

**Joynes v Acadia-P/A 161st St LLC**

2013 NY Slip Op 33660(U)

October 3, 2013

Sup Ct, Bronx County

Docket Number: 0300284/2011

Judge: Wilma Guzman

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This opinion is uncorrected and not selected for official publication.

[\* 1]

PART 07

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

Case Disposed   
Settle Order   
Schedule Appearance

-----X  
JOYNES, BRENDA

Index No. 0300284/2011

-against-

Hon. WILMA GUZMAN

ACADIA-P/A 161ST STREET LLC  
-----X

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
Noticed on **March 26 2013** and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this *Motion is decided in accordance with the attached decision and order.*

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 10/3/13

Hon.   
\_\_\_\_\_  
WILMA GUZMAN, J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

Index No. **300284/11**  
Motion Calendar No. **9**  
Motion Date: **7/29/13**

\_\_\_\_\_  
BRENDA JOYNES

Plaintiff,

-against-

**DECISION/ ORDER**

**Present:**

**Hon. Wilma Guzman**  
Justice Supreme Court

ACADIA-P/A 161<sup>st</sup> Street, LLC and  
GATEWAY BUILDING SERVICES, INC.  
Defendants.

\_\_\_\_\_  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, Exhibits Thereto.....	1
Affirmation in Opposition .....	2
Reply Affirmation .....	3

*Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:*

Defendants Acadia-P/A 161<sup>st</sup> Street LLC (hereinafter referred to as "Acadia") moves this court for an Order on the cross-claims against defendant Gateway Building Services Inc., (hereinafter referred to as "Gateway") on the grounds of contractual and common law indemnification. Defendant Gateway submitted written opposition. Plaintiff failed to appear for oral argument, as such, this motion is considered on default of the plaintiff.

Plaintiff commenced this action seeking damages for injuries allegedly sustained as the result of a slip and fall which occurred on March 29, 2010 at 260 East 161<sup>st</sup> Street, Bronx, County (the subject premises) for which Defendant Acadia is was the property manager and defendant Gateway is the contractor.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986) and Winegrad v. New York University Medical Center,

64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in Court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. *See, Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1<sup>st</sup> Dept., 1989). It is well settled that issue finding, not issue determination, is the key to summary judgment. *See, Rose v. Da Ecib USA*, 259 A.D.2d 258 (1<sup>st</sup> Dept., 1999). Summary judgment will only be granted if there are no material, triable issues of fact. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Plaintiff testified that on the date of her accident to her knowledge, Gateway Building Services was an outside contractor for the subject premises. Plaintiff worked in the subject building. As she left the building, at approximately 8:00pm she exited the elevator and walked through the vestibule doors towards the outside doors. As she walked, she slipped and fell on what she described as rainwater that came in as a result of the rain that day. After she fell she noticed her coat was wet and dirty. She reported the fall to the office manager and the custodian staff.

James Chrisme testified that he is the Building Manger for the subject premises employed by Acadia Realty Trust. The subject building is owned by Acadia Realty-P/A LLC. His duties in March 2010 included making sure the staff kept the building clean, common areas were safe and repairs were made. Gateway was hired as a subcontractor to keep the building clean. He testified that Gateway had a staff of six or seven people. Mr. Chrisme issued maintenance assignments to the Gateway employees, including telling the employees to put down mats and mop if he observed water coming into the building. . He testified that Gateway trained their employees on how to handle inclement weather however, it was his role as the building manager to make sure that Gateway got the job done if there was such inclement weather, including rain. If it was raining all day long mats would be placed down, including by the doors exiting the building. There would also be caution signs. Mr. Chrisme testified that the plaintiff showed him where she fell and he observed a mat to be in that area.

Mike Acevedo testified on behalf of the that he is the Engineer of the Boiler and was a night supervisor. He also does the plaster, paint, plumbing inside the building. Mr. Acevedo testified that Mr. Chrisme, prepares his schedule, supervises and inspects his work prepare a schedule, including

instructing what to do in the building in inclement weather. Mr. Acevedo testified that it was the customary practice to put the mats down whenever it rained.

The Service contract between Acadia [Manager] and Gateway [Contractor], executed on December 26, 2007 and effect 2008–2011 as attached to defendant Acadia’s moving papers indicates that the services to be performed : “For the consideration hereinafter set forth in paragraph 3 hereof, contractor agrees to perform the Services in accordance with the schedule and in the manner specified in the specification, which are attached hereto as Exhibit “A” and made a part hereof by reference.” However, Exhibit “A” to the contract as submitted by defendant Acadia does not include the specifications. As such, this Court can not determine other than by improperly relying on the conflicting testimony of Mr. Chrisme and Mr. Acevedo as to what the specific duties of Gateway were in regards to being the cleaning contractor for the building. Furthermore, as indicated by Mr. Chrisme’s testimony, he maintained and exercised the authority to direct the work of Gateway employees and questions of fact as to each parties negligence is an issue to be resolved by the trier of fact.

Section 9 of the Service Agreement states in pertinent part.

Contractor shall defend, indemnify and hold harmless Manager... with respect to all loss, damages, fines, penalties, costs and expenses and liabilities . . . arising from any claim, suit or action in which it is alleged or determined that any injury to or death of any person, or damage or destruction to the property of any person, was caused in whole or in part by:

i. The acts omission, whether negligent, willful or otherwise, of Contractor its employees or agents.

Indemnification contracts that seek to indemnify contractors from their own acts of negligence are unenforceable. Itri Bric & Concrete Corp. v. Aetna Casualty & Surety Co., 89 N.Y.2d 786 (1997). The indemnification clause herein as written, seeks to require indemnification of the contractor for its own acts, whether it be negligent or not. As such, this indemnification clause is void and unenforceable. See also, Brooks v. Judlau Contracting, Inc., 11 N.Y.3d 204 (2008).

Based upon the foregoing, this Court finds that defendant Acadia has not met the burden for summary judgment on the issues of contractual indemnification and common law indemnification.

This Court finds defendant Acadia's remaining arguments without merit.

Accordingly, it is

ORDERED that defendant Acadia's motion for summary judgment is hereby denied. It is further

ORDERED that defendant Acadia shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of entry of this order.

This constitutes the decision and order of this Court.

DATE 10/3/13



HON. WILMA GUZMAN  
Justice Supreme Court.