FILED: NEW YORK COUNTY CLERK 11/24/2015 04:13 PM INDEX NO. 156957/2012
NYSCEF DOC. NO. 104 RECEIVED NYSCEF: 11/24/2015

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

BLEKHER, IRINA

-v-

F.W.P. REALTY CORP.

INDEX NO. 156957/2012

MOTION DATE

MOTION SEQ. NO. 004

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

In this personal injury action, the branch of the motion by defendant Stone Eagle LLC ("Stone Eagle") for summary judgment dismissing the cross-claims asserted against it and for conditional summary judgment on its cross-claims against defendant Smorgas Chef, LLC ("Smorgas") for common law and contractual indemnification including future attorneys' fees and defense costs, and the cross-motion by Smorgas extending its time to respond to the Notice to Admit, are resolved as follows:[1]

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

[1] The branch of the motion by defendant Stone Eagle for summary judgment dismissing the plaintiff's complaint is moot., as Smorgas Chef has settled all of plaintiffs' claim against the defendants.

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

Dated: _____ _____, 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

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]).

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence" (*Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [1st Dept 2010] *citing Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999]; *Espinoza v Federated Dept Stores, Inc.*, 73 AD3d 599, 904 NYS2d 3 [1st Dept 2010] (As there has been no finding of negligence on the part of Macy's, co-defendants are not entitled to common law indemnification for costs and attorney's fees by Macy's)).

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Campos v. 68 East 86th Street Owners Corp.*, 117 A.D.3d 593, 988 N.Y.S.2d 1 [1st Dept 2014]; *Torres v. 63 Perry Realty, LLC*, 2014 WL 7180935 [2d Dept 2014]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]). In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]; 46 A.D.3d 367848 N.Y.S.2d 59 [1st Dept 2007] (upholding an award of conditional summary judgment on lessor's cross claim for contractual indemnification against lessee where lessee ran the garden-type hose that allegedly caused plaintiff's fall)).

Stone Eagle established that its lease with Smorgas contained the following indemnification provision:

> Section 8.03 entitled "Indemnification of Landlord" provides in relevant part:
>
> Tenant will indemnify Landlord and save it harmless from and against any and all claims, actions, damages, liability and expense in connection with the loss of life, personal injury and/or damage to property arising from or out of any occurrence in, upon, or at the Premises, or the occupancy or use by Tenant of the Premises, or occasioned wholly or in part by any act or omission of Tenant, [and] its . . . contractors . . . but excluding the negligence or intentional acts of Landlord . . . . In case the Landlord shall be a party to any litigation involving third party commenced by or against Tenant with respect to an indemnified claim, then Tenant shall protect and hold Landlord harmless and shall pay all costs, expense and reasonable attorneys fees incurred or paid by Landlord in connection with such litigation . . . .

Such indemnification clause does not seek to indemnify Stone Eagle for its own acts of negligence or intentional acts, and is thus enforceable (*see Brooks v. Judlau Contracting, Inc.,* 11 N.Y.3d 204898 N.E.2d 549869 N.Y.S.2d 366 [2008]).

As to Stone Eagle's freedom from negligence, Stone Eagle established that on June 26, 2012, plaintiff fell "inside" the premises located at 53 Stone Street, New York, New York (the "Premises"), which it, as owner, had previously leased to Smorgas, to operate a restaurant thereat (plaintiff EBT, pp. 12, 31). Plaintiff fell at "the exit from the restaurant" as she was exiting to go outside; before she reached the doorway, she "stepped on [her] right foot and [] landed on [her] right foot" to a "Lower level" and fell to the ground (plaintiff EBT, pp. 32, 34, 40-41, 44); She "stepped [one step] down from the wood floor to the carpet" (plaintiff EBT, pp. 50, 138); she "didn't see the step that was there" and her right foot missed the step entirely (plaintiff EBT, pp. 42, 138); there was no lighting in the area (plaintiff EBT, p. 41). After the fall, plaintiff "looked back" to see why she fell, and saw the "step covered with the carpet" (plaintiff EBT, p. 49). Plaintiff was unaware of any complaints to anyone regarding the lighting or configuration of the step are where the accident occurred (plaintiff EBT, p. 144).

Stone Eagle also established that Smorgas operated the restaurant, and performed work to the interior of the restaurant, including changing the "direction" and "orientation" of the steps, in that "They used to go straight, I think pointing that way, now they go sideways" (Smorgas by Min Ye EBT, pp. 35, 37). At some point after 2008, the stairs were moved to the right so that you had to turn right to go up into the restaurant (Smorgas by Min Ye EBT, pp. 40). Stone Eagle was not involved in the work, but was aware of the work (Smorgas by Min Ye EBT, p. 78). Smorgas was responsible for maintenance of the Premises and Smorgas never made any complaints to Stone Eagle regarding the configuration of the entranceway area (Smorgas by Min Ye EBT, p. 124).

