

**Mrkulic v 405 Lexington Ave. LLC**

2013 NY Slip Op 30551(U)

March 18, 2013

Supreme Court, New York County

Docket Number: 116963/06

Judge: Saliann Scarpulla

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

*Handwritten signature/initials*

PRESENT: HON. SALIANN SCARPULLA  
*Justice*

PART 19

Index Number : 116963/2006  
MRKULIC, NAKSIJA  
vs.  
405 LEXINGTON AVENUE  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

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

decided per the memorandum decision dated 3/18/13  
which disposes of motion sequence(s) no. 002 and 003.

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

RECEIVED  
MAR 20 2013  
EAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT-CIVIL

FILED

MAR 21 2013

NEW YORK  
COUNTY CLERK'S OFFICE

*Handwritten signature: Saliann Scarpulla, J.S.C.*

Dated: 3/18/2013

- 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  
COUNTY OF NEW YORK: PART 19

----- X  
NAKSIJA MRKULIC,

Plaintiff,

- against -

405 LEXINGTON AVENUE LLC, TISHMAN SPEYER  
PROPERTIES, L.P. and JOHN DOES 1-10, said names  
being fictitious but intended to represent the identities of  
defendants not yet ascertained, GUARDIAN SERVICES  
INDUSTRIES, CORP., incorrectly sued as GUARDIAN  
SERVICES INDUSTRIES, INC. and HQ GLOBAL  
WORKPLACES, INC.,

Defendants.

----- X  
405 LEXINGTON AVENUE LLC and  
TISHMAN SPEYER PROPERTIES, L.P.

Third-Party Plaintiffs,

-against-

HQ GLOBAL WORKPLACES, INC. and GUARDIAN  
SERVICES INDUSTRIES, INC.

Third-Party Defendants.

----- X  
**For Plaintiff:**  
Cheriff & Fink, P.C.  
2 Rector Street, Suite 2104  
New York, NY 10006

**For Defendant Guardian Services:**  
Lester Schwab Katz & Dwyer, LLP  
120 Broadway  
New York, NY 10271

**For Defendants 405 Lexington and Tishman Speyer:**  
Ahmuty, Demers & McManus, Esqs.  
200 I.U. Willets Road  
Albertson, NY 11507

**For Defendant HQ Global Workplaces:**  
Hoey, King, Epstein, Prezioso & Marquez  
55 Water Street, 29th Floor  
New York, NY 10041

Index Number: 116963/06  
Submission Date: 11/14/12

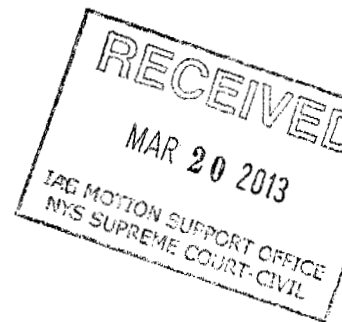
**DECISION and ORDER**

**FILED**

**MAR 21 2013**

**NEW YORK  
COUNTY CLERK'S OFFICE**

Index Number: 590099/07



Papers considered in review of defendants 405 Lexington and Tishman Speyer’s motion for summary judgment and defendant HQ Global Workplace’s cross-motion for summary judgment (motion seq. no. 002):

- Notice of Motion/Affirm. of Counsel/Exhibits.....1
- Plaintiff’s Memo. of Law in Opp. to Motion/Affirm. of Counsel.....2
- Freire Affirm. in Opp. to Motion.....3
- Del Toro Affirm. in Partial Opp. to Motion.....4
- Reply Affirm. in Supp. of Motion.....5
- Notice of Cross-Motion/Affirm. of Counsel.....6
- Lehrer Affirm. in Opp. to Cross-Motion.....7
- Del Toro Affirm. in Partial Opp. to Cross-Motion.....8
- Reply Affirm. in Supp. of Cross-Motion.....9

Papers considered in review of Plaintiff’s motion for partial summary judgment (motion seq. no. 003):

- Notice of Motion/Affirm. of Counsel/Affidavits/Exhibits.....1
- Lehrer Affirm. in Opp. to Motion.....2

