

**Merkin v AWR Group, Inc.**

2015 NY Slip Op 32197(U)

November 17, 2015

Supreme Court, New York County

Docket Number: 156129/12E

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 8

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ESTHER MERKIN,  
Plaintiff,

-against-

AWR GROUP, INC., 7 HANOVER ASSOCIATES,  
LLC, and COLGATE SCAFFOLDING,

Index No. 156129/12E

Defendants.

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7 HANOVER ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

Third-Party Index  
No. 590070/13

AWR GROUP, INC. and COLGATE SCAFFOLDING,

Third-Party Defendants.

-----X

7 HANOVER ASSOCIATES, LLC,

Second Third-Party Plaintiff,

-against-

Second Third-Party  
Index No. 595119/14

STIGER CONSTRUCTION INC.,

Second Third-Party Defendant.

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**Joan M. Kenney, J.:**

This action arises from a slip-and-fall accident on the public sidewalk in front of the building located at 7 Hanover Square, New York, New York, on July 11, 2012. Motions with sequence numbers 007, 008, 009 and 010 are hereby consolidated for disposition.

In motion sequence number 007, second third-party defendant Stiger Construction Inc. (SCI) moves, pursuant to CPLR 3212, for

summary judgment (1) dismissing plaintiff's complaint and all cross claims against defendant/third-party plaintiff/second third-party plaintiff 7 Hanover Associates, LLC (Hanover); and (2) dismissing the second third-party complaint and all cross claims against SCI.

In motion sequence number 008, defendant/third-party defendant CS Bridge Corp. d/b/a Colgate Scaffolding (CS) moves, pursuant to CPLR 3212, for summary judgment (1) dismissing plaintiff's complaint; (2) dismissing the third-party complaint; (3) in CS's favor on its counterclaim/cross claim for contractual indemnification against Hanover; and (4) in CS's favor for a conditional order against Hanover (a) to indemnify CS for any damages CS must pay to plaintiff; and (b) to indemnify CS for its defense costs and attorneys' fees.

In motion sequence number 009, Hanover moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it, or, in the alternative, granting Hanover summary judgment on its common-law indemnification claim against AWR Group, Inc. (AWR) and SCI.

Lastly, in motion sequence number 010, defendant/third-party defendant AWR moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims alleged against it, and dismissing the third-party complaint and all cross claims brought against it.

Because some of the issues overlap, the court will not

consider the motions in sequence.

#### **BACKGROUND**

Esther Merkin (plaintiff) alleges that she was seriously injured when she hit her head on a support of a sidewalk bridge (the bridge) after slipping on water on the sidewalk in front of 7 Hanover Square (the building) on July 11, 2012, at around 4:30 in the afternoon. Plaintiff attests that it was a sunny, hot afternoon, but as she was walking along the street across from the building, she felt water coming down, like rain, and realized that it was coming from the top of the building. She crossed the street to get under the bridge, away from the water. When she arrived at the sidewalk under the bridge, she slipped on the wet sidewalk, fell, and was injured.

Hanover is the owner of the building. Through its agent, MB Real Estate (MB), it hired AWR to perform façade restoration work on the building. Also through MB, Hanover hired CS to erect and disassemble the bridge over the sidewalk. AWR subcontracted the actual façade restoration work to SCI. Near the end of the restoration, SCI had to perform water tests to make sure that the façade was waterproof. The test required water to be pumped through a spray bar onto the façade. As a result, water descended from the building to the bridge and sidewalk. The bridge was not waterproof, and it is uncontested that the MB/CS contract did not require the bridge to be waterproof.

Approximately four months before the accident, on March 27, 2012, the New York City Department of Buildings issued a violation to AWR because the bridge did not cover the entire width of the sidewalk. MB and CS entered into a change order, dated April 8, 2012, whereby CS agreed to install catchalls on the full bridge, and to widen the Pearl Street part of the bridge (where plaintiff fell). In addition, SCI installed blue tarping below the bridge to lessen the amount of water that fell to the sidewalk. The violation was cured and the partial stop work order was fully rescinded on April 26, 2012, approximately three months before the accident. The court notes that the violation concerned the bridge not covering the full width of the sidewalk, not any issue with water.

#### **THE PLEADINGS**

Plaintiff's complaint alleges one cause of action sounding in negligence against AWR, Hanover and CS. CS's answer to the amended complaint alleges a cross claim for common-law indemnification and contribution against AWR, Hanover and SCI. CS also asserts four cross claims against Hanover alone for various bases for contractual indemnification. AWR's answer to plaintiff's amended complaint alleges three cross claims against Hanover and CS, for contribution, contractual indemnification, and breach of contract for failure to procure insurance. Hanover did not answer plaintiff's amended complaint.

Instead, Hanover brought a third-party action against AWR and CS. In its amended third-party complaint, Hanover alleges two causes of action against AWR, for common-law and contractual indemnification, and one cause of action against CS for common-law indemnification. AWR's answer to Hanover's amended third-party complaint asserts one cross claim against CS, for contribution and common-law indemnification. CS's answer to Hanover's amended third-party complaint alleges two cross claims against AWR, for contribution and common-law indemnification, and contractual indemnification. It also asserts five counterclaims against Hanover for contribution and common-law indemnification, and various bases for contractual indemnification.

Hanover's second third-party complaint against SCI alleges causes of action for common-law indemnification and contribution. In its answer, SCI does not assert any cross claims or counterclaims.

In her December 5, 2013 bill of particulars, plaintiff alleges, among other things, that defendants violated Labor Law § 240 (1).

