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

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EDWARD WASNEUSKI and CATHERINE WASNEUSKI,

Plaintiffs,

-against-

SHABBAH REALTY, LLC, JACKSON HEWITT INC. and AST TAX SERVICES, INC.,

Defendants.

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JACKSON HEWITT INC.,

Third-party plaintiff,

-against-

AST TAX SERVICES INC.,

Third-party defendant.

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Index No. 154113/14

Motion seq. nos. 005, 006

DECISION AND ORDER

BARBARA JAFFE, J.:

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By notice of motion, defendant/third-party defendant AST Tax Services Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and third-party action against it. Plaintiffs and defendant/third-party plaintiff Jackson Hewitt Inc. oppose. (Mot. seq.

no. 005).

By notice of motion, Jackson moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and cross claims against it, and for an order granting it summary judgment in the third-party action against AST. Plaintiffs oppose. (Mot. seq. no. 006).

I. BACKGROUND

This action arises from an alleged slip and fall that occurred on January 29, 2014 on the sidewalk abutting property owned by nonmoving defendant Shabbah Realty, LLC, which allegedly leased the property to AST, Jackson's franchisee. On or about December 22, 2011, AST and Jackson entered into a franchise agreement, effective through February 6, 2026, whereby AST agreed, as pertinent here, to select an office and comply with applicable laws and regulations, to "purchase and display signs that [Jackson] specif[ies] and approve[s]," and to procure and maintain insurance during the term of the agreement. AST also agreed to open "at least one Office, . . . in the Territory by the start of the first Tax Season after [December 22, 2011]," and maintain at least one office during each subsequent "Tax Season," which is defined in the agreement as the period commencing annually on January 2 and ending the day federal income tax returns are due. (NYSCEF 67).

The agreement also provides that if Jackson becomes a party to a suit by reason of

> (i) any claimed act or omission by [AST], [its] customers, [its] current or former employees, [its] Owners, officers or directors, or agents, (ii) any act or omission occurring in the Franchised Business, (iii) any act or omission with respect to the Franchised Business, or (iv) any claims against [Jackson] as franchisor relating to [AST's] operations, including, but not limited to, claims seeking to hold [Jackson] vicariously liable for [AST's] actions . . . [AST] shall indemnify, defend, and hold [Jackson], . . . harmless against all judgments, . . . and expenses, including attorneys' fees, court costs, and other expenses of the litigation . . . .

(*Id.*). AST also agreed that it is

> an independent contractor and that no principal-agent, partnership, employment, joint venture or fiduciary relation exists between [AST and Jackson]. [AST] is solely liable for any damages to any person or property arising directly or indirectly out of the operation of [its] Franchised Business. . . . This Agreement is solely a license to use [Jackson's trademarks] in a tax return preparation business using [Jackson's] Operation System.

(*Id.*). Jackson agreed, among other things, to provide AST with proprietary tax preparation software, and advertising and training materials. (*Id.*).

On November 22, 2013, AST purchased general liability insurance for a period covering January 6, 2014 through January 6, 2015, and named Jackson as an additional insured. (NYSCEF 68).

On February 4, 2014, AST and Shabbah entered into a three-month lease for the premises, commencing February 1, 2014, at a monthly rent of $2,000. In a section of the lease entitled "Background," AST and Shabbah agreed that "Lessor [AST] and Shabbah Realty ("Owner") entered into a Lease Agreement (the "Main Lease") for the premises . . . ," that the lease was "subject to all the terms and provisions of the Main Lease and to any matter to which the Main Lease is subject[,]" and that the lease would not take effect unless Shabbah "executes its consent." The lease is signed by AST, but not by Shabbah. (NYSCEF 65). A canceled check dated March 31, 2014, and signed by AST, reflects its $6,000 payment to Shabbah for "Rent 2014." (NYSCEF 66).

On or about April 22, 2014, plaintiffs commenced this action alleging that plaintiff Edward Wasneuski slipped and fell while on the sidewalk abutting the property owned by Shabbah. (NYSCEF 1). AST answered, asserting against Jackson cross claims in common-law indemnification and contribution, and Jackson answered, asserting against AST cross claims in

contractual and common-law indemnification, a failure to procure insurance, and contribution. (NYSCEF 62-63). Jackson thereafter commenced a third-party action against AST asserting the same claims. (NYSCEF 59).

