable to the negligence of [DC Tile] or any entity for which it is legally responsible or vicariously liable . . ."

(Allison affirmation, exhibit L, the MSA § 4.c).

Assuming, *arguendo,* that Sirius is an "Owner" under the MSA, DC Tile does not owe it contractual indemnification. The MSA's indemnification provision triggers only from claims arising from DC Tile's work. The record contains no evidence that plaintiff's accident arose from DC Tile's work. Accordingly, the MSA's indemnification provision does not trigger and DC Tile does not owe Sirius contractual indemnification.

JKM does not oppose the motion. In addition, JKM, a moving company, is not a party to the MSA or defined therein. Accordingly, the MSA's indemnification provision does not trigger and DC Tile does not owe JKM contractual indemnification.

The court has examined the remaining arguments of the parties and finds them to be unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant/second third-party defendant DC Tile & Marble LLC (i/s/h/a D.C. Tile & Marble, Inc. d/b/a DC Tile and d/b/a DC Time & Marble, DC Tile, and DC Time & Marble) (DC Tile), pursuant to CPLR 3212, for summary judgment dismissing the complaint, second third-party complaint and all cross-claims and counterclaims asserted as against it is granted, and the complaint and second third-party complaint are severed and dismissed as against DC Tile with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and movant must serve a copy of this decision and order on the County Clerk's office, which is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for the remaining parties are directed to appear for a conference in Room 345, at 60 Centre Street, on March 13, 2019, at 10:00 a.m.

12/17/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE