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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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253 EAST 62nd STREET, LLC,

Plaintiff,

- against -

MOLUKA ENTERPRISES, LLC, DEMO PLUS INC., YOLANDA QUEEN, DOUGLAS ELLIMAN PROP. MGMT., BELLMARC PROP. MGMT. SERVS., INC., LIORA ELGHANAYAN and JOHN ELGHANAYAN,

Defendants.

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DOUGLAS ELLIMAN PROPERTY MANAGEMENT s/h/a DOUGLAS ELLIMAN PROP. MGMT., YOLANDA QUEEN and BELLMARC PROPERTY MANAGEMENT SERVICES, INC. s/h/a BELLMARC PROP. MGMT. SERVS., INC.,

Third-Party Plaintiffs,

-against-

P&J RENOVATIONS, INC., BERZAK ASSOCIATES ARCHITECTS P.C. and SDG ENGINEERING, PC,

Third-Party Defendants.

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P&J RENOVATIONS, INC.,

Second Third-Party Plaintiff,

-against-

PERCIBALLI CONTAINER SERVICE, INC.,

Second Third-Party Defendant.

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Index No. 651477/2010

Mot. seq. no. 18

DECISION AND ORDER

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PERCIBALLI CONTAINER SERVICE, INC.,

Third Third Party-Plaintiff,

-against-

DEMO DELUXE, INC. and MICHAEL SARNELLI,

Third Third-Party Defendants.

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BARBARA JAFFE, J.:

For plaintiff:
Ashley Serrano, Esq.
Pardalis & Nohavicka, LLP
3510 Broadway, Ste. 201
Astoria, NY 11106
718-777-0599

For Moluka:
James Yoo, Esq.
Hardin Kundla *et al.*
110 William St.
New York, NY 10038
212-571-0111

For Bellmarc, Douglas, and Queen:
Doris Rios Duffy, Esq.
Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Fl.
Brooklyn, NY 11201
718-250-1100

For P&J:
Richard A. Walker, Esq.
Weiner, Millo *et al.*
220 Fifth Ave., 10th Fl.
New York, NY 10001
212-213-1220

This action arises from damage to plaintiff's building at 1177 Second Avenue in Manhattan that allegedly resulted from demolition work performed on the adjacent vacant building located at 1179 Second Avenue, owned by defendant Moluka Enterprises, LLC (Moluka).

Defendants Douglas Elliman Property Management (DEPM), Yolanda Queen, and Bellmarc Property Management Services., Inc., move pursuant to CPLR 3212 for summary dismissal of the complaint against them, and for contractual indemnity and attorney fees as against Moluka on Bellmarc's cross claim, and as against third-party defendant P & J Renovations, Inc.

I. BACKGROUND

On or about May 1, 2003, Moluka entered into a two-year management agreement with Bellmarc, whereby Bellmarc became managing agent of Moluka's five properties, including the building at 1179 Second Avenue. Pursuant to the agreement, Bellmarc agrees, subject to Moluka's approval and at Moluka's cost, to maintain the buildings in "such condition as may be deemed advisable" by Moluka, and to cause repairs and alterations to be made to the buildings, with repairs involving expenditures exceeding $1,000 for any one item requiring Moluka's approval. However, emergency repairs, i.e. repairs immediately necessary for the preservation of the buildings or safety of the residents, building occupants, or other persons, may be made by Bellmarc regardless of the cost without Moluka's approval but after consultation, if possible, with Moluka. (NYSCEF 319).

Among its other duties, Bellmarc agrees, subject to Moluka's approval and at Moluka's cost, to hire, pay and supervise all persons necessary to be employed in order to properly maintain and operate the building, and which employees will then "in each instance shall be [Moluka's] and not [Bellmarc's] employees"; to recommend and, with Moluka's approval, cause all such acts and things to be done in or about the buildings as necessary or desirable to comply with any orders or violations affecting the buildings; and visit the buildings as frequently as necessary but no less frequently than once a week and from time to time conduct unscheduled inspections. Moluka authorizes Bellmarc "for [Moluka's] account and on its behalf, to perform any acts or do anything necessary or desirable in [Bellmarc's] reasonable judgment in order to carry out [Bellmarc's] duties", and "everything done by [Bellmarc] under the provisions [of the managing agreement] shall be done as agent of [Moluka] . . ." (*Id.*).

