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

PRESENT: DEBRA A. JAMES Justice — PART 59

JULIO BOBET,

Plaintiff,

- v -

ROCKEFELLER CENTER, INC., ROCKEFELLER CENTER NORTH, INC., TIME, INC., RESTAURANTS ASSOCIATES, INC., and ONE SOURCE HOLDINGS,

Defendants.

Index No.: 110819/04

Motion Date: 12/23/11

Motion Seq. No.: 08

ROCKEFELLER CENTER, ROCKEFELLER CENTER NORTH, INC., TIME, INC.,

Third-Party Plaintiffs,

-v -

RAMAC CORPORATION (US),

Third-Party Defendant.

ONE SOURCE FACILITY SERVICES, INC.,

Second Third Party Plaintiff,

-v -

RAMAC CORPORATION (US),

Second Third Party Defendant.

ONE SOURCE FACILITY SERVICES, INC.,

Fourth Third Party Plaintiff,

-v -

ISK-ROCK, INC.,

Fourth Third Party Defendants.

FILED

SEP 06 2012

NEW YORK COUNTY CLERK'S OFFICE

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

The following papers, numbered 1 to 11 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3 - 8
Replying Affidavits - Exhibits	9 - 11

Cross-Motion: ☒ Yes ☐ No

Defendant Restaurant Associates, Inc., (Associates) moves for an order "so-ordering" the stipulation of discontinuance of

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

the action against it with prejudice executed by plaintiff or in the alternative to renew this court's order dated March 11, 2010 denying its motion for summary judgment dismissing the complaint and cross claims against it. Rockefeller Center and Time cross-move for summary judgment against Associates seeking contractual and common law indemnification. The court shall deny the parties' respective applications.

The Clerk properly rejected Associates's attempt to file a stipulation of discontinuance where the stipulation was not signed by all the parties to the litigation (CPLR 3217 [a] [2]). Associates now moves pursuant to CPLR 3217 (b) to discontinue the action based upon plaintiff's execution of a stipulation to discontinuance of his claims against it. However, the court must deny the relief sought under CPLR 3217 (b) because by definition only the party asserting a claim can move to discontinue it. Associates's application to terminate plaintiff's claims against it is not in the nature of a discontinuance but rather seeks dismissal of the complaint with the consent of the plaintiff which relief Associates has moved for in the alternative.

Associates for the second time moves for summary judgment dismissing plaintiff's claims and the cross-claims asserted by the other parties against it on the grounds that it should be permitted to renew its motion for summary dismissal because its witness has now appeared for deposition and this court's earlier

denial of its motion was predicated upon incomplete discovery. The other defendants and third-party litigants oppose Associates' motion while plaintiff submits no opposition to the relief sought.

The complaint alleges that defendants were negligent in leaving a garbage bag filled with coffee grounds and other trash on the floor next to the freight elevators in the basement where plaintiff was employed as an exterminator by third-party defendant Ramac Corporation, the extermination contractor for the building, causing him to trip and fall and sustain injuries.

Rockefeller Center, North, Inc., is the owner of the premises and Time, Inc., is the main tenant. Movant Associates pursuant to a contract with Time, Inc., provides food and beverages services upon the premises while One Source Facility Services provides cleaning services upon the premises.

With respect to Associates' prior motion, the court held that Associates' "affidavits are not sufficient to establish prima facie entitlement to a judgment." The policy prohibiting successive motions for summary judgment has no application where, as here, the first motion, made before discovery is concluded, is denied on the ground of the existence of a factual issue which, through later disclosure of facts, is resolved. Freeze Right Refrig. & A.C. Servs. v City of New York, 101 AD2d 175 (1st Dept 1984). On this motion the court finds that Associates has met

its burden of establishing its prima facie entitlement to summary dismissal by submitting deposition testimony that its restaurant was located on the second floor of the building and that it neither occupied or ever used the basement level of the building and that any garbage bags from the second floor were brought only to the sub-basement level where the compactor was located. Associates asserts that there is no evidence that it placed the garbage bag which caused plaintiff's accident anywhere in the basement level at the time of plaintiff's accident. See Pomerantz v Culinary Inst. of Amer., 2 AD3d 821 (1st Dept 2003).

The other defendants have failed to raise a triable issue of fact that Associates either created or had actual or constructive notice of the hazardous condition. The First Department held in Giuffrida v Metro North Commuter R. Co. (279 AD2d 403, 404 [1st Dept 2001]), "[w]here the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed", and Associates has done so. In an effort to refute Associate's demonstration, the moving co-defendants point to plaintiff's testimony that after falling he noticed that he slipped on a clear garbage bag that contained coffee grounds and cups. They also cite the record evidence that defendant

Associates used clear plastic bags to dispose of trash, which would have included coffee grounds and cups. However, though the record contains evidence that clear garbage bags originated from Associates, and that the clear garbage bag was visible and apparent, it is devoid of any evidence that tends to show how long a period of time such clear garbage bag was in the basement area before plaintiff fell there. In fact, at his deposition, plaintiff stated that he saw nothing on the floor of the basement area at 9:00 pm, but it was only later, when he returned to the area at midnight that he slipped and fell on the clear garbage bag. There is no evidence that Associates' employees ever traversed the basement area (cf. Eisenberg v Lunch Boy, Inc, 256 AD2d 93 [1st Dept 1998]), let alone that they regularly or routinely left anything there (Pfeuffer v New York City Housing Authority, 93 AD3d 470 (1st Dept 2012). In fact, the only evidence is that after 9:00 pm, Associates employees no longer had access to the freight elevators and therefore could no longer even get into the basement where plaintiff fell. Thus, any conclusion that Associates gained access to place a clear garbage bag in the basement after 9:00 pm on the day of plaintiff's accident would be purely speculation. DeJesus v New York City Housing Authority, 53 AD3d 410, 411, aff'd 11 NY3d 889 (2008). The court shall therefore grant Associates's motion for summary judgment.

