

Great N. Ins. Co. v Estelle Irrigation Corp.

2013 NY Slip Op 32031(U)

August 29, 2013

Sup Ct, New York County

Docket Number: 600910/2008

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C. Justice

PART 48

Index Number : 600910/2008
5 EAST 80TH ST. LLC
vs.
WINDOW BOX MG LTD
SEQUENCE NUMBER : 003
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

*Motion decided in accordance with the annexed memorandum
decision and order*

FILED

AUG 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/29/13

[Signature], J.S.C.
JEFFREY K. OING
J.S.C.

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: IAS PART 48

-----x

GREAT NORTHERN INSURANCE COMPANY A/S/O
ABY ROSEN,

Plaintiff,

-against-

ESTELLE IRRIGATION CORP., TOWN & GARDENS,
LTD., and THE WINDOW BOX MG LTD.,

Defendants,

-----x

5 EAST 80TH ST, LLC,

Plaintiff,

-against-

THE WINDOW BOX MG LTD. and
ESTELLE IRRIGATION CORP.,

Defendants.

-----x

THE WINDOW BOX MG LTD.,

Third-Party Plaintiff,

-against-

TRI-STAR CONSTRUCTION LLC,

Third-Party Defendant.

-----x

JEFFREY K. OING, J.:

Preliminary Facts

On November 28, 2005, Kevin Streaks, an employee of
third-party defendant Tri-Star Construction Corp. ("Tri-Star"),
entered the townhouse owned by plaintiff 5 East 80th St. LLC ("5
East") located at 5 East 80th Street and discovered water

Action No. 1

Index No.: 105470/08

Mtn Seq. No. 004

DECISION AND ORDER

Action No.2

Index No.: 600910/08

**Mtn Seq. Nos. 003,
004, 005**

FILED

AUG 30 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

Third-Party

Index No.: 590368/10

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 2 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

cascading down the walls. After shutting off the water, Streaks and Robert Laquidara, Tri-Star's site superintendent, discovered that the water was coming from a burst manifold in the irrigation system on the fifth floor of the townhouse. The system had not been drained and winterized, and the water in the pipes allegedly froze and burst, causing the flooding that damaged the townhouse. Aby Rosen ("Rosen"), the townhouse's tenant, submitted a claim for damages to plaintiff Great Northern Insurance Company ("Great Northern"), which Great Northern paid.

The Instant Actions

Great Northern commenced a subrogation action (Action No. 1) against defendants Estelle Irrigation Corp. ("Estelle"), Town & Gardens, Ltd. ("Town & Gardens"), and The Window Box MG Ltd ("Window Box"). Simultaneously, 5 East commenced a separate action (Action No. 2) against Window Box and Estelle. Subsequently, Window Box filed a third-party complaint against Tri-Star in Action No. 2, the 5 East action.

In an order, dated June 6, 2010, Justice Marylin G. Diamond consolidated the two actions for joint discovery. Great Northern discontinued Action No. 1 against Town & Garden on March 26, 2012. Window Box then filed a third-party complaint against defendant RFR Realty LLC ("RFR") on August 17, 2012.

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 3 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

Summary Judgment Motions

Defendants, Estelle (Action No. 1, Mot. Seq. No. 004), Window Box (Action No. 2, Mot. Seq. No. 003) and third-party defendant Tri-Star (Action No. 2, Mot. Seq. No. 004) separately move, pursuant to CPLR 3212, for summary judgment dismissing the complaints and third-party complaint, respectively.

Plaintiff 5 East moves, pursuant to CPLR 1010, to dismiss Window Box's third-party complaint against RFR (Action No. 2, Mot. Seq. No. 005).

Motion seq. no. 004 of Action No. 01 and nos. 003, 004, 005 of Action No. 02 are consolidated herein for disposition.

Facts

In 2003, Rosen hired Tri-Star to perform a gut renovation of the townhouse. In connection with the project, Tri-Star hired Town & Gardens to install an irrigation system to carry water out of the house to various gardens, including the fifth floor terrace garden. Tri-Star itself had no involvement with the installation or maintenance of the irrigation system (Laquidara 1/13/10 EBT at pp. 17-20). A subcontractor, Citron Plumbing, installed the lines leading out to the irrigation system. Rosen then hired Window Box to implement the architect's plans for the townhouse's gardens and to maintain them once they were installed (Turner 4/14/10 EBT at pp. 17-18). Tri-Star completed all

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 4 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

substantive work on the gut renovation in 2004, save some minor items (Laquidara 1/13/10 EBT at pp. 13-14).