The parties also agreed that Bellmarc would not be liable to Moluka "for any loss or damage not caused by [Bellmarc's] own negligence or failure to carry out its obligations thereunder," and Moluka would idemnify Bellmarc against and hold it harmless from any liability, damages, penalties, costs and expenses, including reasonable attorney fees, sustained or incurred for injury to any person or property in, about and in connections with the buildings, from any cause whatsoever, unless caused by Bellmarc's failure to carry out its contractual obligations. Moluka also agreed to reimburse Bellmarc upon demand for any moneys that Bellmarc is required to pay out for any reason whatsoever, either in connection with, or as an expense of, any claim instituted or maintained against Bellmarc or Bellmarc and Moluka jointly or severally, effecting or due to the condition or use of the buildings or acts or omissions of Bellmarc. (NYSCEF 319).

Bellmarc agreed to indemnify Moluka for liability resulting from injury to persons or property in, about and in connection with the buildings, directly or indirectly caused by Bellmarc, and for liability resulting from acts "improperly performed" by Bellmarc. (*Id.*).

By agreement dated January 8, 2009, Moluka hired P&J to demolish the building, which by then had been vacant and sealed for several years. Their agreement identifies the owner as "Moluka . . . c/o Bellmarc," and is signed by Queen, Bellmarc's property manager, "as agent for Moluka." P&J agreed to indemnify Moluka and its agents against claims, damages, losses or expenses, including attorney fees, arising out of or resulting from performance of P&J's work, "but only to the extent caused in whole or in part by negligent acts or omissions of [P&J], a Subcontractor, anyone directly or indirectly employed by them or anyone else," regardless of whether the claim or damage "is caused in part by a party indemnified hereunder." (NYSCEF

319, 336).

P&J thereafter subcontracted with second third-party defendant Perciballi Container Services, which thereafter engaged Demo Plus. (NYSCEF 330, 216).

Following a declaration of the New York City Department of Buildings, dated June 9, 2009, that the building at 1179 Second Avenue was in imminent danger of collapse and constituted a hazard to public safety (NYSCEF 311), the demolition of the building commenced. The wall between plaintiff's and Moluka's buildings was allegedly damaged on August 3, 2009.

On or about January 29, 2010, DEPM purchased all of Bellmarc's assets, but none of its liabilities. (NYSCEF 320, 347).

II. PROCEDURAL BACKGROUND

On or about September 9, 2010, plaintiff commenced this action, advancing causes of action against defendants for negligence, negligent hiring, negligent supervision, and violations of the New York City Administrative Code. (NYSCEF 312).

On or about November 22, 2010, Bellmarc served its answer, asserting against Moluka cross claims for contribution and indemnification. (NYSCEF 313). In an amended answer, dated February 8, 2011, Bellmarc seeks contribution and indemnification from DEPM and Queen. (NYSCEF 317).

By summons and third-party complaint dated February 1, 2012, Bellmarc impleaded P&J, Berzak, and SDG as third-party defendants, and asserted claims for common-law and contractual indemnification, contribution, and breach of contract for failure to procure insurance coverage. (NYSCEF 314).

By stipulation so ordered on or about October 13, 2013, plaintiff and P & J discontinued

their actions against DEPM and Queen. (NYSCEF 310).