Rockefeller Center and Time cross-move for summary judgment against Associates on their claims for contractual and common law indemnification.

Preliminarily, Associates argues that the cross-motion is untimely and that in any event the cross-movants are not entitled to summary judgment on their claims for indemnification. The court holds that the cross-motion is timely. There is no dispute that Associates's motion for summary judgment is timely and because that motion sought summary judgment dismissing the cross-claims of Rockefeller Center and Time, those parties' cross-motions seeking summary judgment in their favor on those claims are properly considered. As stated by the Court

> an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds. In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (see CPLR 3212 [a]) to review the untimely motion or cross motion on the merits. Notably, the court, in the course of deciding the timely motion, is, in any event, empowered to search the record and award summary judgment to a nonmoving party (see CPLR 3212 [b]).

Grande v Peteroy, 39 AD3d 590, 592 (2d Dept 2007).

With respect to the cross-movants' claims for contractual indemnification, the contract between Associates and Time states in pertinent part that

> The Contractor [Associates] shall be responsible for and shall indemnify and hold harmless Time Inc. and its affiliates . . . from and against any and all loss,

> claims, damages, liabilities, judgments, penalties, fines and costs of any kind and all legal action, including attorney's fees . . . of any nature arising out of or resulting from any breach or alleged breach of any of the Contractor's obligations, representations or warranties hereunder.

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 (1989). Here, Associates' duty to indemnify is only triggered by an alleged breach of the contract between Associates and Time. Time asserts that Associates breached the "Sanitation and Maintenance" section of their contract which stated in pertinent part that Associates "shall be responsible for gathering and containerizing trash and garbage generated by the provision of Dining Services (Time Inc. shall remove all trash and garbage so gathered and containerized by [Associates], at locations to be specified by Time Inc.). The cleaning of sanitation areas around the trash containers is the responsibility of [Associates]."

Associates is correct in stating that Rockefeller Center cannot assert a claim for contractual indemnity because it is not a party to the contract containing the indemnity clause and therefore the court upon a search of the record (CPLR 3212 [b]) would dismiss Rockefeller Center's claim for contractual indemnification against Associates.

Time's cross-motion for summary judgment seeking contractual indemnification shall also be denied. In order to be entitled to indemnification under the contract, Time must establish that plaintiff's claims against Associates arise out of a "breach or alleged breach" of its contractual obligations. Time on this motion has failed to set forth a prima facie case of such a breach by Associates. Plaintiff's allegations do not implicate the contractual duties relied upon by Time here as Associates was only required to gather and containerize its garbage and the contract explicitly provides that Time was responsible for removing garbage placed in the designated areas. Associates's cleaning obligation by the contract's express terms extended only to the area around its trash receptacles.

Contrary to Time's assertions, the indemnification provision of this contract is narrower than that considered by the Court in Drzewinski v Atlantic Scaffold & Ladder Co., Inc. (70 NY2d 774, 776 [1987]) wherein indemnification was triggered "by reason of any omission or act of the indemnitor . . . in the execution of the work." In Drzewinski, the indemnification came into effect based upon any claim which alleged some act or omission by the indemnitor. In this case, indemnification is only triggered by an act alleged to have caused injury which is done in breach of a contractual obligation of the indemnitor. Time here has failed

to sustain its prima facie burden of demonstrating that Associates's alleged actions constituted such a breach.

With respect to the cross-movants' application for summary relief on their cross-claims for common indemnification, the applicable legal standard is as follows:

> The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner. To establish their claim for common-law indemnification, the third-party plaintiffs were required to prove not only that they were not negligent, but also that the proposed indemnitor [] was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury.

Bellefleur v Newark Beth Israel Medical Center, 66 AD3d 807, 808 (2d Dept 2009) (internal quotations and citations omitted). Here, Time and Rockefeller Center have failed to demonstrate a prima facie case as to their lack of negligence. Moreover as discussed above, there is no evidence that Associates was responsible for negligence that contributed to the plaintiff's accident, and therefore Rockefeller Center and Time's claim for common law indemnification is moot.

Accordingly, it is

ORDERED that Restaurant Associates' motion for an order "so-ordering" the stipulation of discontinuance executed by Associates and the plaintiff is DENIED; and it is further

ORDERED that Restaurant Associates' motion for summary judgment dismissing the complaint and cross-claims as against Restaurant Associates, Inc. is GRANTED; and it is further

ORDERED that the cross-motions of Rockefeller Center North, Inc., and Time, Inc. are DENIED; and it is further

ORDERED that the remaining parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013, for a pre-trial conference on September 20, 2012 at 2:30 P.M.

This is the decision and order of the court.

Dated: August 23, 2012 ENTER:

J.S.C.
DEBRA A. JAMES

FILED
SEP 06 2012
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