In May 2005, Rosen terminated Town & Gardens. In June 2005, Window Box contacted Estelle with a request for repairs to some piping on the sixth floor (Keane 1/27/10 EBT at pp. 17-19). Estelle's owner, Declan Keane, came to the townhouse to inspect the system. Estelle's workers subsequently returned to the townhouse on several occasions to, inter alia, repair piping on the sixth floor, adjust the water flow, and fix timers (Id. at pp. 23, 26, 32-33). Keane testified at his EBT that Estelle only sent workers when requested by Window Box (Id. at pg. 65). There was no contract between Estelle and any other defendant entity in this action (Id. at pg. 68).

The record demonstrates some dispute as to the nature of Estelle's services. Keane testified that Estelle's services were provided only on an "on call" basis (Id. at pg. 67). On the other hand, Barry Turner, head gardener for Window Box, testified at his EBT that he believed Estelle was on a regular maintenance schedule (Turner 4/14/10 EBT at pg. 52). Another area of dispute involves post-inspection activities. After inspecting the townhouse with Keane, Turner stated that his understanding was that Estelle would take charge of maintaining the irrigation system (Id. at pg. 43). There is no dispute that the only entity that dealt with Estelle was Window Box. Further, Estelle took

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 5 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

all their direction from Window Box representatives (Keane 1/27/10 EBT at pp. 130-31) and had no contact with 5 East, Rosen, or Tri-Star (Id. at pg. 77). At his EBT, Rosen testified that he had never heard of Estelle (Rosen 1/11/10 EBT at pg. 13). Mariutia Araujo, Rosen's house manager, gave similar testimony (Araujo 12/19/2011 EBT at pp. 47-48).

Keane testified that September 30, 2005 was Estelle's last service call to the townhouse, and that the purpose of the service call was to reduce the water flow in the system (Keane 1/27/10 EBT at pp. 33-34). Estelle received no further calls to service the system prior to the incident (Id. at pg. 43). On November 3, 2005, Laquidara was at the townhouse and, after discovering the irrigation system was not yet drained, remarked in passing to Turner that the system should be drained and winterized because the temperature was dropping. Turner replied that Keane was currently busy, but that Turner would "get him to do it" (Laquidara 1/13/10 EBT at pp. 22-24). There is no dispute that no one called Estelle to ask it to drain and winterize the system.

Rosen and his family were away over the Thanksgiving weekend, November 24-28, 2005. During that time, the water in the irrigation system for the fifth floor gardens froze, causing the manifold to burst. Water leaked back into the house, causing the damage and flooding that Streaks found when he entered the

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 6 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

townhouse on November 28, 2005 (Id. at pp. 31-32). Laquidara testified that upon inspecting the system he noticed ice on the manifold (Id. at pp. 87-88). He left the manifold where it was and called Turner to request repair services. Turner was surprised as this call was the first time Tri-Star had spoken to Window Box regarding the gardens and the irrigation system (Turner 4/14/10 EBT at pp. 95-96). This fact was corroborated by Margaret Geiger, Window Box's owner, who testified at her EBT that she was unaware of any involvement Tri-Star had with Window Box's work (Geiger 1/20/10 EBT at pp. 91-92).

Turner then called Keane to come to the townhouse and inspect the damage. Keane testified that the only damage to the irrigation system he could see was a crack in the manifold (Keane 1/27/10 EBT at pg. 81). Keane then winterized the system (Id.). Turner and Keane subsequently disputed responsibility for the failure to winterize the system. Keane asserted that no one had called him, to which Turner replied that Keane had the responsibility to winterize the system anyway. Turner later testified that Estelle was responsible because "[they] were working there the whole previous, you know, spring and summer and up 'til that point, and that was my understanding of what irrigation guys do" (Turner 4/14/10 EBT at pp. 62-63).

Marcelle Dial, Great Northern's property adjuster, inspected the site of the incident a few days later (Dial 6/18/09 EBT at

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 7 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

pp. 33-34). She observed a pipe lying on the terrace and took several pictures of the incident site, which were subsequently authenticated at her EBT (Id. at pp. 40-41). Several months later, Estelle removed and replaced the damaged parts of the irrigation system (Keane 1/27/10 EBT at pp. 83-84). The record does not accurately reflect what happened to the damaged manifold after the repairs. Dial did not instruct 5 East or Rosen to retain the pipe (Dial 6/18/09 EBT at pp. 31-32).

Discussion

I. Spoliation of Evidence

Window Box, Estelle, and Tri-Star separately move for dismissal of the complaint and, in Tri-Star's case, the third-party complaint, on the grounds of spoliation of evidence. They claim that 5 East and Great Northern's failure to retain key evidence, namely the cracked manifold, has prejudiced their defense of this action.