**HON SALIANN SCARPULLA, J.:**

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this negligence action, defendants 405 Lexington Avenue, LLC (“405 Lexington”) and Tishman Speyer Properties, L.P. (“Tishman”) (collectively, “405 Lexington/Tishman”) move (motion seq. no. 002) for: (1) summary judgment dismissing plaintiff Naksija Mrkulic’s (“Mrkulic”) complaint and all cross-claims; and (2) summary judgment on their third-party complaint against HQ Global Workplaces, Inc. (“HQ Global”) and Guardian Services Industries, Inc. (“Guardian”) for contractual indemnification pursuant to CPLR § 3212. HQ Global cross-moves for summary judgment dismissing Mrkulic’s complaint and all cross-claims.

Guardian moves (motion seq. no. 003) for: (1) summary judgment dismissing 405 Lexington/Tishman’s third-party complaint for breach of contract and contractual indemnification; and (2) summary judgment dismissing HQ Global’s cross-claims for

contribution, common law indemnification, contractual indemnification, and breach of contract pursuant to CPLR § 3212.

### **Background**

Mrkulic was a janitorial worker employed by Guardian to perform cleaning services on the 25th Floor of 405 Lexington Avenue, New York, NY (the “premises”). In her complaint, Mrkulic alleges that she fell and suffered personal injuries while working at the premises on August 26, 2005. Mrkulic alleges that defendants negligently created or allowed a hazardous and unsafe condition to exist on the premises – a wet spot on a carpet – which caused her injuries.<sup>1</sup>

At her deposition, Mrkulic testified that at approximately 11:45 P.M., she was vacuuming a carpeted hallway on the 25th Floor, near the kitchen. Mrkulic then “realized there was some water on the carpet.” Mrkulic testified that “the vacuum started to splatter the water so I got scared and I stopped the vacuuming and I wanted to pull the cords from the outlet.” Mrkulic testified that as she was running to unplug the vacuum cord in the kitchen, she slipped on the kitchen floor because her shoes were wet from the carpet.

Mrkulic testified that the wet spot was circular in nature and approximately two to three feet in diameter. Mrkulic did not know how the wet spot was created, but testified that it “looked like the water was coming from the floor itself.”

---

<sup>1</sup> Mrkulic originally alleged a negligence cause of action against Guardian. However, Mrkulic’s negligence claim against Guardian has been discontinued pursuant to a stipulation of discontinuance dated December 22, 2008.

Prior to the accident, Mrkulic had been to the 25th Floor earlier in the evening, at approximately 5:30 P.M., to collect garbage, and later at 9:00 P.M. Mrkulic did not see the wet carpet spot at either of those times. Mrkulic testified that when she was in the kitchen at 9:00 P.M., the kitchen appeared to have been recently cleaned by another Guardian employee. Mrkulic also observed that in the kitchen, the "sink was full, three-quarters" although she did not observe whether the faucet was leaking. Mrkulic reported the condition of the sink to her supervisor, Tage Ramharack, at approximately 9:00 P.M.

In her complaint, Mrkulic alleged that 405 Lexington was the landlord and long-term ground lessee of the premises, and Tishman was the managing agent. Grantley Ewart ("Ewart"), a Tishman mechanic, testified that he was not aware of any leaks on the 25th Floor prior to Mrkulic's accident, except for ceiling leaks and air conditioner leaks that were 100 feet and 30 feet away, respectively. Ewart also testified that he was never informed of any water on the carpet of the 25th Floor near Mrkulic's accident.

At the time of the accident, HQ Global was the tenant that occupied the 25th Floor pursuant to a lease with 405 Lexington ("the Lease"). HQ Global was an executive office provider that rented out office space on the 25th Floor, and also provided reception and conference room access to subtenants. HQ Global employed a sales manager, Marisa Mohan ("Mohan"). At her deposition, Mohan testified that she made biweekly visits to the 25th Floor in 2005, and she was never advised of any water or mechanical problems with the kitchen.