As to Stone Eagle's lease with Smorgas, Section 10.01, entitled "Landlord's Duty to Maintain Structure" provides:

> Landlord will keep the roof, exterior walls, foundation, structural columns and structural floor or floors *(excluding other floor and floor covering, walls installed at the request of Tenant . . .)* and other structural portions of the Building and the Premises in good repair and in the same condition as other first class properties.

Section 10.02, entitled "Tenant's Duty to Maintain" provides:

> Tenant will, at its own cost and expense, maintain the Premises (except that part Landlord has agreed to maintain) in good and tenantable condition, and make all repairs to the Premises and every part thereof as needed . . . .

Further, Section 10.03 entitled "Landord's Repair of Premises" provides, as follows:

> Landlord shall be under no obligation to make any repairs, replacements, reconstruction, alterations, renewals, or improvements to or upon the Premises . . . exclusively serving the Premises except as expressly provided herein.

Finally, Section 7.01 of the Lease, entitled, "Alterations; Damages" provides, in relevant part:

> . . . Tenant shall be directly responsible for any and all damages resulting from any

alteration, addition or change Tenant makes whether or not Landlord's consent therefore was obtained. . . .

It is undisputed that Stone Eagle is an out-of-possession landlord, and that the Lease requires Smorgas to maintain the Premises in good condition and make repairs thereto. It is also undisputed that an out-of-possession landlord is generally not liable for a third-party's injuries on its premises unless the landlord "has a contractual obligation to maintain the premises or right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420, 927 NYS2d 49 [1st Dept 2011]; *Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000], *citing Velazquez v Tyler Graphics Ltd.*, 214 AD2d 489, 625 NYS2d 537 [1st Dept 1995]; *Nameny v East New York Sav Bank*, 267 AD2d 108, 699 NYS2d 412 [1st Dept 1999], *citing Johnson v Urena Service Ctr.*, 227 AD2d 325, 642 NYS2d 897 [1st Dept 1996], *lv denied* 88 NY2d 814, 651 NYS2d 16 [1996]).

Here, Stone Eagle's lease obligation to maintain "structural floor or floors," excluded "other floor and floor covering . . . installed at the request of Tenant," and Stone Eagle established that Smorgas repositioned the subject step prior to plaintiff's fall, and that Stone Eagle did not play any role in the relocation and alteration of the location of the step. Thus, Stone Eagle established that it did not create the dangerous condition or was contractually obligated to make any repair or maintain the subject step. And, there is no indication that dangerous condition of the step violated a specific statutory safety provision.

And, to the degree plaintiff asserts that her accident was caused, in whole or in part, by the insufficient lighting at the area in which she fell, Stone Eagle cannot be held liable for this alleged condition (*see Peck v 2-J, LLC*, 56 A.D.3d 277 866 N.Y.S.2d 661 [1st Dept 2008] (dismissing the complaint against defendant, finding that "out-of-possession defendant owner could not be liable for the claimed inadequate lighting, despite its right to reenter under the lease, because the defendant tenant controlled the lighting level at its restaurant, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision")). Further, inasmuch as plaintiff claims that there was no handrail at the accident location, plaintiff cited no support for the position that the absence of a handrail constituted a significant structural or design defect that violates a specific statutory building code provision that gives rise to liability of the Stone Eagle.

Based on the foregoing, Stone Eagle met its *prima facie* burden by establishing its freedom from negligence for plaintiff's accident, and entitlement to summary judgment on its contractual and common law indemnification claims.

Smorgas's contention that it merely moved the subject step to the right, does not raise an issue of fact as to whether Stone Eagle created the condition that caused plaintiff's fall, or was contractually obligated to make any repair or maintain the subject step. Smorgas's conclusion assertion that the negligent design and maintenance of the subject step was attributable to Stone Eagle is unsupported by the record.

Furthermore, as to Smorgas's cross-motion to extend the time to respond to Stone Eagle's Notice to Admit is denied. CPLR 3123 requires that a reply to a Notice to Admit shall be served

within twenty days after service of the Notice (*Civil Service Bar Ass'n v. City of New York*, 83 A.D.2d 815, 442 N.Y.S.2d 59 [1st Dept 1981]; *Kowalski v. Knox*, 293 A.D.2d 892 741 N.Y.S.2d 291 [3d Dept 2002] ("As a result of defendant's unexcused neglect to respond to the notice within either the original 20–day period or the 60–day extension or to timely seek relief from its allegedly improper request (see, CPLR 3103), Supreme Court properly considered defendant to have admitted all of the statements in the notice to admit")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendant Stone Eagle LLC for summary judgment dismissing the cross-claims asserted against it and for conditional summary judgment on its cross-claims against defendant Smorgas Chef, LLC for common law and contractual indemnification including future attorneys' fees and defense costs is granted, and the cross-claims asserted against Stone Eagle are dismissed; and it is further

ORDERED that the cross-motion by Smorgas extending its time to respond to the Notice to Admit is denied; and it is further

ORDERED that Stone Eagle LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 11/23/15 **ENTER:** _____, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**