The moving parties rely heavily on Kirkland v New York City Hous. Auth., 236 AD2d 170, 173 (1st Dept 1997). In Kirkland, a stove installed by a third-party defendant allegedly caught fire and burned the plaintiff's decedent. Prior to the third-party action, the parties had the opportunity to inspect the stove. Five years later, the defendant removed the stove from the apartment. The Kirkland court held that the third-party defendant was irreparably prejudiced by their inability to

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 8 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

inspect the stove. Because the central issue in the case was whether the stove's gas line was correctly installed, discarding the stove "irrevocably stripped Vitanza, as a later-impleaded third-party defendant, of useful defenses and exposed Vitanza to extreme prejudice" (Kirkland, 236 AD2d at 175). The Kirkland court upheld the dismissal of the third-party complaint because "whether Vitanza was negligent in installing a gas connection cannot be determined without an actual inspection of that connection in context with the stove" (Id. at 175-76).

Their reliance is misplaced. Although defendants urge this Court to consider their argument that the manifold was misused or defective such that the inability to examine the manifold would be prejudicial to their respective defenses, the facts herein, unlike Kirkland, clearly demonstrates that the underlying negligence claim asserted in these actions is not premised on the installation, maintenance, or design of the manifold. The record is clear that there is no dispute as to the cause of the accident. In that regard, the record demonstrates that all defendants do not dispute that the irrigation system should have been winterized so as to prevent events such as the accident in this case (see, 5 East's Mem. of Law in Opposition to Estelle and Window Box's Motions, pg. 7, fn 8 [collecting deposition testimony of Turner, Laquidara, and Keane]). Indeed, Keane, Estelle's owner, testified that the accident was caused by the

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 9 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

failure to winterize (Keane 1/27/10 EBT at pg. 128). Further, when he inspected the irrigation system following the accident, he found the system was intact, except for the cracked manifold (Id. at 81). Clearly then, the issue is which parties had the duty to winterize the irrigation system, and the condition of the manifold is merely ancillary to that issue because the condition itself is not an element of the negligence claim. Thus, under these circumstances, defendants' inability to conduct an inspection the manifold did not amount to "extreme prejudice". For these same reasons, defendants' reliance on similar cases is unavailing (see, e.g., New York City Transit Auth. v. Consolidated Edison Co. of N.Y., Inc., 40 AD3d 273 [1st Dept 2007] [upholding dismissal due to spoliation when missing cable tray was necessary to investigate cause of fire]); Horace Mann Ins. Co. v. E.T. Appliances, 290 AD2d 418, 419 [2d Dept 2002] [dismissing complaint where plaintiff was on notice that stove was needed for future litigation and failed to preserve it]).

Spoliation sanctions are also appropriate where "a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (Kirkland v New York City Hous. Auth., 236 AD2d 170, 173 [1st Dept 1997]). Courts may, where appropriate, dismiss a complaint or strike responsive pleadings for spoliation of evidence (Ortega v. City of New York, 9 NY3d

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 10 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

69, 76 [2007])). This principle is equally inapplicable to the facts herein.

Hartford Fire Ins. Co. v Regenerative Bldg. Const. Inc. is instructive. In Hartford Fire, water pipes in the plaintiff's subrogee's newly built home froze and ruptured, damaging the basement. The damaged pipes were disposed of during repairs, but the record was not clear as to the details. The Appellate Division, Third Department, held that because there was no evidence of bad faith by the plaintiff, and no party knew where the pipes were, the Court would not presume that the plaintiff was responsible for the disappearance of the pipes or that the plaintiff discarded the pipes to thwart discovery. Accordingly, the Third Department held that Supreme Court denial of the defendants' motion for dismissal due to spoliation of evidence was not an abuse of discretion (Hartford Fire, 271 AD2d 862, 864 [3d Dept 2000]).

Here, the record is unclear as to what happened to the manifold following the accident. Again, Laquidara saw the burst manifold when he first inspected the accident site. Estelle winterized the system the day after Laquidara discovered the accident, and disconnected the system from the rest of the townhouse. A few days later, on December 1st, Dial, Great Northern's adjuster, came to the townhouse and took photos of the system. At that point, the pipe was lying on the terrace. Some

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 11 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

months later, Estelle's workers returned to the house, and repaired and replaced the damaged parts. Nothing in the record indicates that there was any directive to preserve the manifold, or if there were such a directive that there was a deliberate and intentional disregard of the directive. Nor is there any evidence in the record showing what happened to the cracked manifold or who disposed of it. The repairs to the irrigation system were finished two years prior to the commencement of the first action. Under these circumstances, imposition of a spoliation sanction is unwarranted.