On October 29, 2013, Moluka's member, Liora Elghanayan, testified at an examination before trial, as pertinent here, that for buildings owned by Moluka and managed by Bellmarc, Moluka paid for any expenditures; that Queen on behalf of Bellmarc handled all matters related to the building; that Elghanayan hired Berzak to work on the demolition at issue; that Elghanayan hired Warren Cole as a paid consultant to help her with the demolition and to communicate with Queen about it; that in 2009 Moluka kept its records in Queen's office and received mail at Bellmarc's office; and that during the demolition she did not expect Queen to be physically present or supervise the work, but to act as her managing agent and organize the demolition. (NYSCEF 322).

On October 30, 2013, Queen testified that in 2005 she began managing Moluka's properties on behalf of Bellmarc, and that Bellmarc's sole duties related to the building at 1177 Second Avenue and Moluka's other vacant buildings was to maintain the sidewalks and remove snow therefrom and to pay water and tax bills; the buildings were locked and no one at Bellmarc had keys to them. While she was property manager for the buildings, she met monthly with Elghanayan to discuss issues with residents, to have Elghanayan to sign off on invoices, and to get her approval on contracts, payment requisitions, and legal matters. Generally, Queen had the authority to make payments under $1,000, but anything above that required Elghanayan's or Moluka's approval. She did not visit the building while it was being demolished, and Bellmarc did not inspect the building before the demolition. During the demolition, when payment requests were received by Queen, she transmitted them to Elghanayan who approved them and issued a check, which Queen then mailed. (NYSCEF 321).

On November 13, 2013, Michael Berzak testified at a deposition, as pertinent here, that Elghanayan and Cole asked him to become involved with the demolition, that he acted as Moluka's agent and recommended demolition and engineering professionals for the project, and that during the demolition he received invoices from the contractors, reviewed them, and then forwarded them to Queen with instructions as to whether to pay them. (NYSCEF 324).

By decision and order dated October 21, 2014, I granted Moluka's motion for leave to amend its answer to include a cross claim seeking contractual indemnification from Bellmarc, Douglas, and Queen.

On March 31, 2015, Warren Cole was deposed, testifying that for at least 15 years, he has acted as consultant and designated developer for Moluka, that he agreed with Moluka that he would fund some or all of the monies needed to demolish the building, and that either he or Moluka provided funds for Bellmarc to use or expend related to the buildings. (NYSCEF 323).

III. CONTENTIONS

DEPM, Queen, and Bellmarc variously argue that they are entitled to a dismissal. Relying on its purchase agreement with Bellmarc, DEPM denies being managing agent for the premises at the time of the demolition. Queen maintains that she was acting within the scope of her employment with Bellmarc at the time of the demolition, and thus cannot be held liable personally. Bellmarc claims that it acted solely as Moluka's disclosed agent, acting in conformity with its instructions, and that it owed no duty to plaintiff nor did it act negligently toward plaintiff as it did not participate in the demolition or in breach of its contractual duties to Moluka. It also denies owing any contractual indemnity to Moluka. Rather, Bellmarc seeks contractual indemnity and attorney fees from Moluka and from P&J. (NYSCEF 307).

In opposition to the motion, plaintiff argues that there remain triable issues of fact as to whether Bellmarc owed it a duty of care "based on the increased risk of harm . . . created from [its] failure to supervise the demolition project . . . [and that] the execution of the demolition was a non-delegable duty that subjects [it] to liability for [its] hired contractor's negligence due to [its] failure to instruct and supervise [its] contractor during the inherently dangerous demolition project," claiming to be "a third party" to the Bellmarc/Moluka management contract. Plaintiff contends that Bellmarc "executed the demolition" by hiring P&J and therefore owed a duty of reasonable care to third parties during the demolition, and observes that Bellmarc admitted that it failed to supervise the demolition. Plaintiff also maintains that Bellmarc, DEPM, and Queen's arguments concerning their right to be indemnified by other parties do not resolve "any issues of fact as to plaintiff's direct claims for negligence against them." (NYSCEF 336).