Mohan also testified that HQ Global employed three or four receptionists who worked on the 25th Floor from 8:30 A.M. to 5:30 P.M. Mohan testified that the 25th Floor may have accommodated more than ten subtenants, and that the subtenants had 24 hour access to the premises after the receptionists left at 5:30 P.M.

Tage Ramharack ("Ramharack") was Guardian's night supervisor on the date of the accident. Ramharack supervised the cleaning staff and conducted monthly inspections to assess the cleanliness of each floor. Ramharack testified that he did not receive any reports about any problems with the kitchen area on the 25th Floor between May and August 2005. Guardian's project manager, Senada Pali ("Pali"), also testified that she does not remember any reports of problems with the kitchen.

405 Lexington/Tishman commenced a third-party action against HQ Global and Guardian. 405 Lexington/Tishman asserted four claims against HQ Global for (1) contribution; (2) breach of contract, (3) contractual indemnification, and (4) a declaratory judgment that HQ Global is liable for indemnification.<sup>2</sup>

405 Lexington/Tishman seeks contractual indemnification from HQ Global under a lease agreement with HQ Global (the "Lease"). The Lease provides that HQ Global must indemnify and defend 405 Lexington/Tishman from any and all losses "arising from any accident, injury or damage whatsoever caused to any person or to the property of any person and occurring during the Term . . . in or about the Premises." HQ Global must

---

<sup>2</sup> 405 Lexington/Tishman also asserted these four claims as cross-claims against HQ Global. See 405 Lexington/Tishman's Verified Answer to Plaintiff's Verified Amended Complaint, dated June 25, 2007.

also obtain commercial general liability insurance naming 405 Lexington/Tishman as additional insureds under the terms of the Lease.

405 Lexington/Tishman asserted two third-party claims against Guardian for (1) breach of contract and (2) a declaratory judgment that Guardian is liable for contractual indemnification. 405 Lexington/Tishman seeks indemnification under a services contract between Guardian and TST/TMW 405 Lexington L.P. (the "Services Contract"). The Services Contract provides that Guardian shall indemnify "owner, the OWNER'S AGENT . . . from and against all liability, claims, damages, losses and expenses, including, without limitation, reasonable legal fees and court costs arising out of or alleged to arise out of the negligence" of Guardian. The Services Contract also provides that Guardian shall procure commercial general liability insurance naming the owner and the owner's agent as additional insureds.

HQ Global asserts cross-claims against 405 Lexington/Tishman and Guardian for (1) contribution; (2) common law indemnification; (3) contractual indemnification; and (4) breach of contract. Guardian asserted counterclaims against 405 Lexington/Tishman for contribution and indemnification, and cross-claims against HQ Global for contribution and indemnification.

#### **I. 405 Lexington and Tishman's Motion for Summary Judgment**

In their motion for summary judgment, 405 Lexington/Tishman argue that Mrkulic's complaint should be dismissed because they did not create the wet carpet, nor did they have actual or constructive notice that the carpet was wet.



405 Lexington/Tishman also argue that they are entitled to indemnification from HQ Global under the Lease, and that they are also entitled to indemnification from Guardian under the Services Contract.

In opposition, Mrkulic argues that defendants had constructive notice of the defect because it was apparent that the carpet was wet. Mrkulic also argues that the condition may have existed for a sufficient length of time because Ramharack, Guardian's night supervisor, testified that he only inspected the 25th Floor for cleanliness once per month.

## **II. HQ Global's Cross-Motion for Summary Judgment**

In its cross-motion for summary judgment, HQ Global argues that Mrkulic's complaint should be dismissed because it did not create the condition of the wet carpet, nor did it have actual or constructive notice of the condition.

HQ Global argues that it is entitled to summary judgment dismissing all cross-claims for contribution and common law indemnification because HQ Global was not negligent.<sup>3</sup> HQ Global also argues that 405 Lexington/Tishman's cross-claims for contractual indemnification should be dismissed because the indemnification provision in the Lease is void under General Obligations Law § 5-321. Specifically, HQ Global argues that the indemnification provision is void because it is not limited to HQ Global's acts or omissions, it makes no exception for 405 Lexington/Tishman's negligence, and it does not limit recovery to insurance proceeds.