Accordingly, Window Box's motion for summary judgment, and those branches of Estelle's and Tri-Star's motions for summary judgment based on spoliation of evidence are denied.

II. Estelle's Duty

Estelle moves for summary judgment on the separate ground that it owes no duty to plaintiffs. To maintain an action for negligence against Estelle, plaintiffs must first show that Estelle owed them a duty of care (Espinal v. Melville Snow Contrs., 98 NY2d 136, 138 [2002]). If Estelle owes no duty to plaintiffs, then Estelle is entitled to summary judgment on plaintiffs' negligence claim (Darby v. Compagnie Natl. Air France, 96 NY2d 343, 347 [2001]).

As an independent contractor, Estelle is only liable if they created or maintained a dangerous condition on the premises

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 12 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

(Espinal, 98 NY2d at 140), caused detrimental reliance by the injured party (Id.), or had an agreement to perform routine, regular maintenance at the premises (Id.).

The record demonstrates that there was no written maintenance contract between Estelle and any other party. The absence of a written contract does not, however, end the Court's inquiry. There are issues of fact regarding the nature of Estelle's work at the townhouse that preclude a grant of summary judgment. As set forth above, Estelle and Window Box's principals differ as to whether Estelle was retained on an on-call basis or a regular maintenance schedule. Turner's contention that Estelle was responsible for the regular maintenance of the irrigation system is supported by Keane's testimony that Estelle fixed broken piping, fixed the system's timers, and adjusted the water flow (Keane 1/27/10 EBT at pp. 31-33). Turner also testified that Estelle sent workers to the townhouse not only when Window Box called, but on its own (Turner 4/14/10 EBT at pp. 44-45, 47). Turner testified further that Keane returned to the townhouse at regular intervals (Id. at pg. 50:20-24). Taken altogether, the factual issue that arises is that based on the nature and frequency of Estelle's conduct it may be deemed to have been performing regular, routine maintenance on the irrigation system such that Estelle could be liable in negligence for the flood damage to the building.

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 13 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

Accordingly, that branch of Estelle's motion for summary judgment dismissing the complaint because it owes no duty to plaintiffs is denied.

III. Third Party Complaint against Tri-Star

Window Box's third-party complaint against Tri-Star asserts that the accident occurred due to TriStar's negligence, and seeks indemnification and contribution from Tri-Star in the event that Window Box is liable for damages. Tri-Star claims that it had no duty or responsibilities with regard to the irrigation system, and therefore cannot be held liable for the accident. If Tri-Star owes no duty then the third-party complaint must be dismissed (Darby, supra).

Here, the record demonstrates that Tri-Star did not owe a duty to Window Box or plaintiffs in relation to the irrigation system. Tri-Star's involvement with the irrigation system ended when it hired Town & Garden to install the system. The actual pipes were installed by a non-party subcontractor, Citron Plumbing (Laquidara 1/13/10 EBT at pp.66-67). Another non-party subcontractor, Borough Plastering, sealed the wall around the pipe leading to the fifth floor terrace (Id. at pp. 69-70). Town & Garden connected the irrigation system to the interior pipes (Id. at pg. 68). With respect to this installation, nothing in the record indicates that Tri-Star supervised and/or conducted oversight functions of the work. In fact, Laquidara's,

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 14 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

Tri-Star's general superintendent, testimony that the irrigation system was installed after the renovation was completed, that Tri-Star employees did not inspect, service or even touch the system at any point prior to the accident, and that Tri-Star did not perform any maintenance services whatsoever (Id. at pp. 23-24), is unrebutted. The conversation between Turner, Window Box's head gardener, and Laquidara about draining the system arose because of Laquidara's general knowledge of irrigation systems, and was not a function of Tri-Star's presence at the site (Id. at pg. 24 ["You do enough of these jobs. You should drain down and I, growing up as a kid, my father grained[sic] in my head, October, November comes and you drain down the water. Out of courtesy, I said to Barry it would be a good idea to drain down the water"])). Such a statement, standing alone, is insufficient to create a duty on the part of Tri-Star with respect to the irrigation system.