In opposition to DEPM's and Bellmarc's motions only, Moluka observes that there is nothing in DEPM's submissions demonstrating, *prima facie*, that in purchasing Bellmarc, it did not assume its tort liabilities along with its assets. It relies on its management agreement with Bellmarc and the deposition testimony of Elghanayan as evidence that Bellmarc undertook all duties and displaced its obligations as owner relating to the demolition, thus creating factual issues as to Bellmarc's liability, not only under the management agreement by which its duties to correct violations and comply with any order were "entirely displaced" by Bellmarc, but also for breaching its duties to Moluka and plaintiff to manage and supervise the demolition and remedy any violations. Moluka also argues that Bellmarc is not entitled to judgment on its claim for indemnification as it has not established the absence of negligence on its part. (NYSCEF 344).

In reply, Bellmarc, DEPM, and Queen deny that plaintiff was "a third party" to the

management contract, and observe that plaintiff's claims against them sound in tort and not contract. They reiterate their argument that Bellmarc served solely as agent for Moluka, and that Moluka, through Elgahanayan, controlled all expenditures, only discussing the finances with Bellmarc. Moluka arranged for the supervision of the others by Berzak and the contractors and subcontractors, as recommended by Cole. They allege that Bellmarc paid bills as directed by Berzak once Berzak and SDG determined that the work was satisfactorily performed. They now submit that portion of the purchase agreement between Bellmarc and DEPM reflecting that DEPM did not assume any of Bellmarc's tort liabilities. (NYSCEF 346, 347).

In partial opposition to defendants' motion, P&J contends that Bellmarc is not a party entitled to indemnification under P&J's contract with Moluka as Bellmarc is not listed as Moluka's agent therein, and denies that its owner drafted or read the agreement before signing it. P&J also argues that the conditions upon which it agreed to indemnify have not yet been satisfied absent any finding of negligence, and that Bellmarc has not established its freedom from negligence. (NYSCEF 370).

In reply to P&J, Bellmarc maintains that it is undisputed that P&J's owner signed the agreement and it is thus irrelevant whether he read or drafted it, that Queen signed the agreement as agent for Moluka, and that P&J has not shown that Bellmarc was negligent. (NYSCEF 373).

IV. MOTION FOR SUMMARY JUDGMENT

A. DEPM

Although DEPM did not submit the pertinent provision of its purchase agreement with Bellmarc in support of its contention that it did not assume Bellmarc's liabilities until it replied to Bellmarc's opposition, it has established, *prima facie,* that it did not purchase Bellmarc's tort

liability. In any event, no factual issue is raised with respect to it. (*See* NYCSEF 382, at 6).

B. Queen

Queen establishes, *prima facie*, that she acted solely within the scope of her employment with Bellmarc and cannot be held personally liable for the damage to plaintiff's property. No factual issue is raised with respect to her.

C. Bellmarc

In order to establish a cause of action for negligence, the plaintiff must prove the following elements: duty owed, duty breached, and damages. (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]; *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 221 [1st Dept 2007]). As a general rule, a contractual obligation, standing alone, gives rise to a duty of care in favor of only the promisee and intended third-party beneficiaries to the contract. (*Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). However, a duty of care may also arise, as relevant here, "(1) where the contracting party, in failing to exercise the reasonable care in the performance of his duties, launches a force or instrument of harm; [or] (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002] [internal quotation marks and citations omitted]; *Medinas v MILT Holdings LLC*, __ AD3d __, 2015 NY Slip Op 06044 [1st Dept 2015]). In order to prove detrimental reliance on the defendant's continued performance, the plaintiff must also show that she was aware of the contract pursuant to which the defendant's obligation arises (*eg, Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]), and that there is a direct and demonstrable nexus between the plaintiff's

reliance on the defendant's contractual duties and the plaintiff's injury (*Cresvale Intl., Inc. v Reuters Am., Inc.*, 257 AD2d 502, 505 [1st Dept 1999]).

Moreover, while liability for a dangerous or defective condition on real property generally must be predicated upon ownership, occupancy, control or special use of the property, a managing agent may assume a duty of care where there is a comprehensive and exclusive management agreement between the agent and the property owner that displaces the owner's duty to safely maintain the premises. (*Calabro v Harbour at Blue Pt. Home Owners Assn., Inc.*, 120 AD3d 462 [2d Dept 2014]).