---

<sup>3</sup> Because 405 Lexington/Tishman asserted identical claims as both cross-claims and third-party claims, I construe HQ Global's motion for summary judgment to also seek dismissal of 405 Lexington/Tishman's identical third-party claims.

### III. Guardian's Motion for Summary Judgment

Guardian argues that 405 Lexington/Tishman's third-party claims for indemnification and breach of contract should be dismissed because: (1) 405 Lexington is not the owner listed in the Services Contract and (2) Tishman is not an intended beneficiary of the Services Contract. Guardian also argues that it does not owe indemnification to 405 Lexington/Tishman because it was not negligent.

In opposition, 405 Lexington/Tishman argues that a triable issue of fact exists as to whether 405 Lexington is the owner of the premises covered under the Services Contract. Lexington/Tishman submit the deposition testimony of Denise Wokas, Tishman's property manager, who testified that 405 Lexington was "the ownership entity for the building." Alternatively, 405 Lexington moves for leave to amend its answer to name the proper ownership entity of the premises.

#### Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

## I. 405 Lexington and Tishman's Motion for Summary Judgment

### A. Negligence

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused the plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981). To establish negligence in a slip-and-fall case, a plaintiff must demonstrate that the defendant breached its duty to the plaintiff by creating a dangerous condition, or that the defendant had actual or constructive notice and failed to remedy the situation. *Kesselman v. Lever House Rest.*, 29 A.D.3d 302, 304 (1st Dep't 2006).

Here, I find that 405 Lexington/Tishman made a *prima facie* showing of entitlement to judgment as a matter of law. Through the deposition testimony submitted, 405 Lexington/Tishman offered sufficient evidence to demonstrate that neither company created the condition of the wet carpet, nor did they have actual or constructive notice that the carpet was wet.

First, 405 Lexington/Tishman demonstrated that they did not create the condition. There is no evidence that any employee of 405 Lexington was on the 25th Floor, nor was there any evidence that Ewart, Tishman's mechanic, created the wet condition. Second, 405 Lexington/Tishman demonstrated that they did not have actual notice of the condition. Ewart testified that he had never been notified of any problem with water on the floor in the area of Mrkulic's accident. Ramarack and Pali from Guardian also

testified that they never were advised of any water problems in the kitchen area to report to 405 Lexington/Tishman.

Further, 405 Lexington/Tishman demonstrated that they did not have constructive notice of the wet carpet. To establish constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. *Dombrower v. Maharia Realty Corp.*, 296 A.D.2d 353, 353 (1st Dep't 2002).

Here, Mrkulic's testimony indicates that the wet spot was not visible and apparent for a sufficient length of time for 405 Lexington/Tishman to discover and remedy it. Mrkulic testified that she had been on the floor twice before in the same night at 5:30 P.M. and 9:30 P.M., and she did not see the wet spot until the accident. Mrkulic also testified that another Guardian employee had cleaned the kitchen prior to 9:00 P.M., yet there is no indication that the wet spot had been seen by anyone else prior to the accident.

Mrkulic failed to present any evidence to permit a finder of fact to infer, without speculating, that 405 Lexington/Tishman created the condition, or had actual or constructive notice of the condition and failed to remedy it. *Pinto v. Little Fish Corp.*, 273 A.D.2d 63, 63 (1st Dep't 2000). Although Mrkulic argues that Ramharack, Guardian's night supervisor, only conducted monthly inspections of the 25th Floor, Ramharack's actions are not relevant to whether 405 Lexington/Tishman had constructive notice of the condition.

Accordingly, 405 Lexington/Tishman's motion for summary judgment dismissing Mrkulic's complaint is granted.

## **B. Contractual Indemnification**

### **1. HQ Global**

405 Lexington/Tishman move for summary judgment on their third-party claims against HQ Global for contractual indemnification. Here, I find that 405 Lexington/Tishman are entitled to indemnification for the costs they incurred in defense of the main action as a matter of law. The Lease requires HQ Global to indemnify 405 Lexington/Tishman from losses "arising from any accident, injury or damage whatsoever caused to any person" on the premises. Although there is no finding that 405 Lexington/Tishman were liable in the main action, the broad language of the indemnification provision requires HQ Global to indemnify 405 Lexington/Tishman for the costs they incurred in defending the main action. *Di Perna v. American Broadcasting Company*, 200 A.D.2d 267, 267 (1st Dep't 1994) (finding a right to indemnification of defense costs under broad indemnification provision even when there is no finding of liability in main action).