## DISCUSSION

### Summary Judgment

"Since summary judgment is the equivalent of a trial . . ." (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), and is a "drastic remedy" (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st

Dept 2014)), the proponent of a summary judgment motion "is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law" (*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014]). "In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party. If the moving party fails to make a prima facie showing of entitlement to summary judgment, its motion must be denied [internal citations omitted]" (*Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 478-479 [1st Dept 2013]). However, "[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues . . ." (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

**Labor Law § 240 (1)**

As an initial matter, Labor Law § 240 (1) "imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks" (*Saint v Syracuse Supply Co.*, 25 NY3d 117,

124 [2015]). "Liability under Labor Law § 240 (1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against'" (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139 [2011], quoting *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

The statute has no place in this slip-and-fall action. Plaintiff was not a worker, nor was she exposed to an elevation-related hazard, nor were defendants required to provide her with a safety device of the kind listed in the statute.

#### **Negligence**

"To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty that the defendant owed to the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries. Absent a duty of care, there is no breach and no liability [internal citations omitted]" (*Wang v Barr & Barr, Inc.*, 127 AD3d 964, 965 [2d Dept 2015]).

The hazard of which plaintiff complains was a wet sidewalk, where the water came from water tests which SCI was performing on the renovated façade of the building. Even once the bridge was supplied with blue tarping, the bridge was still not completely waterproof, and water managed to get through the bridge onto the sidewalk below. While plaintiff testified that she saw puddles,



what she actually slipped on was "water," a "wet surface" (Plaintiff's tr at 34).

The Appellate Division, First Department, has consistently found that a wet sidewalk is not an actionable hazardous condition (see e.g. *Bock v Loumarita Realty Corp.*, 118 AD3d 540, 541 [1st Dept 2014] ["mere fact that a sidewalk is 'inherently slippery' by reason of its smoothness or becomes more slippery when wet does not constitute an actionable defect"]; *Georgiou v 32-42 Broadway LLC*, 82 AD3d 606, 607 [1st Dept 2011] ["wetness on outdoor walkways does not constitute a hazardous condition"]; *McGuire v 3901 Independence Owners, Inc.*, 74 AD3d 434, 435 [1st Dept 2010] ["mere wetness on walking surfaces due to rain does not constitute a dangerous condition"]).

Plaintiff has failed to demonstrate that any of the defendants owed her a duty of care, breached that duty, or that the breach was a proximate cause of her injuries. In the absence of a cause of action for which relief may be granted, this action must be dismissed. Therefore, the parts of SCI's, CS's, Hanover's and AWR's motions which seek summary judgment dismissing the complaint are granted.

#### **Contractual Indemnification**

"A party's right to contractual indemnification depends upon the specific language of the relevant contract. The promise to indemnify should not be found unless it can be clearly implied from the language and the purpose of the entire

agreement and the surrounding circumstances. [A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor [internal quotation marks and citations omitted]"

(*Muevecela v 117 Kent Ave., LLC*, 129 AD3d 797, 798 [2d Dept 2015]).

"A contractual provision imposing a duty to indemnify 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed' [citation omitted]" (*Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2d Dept 2015]).

Hanover has not opposed CS's claims for contractual indemnification. Therefore, the court will grant this part of CS's motion, according to the specific language of the MB/CS contract.

Paragraph 10 of the MB/CS contract provides, in relevant part:

"to the fullest extent permitted by law, the Customer [MB/Hanover] shall indemnify and hold harmless Colgate . . . from and against all claims, law suits[, ] damages, losses and expenses, including but not limited to attorney's fees arising out of the performance of this contract. This indemnity obligation shall include claims attributable to bodily injury . . . regardless of whether or not the Customer is responsible for the condition that caused personal injury . . . Customer's indemnity obligation shall also include, but not be limited to all of the following: . . . claims resulting from sidewalk defects, trip and fall accidents . . . regardless of whether the Customer caused or created such condition . . ."

As the language is clear and unambiguous concerning Hanover's obligation to indemnify CS, the court will direct that the issue of

the amount of Hanover's costs, disbursements and attorneys' fees be referred to a Special Referee to hear and report.

The part of CS's motion which seeks summary judgment on its contractual indemnification claims against Hanover is granted. Accordingly, it is

ORDERED that Stiger Construction Inc.'s motion (motion sequence number 007) which seeks summary judgment dismissing the complaint is granted; and it is further

ORDERED that 7 Hanover Associates, LLC's motion (motion sequence number 009) which seeks summary judgment dismissing the complaint is granted; and it is further

ORDERED that AWR Group, Inc.'s motion (motion sequence number 010) which seeks summary judgment dismissing the complaint is granted; and it is further

ORDERED that the part of Colgate Scaffolding's motion (motion sequence number 008) which seeks summary judgment dismissing the complaint is granted; and it is further

ORDERED that the part of Colgate Scaffolding's motion which seeks summary judgment on its contractual indemnification claims against 7 Hanover Associates, LLC is granted; and it is further  
ORDERED that the issue of the amount of 7 Hanover Associates, LLC's costs, disbursements and attorneys' fees owed to Colgate Scaffolding is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the

filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

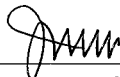
ORDERED that the referred part of Colgate Scaffolding's motion is held in abeyance pending receipt of the report and recommendations of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days of the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,<sup>1</sup> upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

ORDERED that the balance of the motions is denied as moot.

Dated: 11/17/15

ENTER:



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**JOAN M. KENNEY**  
J.S.C.

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<sup>1</sup>Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.