In *Gardner v 111 Corp.*, the managing agent was authorized, as pertinent here, to make necessary repairs and alterations with the condition that any alteration costing more than $2,500 would require the owner's approval, and to supervise, hire, and discharge employees, and which employees were deemed to be the owner's employees and not the managing agent's, and the parties' agreement authorized the agent to make repairs but did not require it to do so and it assumed no responsibility to do so. The Appellate Division, First Department, held that as the owner reserved to itself a certain amount of control of the operation of the premises, the managing agent did not displace that control such that it would be held liable to a third party for that party's injury. (286 AD 110 [1955], *affd* 1 NY2d 758 [1956]).

Here, the agreement between Bellmarc and Moluka reflects that: (1) subject to Moluka's approval and at Moluka's cost, Bellmarc would maintain the buildings in the condition deemed advisable by Moluka; (2) subject to Moluka's approval, Bellmarc would make repairs and alterations to the buildings; (3) repairs costing more than $1,000 required Moluka's approval; and (4) emergency repairs could be made by Bellmarc without Moluka's approval but after

consultation with Moluka, if possible. Also subject to Moluka's approval was Bellmarc's authority to hire, pay and supervise all persons necessary to be employed to properly maintain and operate the buildings, and which employees were deemed to be Moluka's and not Bellmarc's employees, and to act as necessary or desirable to comply with orders or violations affecting the buildings.

Moreover, Moluka's owner testified that she paid for any expenditures related to the buildings, that she hired Berzak to oversee the demolition, and that she did not expect Queen to be physically present or supervise the demolition. Queen testified that she met monthly with Elghanayan to discuss issues with tenants and to have her sign off on invoices and approve contracts, payment requisitions, and legal matters, and that during the demolition, payment requests were approved and paid by Elghanayan. And Berzak testified that during the demolition he received invoices from the contractors, reviewed them, and then forwarded them to Queen with instructions as to whether to pay them.

The agreement thus demonstrates that Bellmarc's authority to act regarding the building was primarily subject to Moluka's approval or at least consultation with Moluka, and the parties' conduct reflects that Queen consulted with Elghanayan who made decisions about and authorized payments for the buildings, including the demolition, thereby showing that Moluka retained control over the maintenance and operation of the buildings and that the agreement did not displace Moluka's responsibility to maintain the premises safely. (*See Baulieu v Ardsley Assocs., L.P.*, 85 AD3d 554 [1st Dept 2011] [agent's management of premises not comprehensive and exclusive as repairs having cost of $5,000 or more had to be approved by owner who paid for all repairs]; *Hagen v Gilman Mgt. Corp.*, 4 AD3d 330 [2d Dept 2004] [as evidence demonstrated

that owner reserved to itself significant amount of control over maintenance of premises, managing agent did not have comprehensive agreement that displaced owner's responsibility]; *Lennon v Oakhurst Gardens Corp.*, 229 AD2d 897 [3d Dept 1996] [managing agent did not have control of property to exclusion of owner where, among others, it agreed to maintain property's common elements but subject to direction of owner's board of directors; it hired employees but employees were deemed owner's employees; and it could not make expenditures above $5,000 without owner's consent except in emergency]; *compare German v Bronx United in Leveraging Dollars, Inc.*, 258 AD2d 251 [1st Dept 1999] [triable issue remained as to whether managing agent had exclusive control of building's management as plaintiff submitted document distributed to building's tenants stating that agent was taking over "all management duties" and there was no written agreement clarifying scope of agent's duties]).