Although HQ Global argues that the indemnification provision is void under General Obligations Law § 5-321, I find that the indemnification provision does not violate § 5-321. Section 5-321 permits a lessor and lessee to freely enter into an indemnification agreement that utilizes insurance to allocate the risk of liability to third parties between themselves. *Great N. Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412,

419 (2006). Here, the indemnification clause at issue does not violate § 5-321 because Lexington/Tishman and HQ Global freely entered into the Lease, which contained a broad indemnification provision that uses insurance to allocate the risk of liability to third parties. In addition, the indemnification clause is enforceable under § 5-321 because there is no showing that 405 Lexington/Tishman were negligent in causing Mrkulic's injuries. *Crouse v. Hellman Construction Co.*, 38 A.D.3d 477, 478 (1st Dep't 2007).

Accordingly, 405 Lexington/Tishman's motion for summary judgment seeking contractual indemnification and a declaratory judgment that they are entitled to contractual indemnification from HQ Global is granted only to the extent that 405 Lexington/Tishman are entitled to indemnification of costs incurred in defense of the main action, including reasonable attorney's fees, costs, and disbursements.

## **2. Guardian**

405 Lexington/Tishman move for summary judgment on their contractual indemnification claim against Guardian. Here, I find that Tishman demonstrated its entitlement to judgment as a matter of law against Guardian for indemnification of the costs it incurred in defending the main action.

The Services Contract provides that Guardian will indemnify the "owner" and the "owner's agent" from losses "arising out of or alleged to arise out of the negligence" of Guardian. Because Tishman is listed as the "owner's agent" in the Services Contract, Guardian must indemnify Tishman for the costs of defending Mrkulic's action, which was alleged to arise out of Guardian's negligence. Contrary to Guardian's claim, the

indemnification provision “expressly contemplates the absence of fault” and does not condition Tishman’s right to indemnification on a finding that Guardian was negligent.

*Di Perna v. American Broadcasting Company*, 200 A.D.2d at 267.

Here, I find that 405 Lexington originally failed to show that it is entitled to indemnification from Guardian as a matter of law. The Services Contract lists TST/TMW 405 Lexington as the owner entitled to contractual indemnification, not 405 Lexington. However, I grant 405 Lexington/Tishman’s unopposed motion to amend their answer to name the proper ownership entity of the premises as TST/TMW 405 Lexington. After such amendment, as the proper party has now been named, I grant summary judgment to TST/TMW 405 Lexington for contractual indemnification of the costs incurred in defending the main action.

Accordingly, 405 Lexington/Tishman’s motion for summary judgment seeking a declaratory judgment that they are entitled to contractual indemnification from Guardian is granted as to Tishman and newly added TST/TMW 405 Lexington for costs incurred in the defense of the main action, including reasonable attorney’s fees, costs, and disbursements.

### **C. HQ Global and Guardian’s Cross-Claims**

405 Lexington/Tishman move for summary judgment dismissing all cross-claims asserted by HQ Global and Guardian.<sup>4</sup> I find that 405 Lexington/Tishman demonstrated

---

<sup>4</sup> Guardian’s claims against 405 Lexington/Tishman were asserted as counterclaims, not cross-claims. I construe 405 Lexington/Tishman’s motion as seeking dismissal of Guardian’s counterclaims for contribution and indemnification. Guardian

entitlement to judgment as a matter of law dismissing HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract. HQ Global does not oppose.

I also find that 405 Lexington/Tishman demonstrated its entitlement to judgment as a matter of law dismissing Guardian's claims for contribution and indemnification. Guardian failed to demonstrate any evidence that 405 Lexington/Tishman contributed to Mrkulic's injuries, or that 405 Lexington/Tishman had a duty to indemnify Guardian based on an express contract or implied indemnification theory. To prove an indemnification claim, the movant must show that it maintains a right to "shift the entire loss" to another party based on an express contract or implied indemnification. *Bellevue S. Assoc. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 296 (1991).