Further, Tri-Star's description of its involvement, or lack thereof, with the irrigation system is corroborated by other EBT testimony. Turner testified that Window Box was hired by the project architect (Turner 4/14/10 EBT at pp. 17-18) and paid directly by Rosen (Id. at pp. 73-74). Geiger, Window Box's owner, confirmed that Tri-Star was not involved with Window Box's work at the site (Geiger 1/20/10 EBT at pp. 91-92). Similarly, Keane testified that Estelle only dealt with Window Box (Keane

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 15 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

1/27/10 EBT at pp. 130-131), and had no dealings with anyone else at the townhouse (Id. at pg. 77). The record is devoid of testimony that Tri-Star supervised Window Box or Estelle while they were working in the townhouse. At most, Tri-Star let workers into the house, and then escorted them out when they were finished.

Estelle and Window Box, nonetheless, separately argue that issues of fact preclude summary judgment on the third-party complaint on three grounds: the installation of the interior pipes on the fifth floor, the plastering of the wall where the pipes exited the townhouse, and Tri-Star's control of the premises. Estelle also proffers a file note in which Dial, Great Northern's property adjuster, writes about a conversation she had with Sal Bellino, a Tri-Star employee, regarding the failure to drain the system (Estelle's Affirmation in Partial Opposition to Tri-Star Construction LLC's Motion for Summary Judgment, Ex. B).

Contrary to their arguments, the record demonstrates that Tri-Star had no responsibility or control over the irrigation system -- Estelle and Window Box were the only parties who dealt with it. While Tri-Star controlled access to the townhouse during construction, that fact alone is insufficient to create a factual issue as to Tri-Star's involvement with Window Box's and Estelle's work once their workers were let in. The fact that Dial contacted Tri-Star is not dispositive -- Rosen testified

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 16 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

that he told everyone to call Tri-Star if there was an issue with the townhouse because they had done the renovation (Rosen 1/11/10 EBT at pg. 47).

Accordingly, Tri-Star's motion for summary judgment dismissing the third-party complaint, as well as all cross-claims and counterclaims asserted against it, is granted, and the third-party complaint and all cross-claims and counterclaims asserted against it are dismissed.

IV. Third Party Complaint against RFR

CPLR 1010 provides, in relevant part, that "[t]he court may dismiss a third-party complaint without prejudice" (CPLR 1010). The preliminary conference order provides that all third-party practice shall be completed within 45 days of the last EBT. Accordingly, the deadline for third-party practice was February 2, 2012. Further, notes of issue in both cases were filed without objection on March 9, 2012.

Based on the foregoing time periods, Window Box's filing of its third-party complaint without seeking leave of this Court against RFR on August 30, 2012 was untimely. Further, the record demonstrates that Window Box has known about RFR's involvement since January 11, 2010 -- Rosen testified at his EBT that he owned RFR (Rosen 1/11/10 EBT at pp. 28-29). Window Box proffers no explanation for its delay, makes no allegations that any "unusual or unanticipated circumstances" developed after the note

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 17 of 18

Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

of issue was filed, and fails to explain adequately how the fact that Rosen owned RFR has anything to do with these actions (22 NYCRR 202.21(d)). Nor does Window Box proffer any explanation for its failure to seek the Court's leave to file the third-party complaint (Id.).

Accordingly, 5 East's motion to dismiss the third-party complaint against RFR pursuant to CPLR 1010 is granted, and the third-party complaint against RFR is dismissed without prejudice to Window Box's commencement of a plenary action against RFR.

ORDERED, that Window Box's motion for summary judgment dismissing the complaint and all counter and cross-claims asserted against it is denied; and it is further,

ORDERED, that Estelle's motion for summary judgment dismissing the complaint and all counter and cross-claims asserted against it is denied; and it is further,

ORDERED, that Tri-Star's motion for summary judgment dismissing the third-party complaint and all counter and cross-claims against it is granted, and the third-party complaint and counter and cross-claims against Tri-Star are dismissed; and it is further,

ORDERED, that 5 East's motion to dismiss the third party complaint against RFR pursuant to CPLR 1010 is granted, and the third-party complaint against RFR is dismissed without prejudice

Index No. 105470/08 (Action No. 01)
Mtn Seq. Nos. 004

Page 18 of 18

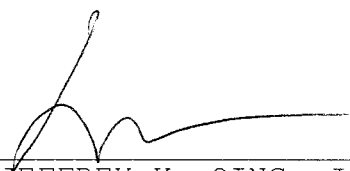
Index No. 600910/08 Action No. 02)
Mtn, 003, 004, 005

to Window Box's commencement of a plenary action against RFR; and
it is further

ORDERED, that counsel shall appear for a pre-trial
conference in Part 48 on October 31, 2013 at 11 a.m.

This memorandum opinion constitutes the decision and order
of the Court.

Dated: 8/29/13


HON. JEFFREY K. OING, J.S.C.

FILED

AUG 30 2013

NEW YORK
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