Even if Bellmarc's duty to maintain the building displaced Moluka's duty, there is no evidence that such duty extended to a duty to supervise its demolition, as any failure to maintain the premises safely or make necessary repairs has no relation to the alleged negligence or injury here. (*See Matter of Ramirez v City of New York*, 13 AD3d 248 [1st Dept 2004] [defendant did not in its capacity as managing agent have complete and exclusive control over lead paint abatement project during which plaintiff allegedly was injured]; *Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450 [2d Dept 2004] [managing agent not liable as management contract was not comprehensive and exclusive agreement, and as its contractual duties did not include altering premises to correct design defect which allegedly caused plaintiff's fall]; *Baher v Shelter Express, Inc.*, 298 AD2d 320 [1st Dept 2002] [maintenance contractor had no duty to correct alleged bus shelter design defect which allegedly caused plaintiff to slip and fall];

compare Tushaj v 322 Elm Mgt. Assocs., Inc., 293 AD2d 44 [1st Dept 2002] [finding managing agent liable for plaintiff's injuries where it had obligation to inspect and maintain building and unfettered authority to make repairs costing less than $500, which included authority to repair or replace defective boards at issue that caused injuries, and as it had actual notice of defective condition and failed to fix it]).

V. MOTION FOR CONTRACTUAL INDEMNITY AND ATTORNEY FEES

As Bellmarc has established that it is entitled to dismissal of the complaint against it, Bellmarc's claim for indemnification against Moluka and P&J is moot. (*See Doodnatch v Morgan Contracting Corp.*, 101 AD3d 477 [1st Dept 2012] [denying as moot defendant's claims for indemnification given dismissal of complaint and cross-claims against defendant]; *Mayes v UVI Holding LLC*, 301 AD2d 409 [1st Dept 2003] [dismissal of complaint against defendant rendered moot its cross claims for indemnification and contribution]).

However, Bellmarc has demonstrated its entitlement to attorney fees from Moluka as Moluka agreed to reimburse Bellmarc for any fees paid in connection with a claim instituted against Bellmarc or Bellmarc and Moluka related to the condition or use of the buildings.

As to P&J, it agreed to indemnify and hold harmless Moluka and its agents from all expenses, including attorney fees, but only if the injury arose from P&J's work and was caused by its negligent acts or omissions. As such a finding has not yet been made against P&J, Bellmarc's claim for attorney fees is premature. (*See Netjets, Inc. v Signature Flight Support, Inc.*, 43 AD3d 1016 [2d Dept 2007] [until liability for plaintiff's loss is established, premature for court to reach issue of whether defendant is entitled to reimbursement for attorney fees from other defendant]).

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Douglas Elliman Property Management, Yolanda Queen, and Bellmarc Property Management Services., Inc.'s motion for summary judgment is granted, and the complaint is dismissed against these defendants; it is further

ORDERED, that defendant Bellmarc Property Management Services, Inc.'s motion for summary judgment on its cross claims against defendant Moluka Enterprises, LLC is granted only as to its claim for attorney fees, and is otherwise denied as moot; it is further

ORDERED, that within ten days from the date of entry of this order, defendant Bellmarc Property Management Services, Inc. shall serve a copy of this order with notice of entry upon all parties, and upon the General Clerk's Office (Room 119) and the Special Referee Clerk's Office (Room 119M), who shall assign this matter to a Special Referee for a hearing to determine the amount of reasonable attorney fees to be awarded said defendant, and upon a receipt of the report from the Special Referee, this court shall make a final determination in this matter; and it is further

ORDERED, that defendant Bellmarc Property Management Services, Inc.'s motion for summary judgment on its third-party claim for contractual indemnity and attorney fees against third-party defendant P & J Renovations, Inc., is denied as moot as to the indemnity claim but denied as premature as to the claim for attorney fees.

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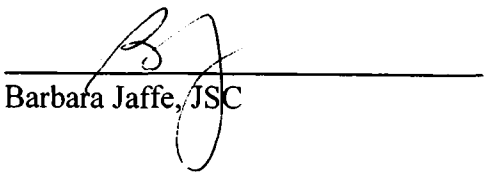

Barbara Jaffe, JSC

DATED: December 24, 2015
New York, New York