Accordingly, 405 Lexington/Tishman's motion for summary judgment dismissing all cross-claims is granted to the extent that HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract are dismissed, and Guardian's counterclaims for contribution and indemnification are dismissed.

## **II. HQ Global's Motion for Summary Judgment**

### **A. Negligence**

HQ Global moves for summary judgment dismissing Mrkulic's complaint. Here, I find that HQ Global demonstrated its entitlement to judgment as a matter of law.

---

also construed 405 Lexington/Tishman's motion in this same manner.



Through the deposition testimony in the record, HQ Global offered sufficient evidence to demonstrate that it did not create the condition, nor did it have actual or constructive notice of the condition.

First, there is no evidence in the record that HQ Global's employees created the condition. HQ Global employs three to four receptionists who leave the premises at 5:30 P.M., and there is no evidence that any of HQ Global's employees created the wet spot involved in Mrkulic's accident at 11:45 P.M. Second, HQ Global demonstrated that it did not have actual notice of the condition. Mohan, HQ's sales manager, testified that she never received any complaints about water issues on the 25th Floor.

Further, HQ Global also demonstrated that it did not have constructive notice of the condition. As stated above, Mrkulic's own deposition testimony indicates that the wet spot was not visible and apparent for a sufficient length of time for HQ Global to discover and remedy it. Mrkulic failed to present any evidence to permit a finder of fact to infer, without speculating, that HQ Global created the condition, or had actual or constructive notice of the condition and failed to remedy it. *Pinto v. Little Fish Corp.*, 273 A.D.2d at 63.

Accordingly, HQ Global's cross-motion for summary judgment dismissing Mrkulic's complaint is granted.

## **B. 405 Lexington/Tishman and Guardian's Cross-Claims**

### **1. Contribution and Common Law Indemnification**

HQ Global cross-moves for summary judgment dismissing all cross-claims for contribution and common law indemnification asserted by 405 Lexington/Tishman and Guardian.

A claim for contribution arises when “two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owed to the injured-person.” *Smith v. Sapienza*, 52 N.Y.2d 82, 87 (1981); *Trump Vill. Section 3, Inc. v. New York State Hous. Fin. Agency*, 307 A.D.2d 891, 896 (1st Dep’t 2003). To prove a claim for common law indemnification, the movant must show that he or she has been held vicariously liable for the wrongdoing of another. *Structure Tone, Inc. v. Universal Services Group, Ltd.*, 87 A.D.3d 909, 911 (1st Dep’t 2011).

Here, I find that HQ Global is entitled to judgment as a matter of law dismissing Guardian and 405 Lexington/Tishman’s cross-claims for contribution and common law indemnification. Neither 405 Lexington/Tishman nor Guardian demonstrated any evidence that HQ Global contributed to Mrkulic’s injuries, or that they were held vicariously liable for any alleged wrongdoing of HQ Global.

### **2. Contractual Indemnification and Breach of Contract**

HQ Global also moves for summary judgment dismissing 405 Lexington/Tishman’s cross-claims for contractual indemnification. In accordance with my grant of summary judgment in favor of 405 Lexington/Tishman’s indemnification

claim against HQ Global for costs incurred in defense of the main action, I deny HQ Global's motion for summary judgment dismissing 405 Lexington/Tishman's contractual indemnification claim.

However, I find that HQ Global is entitled to summary judgment dismissing 405 Lexington/Tishman's breach of contract claim. 405 Lexington/Tishman does not oppose.

Accordingly, HQ Global's cross-motion for summary judgment dismissing all cross-claims is granted to the extent that Guardian's cross-claims for contribution and common law indemnification are dismissed, and 405 Lexington/Tishman's cross-claims for contribution, common law indemnification, and breach of contract are dismissed, and otherwise denied as to 405 Lexington/Tishman's cross-claims for contractual indemnification.

### **III. Guardian's Motion for Summary Judgment**

#### **A. 405 Lexington/Tishman's Claims**

Guardian moves for summary judgment dismissing 405 Lexington/Tishman's breach of contract and contractual indemnification claims. Guardian is entitled to judgment as a matter of law dismissing 405 Lexington/Tishman's breach of contract claims. 405 Lexington/Tishman does not oppose.

In accordance with my grant of summary judgment in favor of Tishman and TST/TMW 405 Lexington's contractual indemnification claim against Guardian, I deny Guardian's motion for summary judgment dismissing their contractual indemnification claims.

Accordingly, Guardian's motion for summary judgment dismissing 405 Lexington and Tishman's third-party claims for breach of contract and contractual indemnification is granted to the extent that the breach of contract claims are dismissed, and otherwise denied.

**B. HQ Global's Claims**

I find that Guardian demonstrated its entitlement to judgment as a matter of law dismissing HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract. HQ Global does not oppose.

Accordingly, Guardian's motion for summary judgment dismissing HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract is granted.

In accordance with the foregoing, it is

ORDERED that 405 Lexington and Tishman's motion for summary judgment (motion seq. no. 002) dismissing Mrkulic's complaint pursuant to CPLR § 3212 is granted; and it is further

ORDERED that Mrkulic's complaint is dismissed as against 405 Lexington and Tishman; and it is further

ORDERED that 405 Lexington and Tishman's motion for summary judgment (motion seq. no. 002) seeking contractual indemnification and a declaratory judgment that 405 Lexington and Tishman are entitled to indemnification from HQ Global pursuant to CPLR § 3212 is granted, and 405 Lexington and Tishman are entitled to indemnification

from HQ Global for costs incurred in the defense of the main action, including reasonable attorney's fees, costs, and disbursements; and it is further

ORDERED that 405 Lexington and Tishman's motion for summary judgment (motion seq. no. 002) seeking a declaratory judgment that 405 Lexington and Tishman are entitled to indemnification from Guardian pursuant to CPLR § 3212 is granted as to Tishman and newly added TST/TMW 405 Lexington for costs incurred in the defense of the main action, including reasonable attorney's fees, costs, and disbursements; and it is further

ORDERED that 405 Lexington and Tishman's motion to amend their answer to name the proper ownership entity is granted; and it is further

ORDERED that 405 Lexington and Tishman's motion for summary judgment (motion seq. no. 002) dismissing all cross-claims pursuant to CPLR § 3212 is granted, and HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract are dismissed, and Guardian's counterclaims for contribution and indemnification are dismissed; and it is further

ORDERED that HQ Global's cross-motion for summary judgment dismissing Mrkulic's complaint pursuant to CPLR § 3212 is granted; and it is further

ORDERED that Mrkulic's complaint is dismissed as against HQ Global; and it is further

ORDERED that HQ Global's cross-motion for summary judgment dismissing all cross-claims pursuant to CPLR § 3212 is granted only to the extent that Guardian's cross-

claims for contribution and common law indemnification are dismissed, and 405 Lexington/Tishman's claims for contribution and breach of contract are dismissed, and otherwise denied as to 405 Lexington/Tishman's cross-claims for contractual indemnification against HQ Global; and it is further

ORDERED that Guardian's motion for summary judgment (motion seq. no. 003) dismissing 405 Lexington and Tishman's third-party claims for breach of contract and contractual indemnification pursuant to CPLR § 3212 is granted only to the extent that the breach of contract claims are dismissed, and otherwise denied; and it is further

ORDERED that Guardian's motion for summary judgment (motion seq. no. 003) dismissing HQ Global's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract is granted; and it is further

ORDERED that HQ's cross-claims for contribution, common law indemnification, contractual indemnification, and breach of contract against Guardian are dismissed.

Settle judgment.

This constitutes the decision and order of this Court.

**FILED**

Dated: New York, New York  
March 16, 2013

**MAR 21 2013**

ENTER: NEW YORK  
COUNTY CLERK'S OFFICE

*Saliann Scarpulla*  
Saliann Scarpulla, J.S.C.