Following joinder of issue, plaintiffs served a bill of particulars wherein they alleged that Wasneuski slipped and fell on a "Jackson Hewitt" sign that had fallen onto the sidewalk in front of the premises and was covered in ice and snow. (NYSCEF 81).

As resolution of Jackson's motion for summary judgment is dispositive of branches of AST's motion, I address it first.

II. GOVERNING LAW

A. Summary judgment standard

To prevail on a motion for summary judgment dismissing a cause of action, the proponent must establish, *prima facie*, its entitlement to summary judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 135 AD3d 211, 217 [1st Dept 2015]). If the moving party meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]).

B. Premises liability

"Generally, liability for a dangerous condition on real property must be predicated upon

occupancy, ownership, control or special use of such premises." (*Creutzberger v County of Suffolk*, 140 AD3d 915, 916 [2d Dept 2016]; *Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]). Absent any of these conditions, the defendant may not be held liable for the dangerous or defective condition on the property. (*Hickman v Medina*, 114 AD3d 907, 907 [2d Dept 2014]; *see also Sewesky v City of New York*, 140 AD3d 666, 666 [1st Dept 2016]). However, an out-of-possession landlord is not liable for the injuries occurring on the demised premised unless it has a duty to maintain the premises imposed by contract, statute, or course of conduct. (*Keum Ok Han v Kemp, Pin & Ski, LLC*, 142 AD3d 688 [2d Dept 2016]). Similarly, whether a franchisor not in possession may be held vicariously liable for the actions of its franchisee depends on the "degree of control that the franchisor maintains over the daily operations of the franchisee or, more specifically, the manner of performing the very work in the course of which the accident occurred." (*Khanimov v McDonald's Corp.*, 121 AD3d 1050, 1051 [2d Dept 2014]; *Repeti v McDonald's Corp.*, 49 AD3d 1089, 1090 [3d Dept 2008]).

C. Indemnification and contribution

A claim for common-law indemnification is premised "not [on] a duty running from the indemnitor to the injured party, but rather . . . a separate duty owed the indemnitee by the indemnitor." (*Raquet v Braun*, 90 NY2d 177, 183 [1997]; *Rehberger v Garguilo & Orzechowski, LLP*, 118 AD3d 765, 766-767 [2d Dept 2014]). A party held vicariously liable may seek common-law indemnification from the party actually at fault for bringing about the plaintiff's injuries, and thus is unavailable to a party from whom the plaintiff seeks recovery for his or her own wrongdoing. (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658 [2d Dept 2014]; *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911-912 [1st Dept 2011]).

Pursuant to CPLR 1401, a party may claim contribution from another where both are "subject to liability for damages for the same personal injury . . . whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." A claim for contribution may lie even where the contributor owed no duty to the injured plaintiff, subject to the requirement that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." (*Raquet*, 90 NY2d at 182-183; *Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]; *Trump Vil. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003], *lv denied* 1 NY3d 504).

III. JACKSON'S MOTION

A. First-party action

Relying on its project coordinator's affidavit, Jackson denies that it owned, operated, controlled, or maintained the premises or appurtenant sidewalk where Wasneuski was injured, and on the 2011 franchise agreement whereby AST agreed to purchase the sign and select the office location, for which Jackson made no warranties, and disclaimed any agency relationship with AST and liability resulting from AST's operation of the franchise. Thus, Jackson argues that it owed no duty to plaintiffs. (NYSCEF 73, 82).

In opposition, plaintiffs contend that the presence of a Jackson Hewitt sign on the property, evidenced by photographs taken of the premises in 2012 and 2013, suggest that Jackson owned the sign, an issue as to which they claim they must explore in discovery. (NYSCEF 108).

In reply, Jackson denies that it owned the sign, and maintains that plaintiffs' contention that discovery might reveal otherwise is without merit. Jackson reiterates its previous

contentions. (NYSCEF 112).

Here, the franchise agreement and the affidavit establish that Jackson neither owned nor occupied the premises, and that it expressly ceded control of the premises to AST as its franchisee and disclaimed any liability for AST's operation of the business. That Jackson retained control over AST's use of its software and training and advertising materials does not prove the existence of any nexus between the manner in which AST performed the work of preparing tax returns and Wasneuski's accident. Thus, Jackson demonstrates, *prima facie*, the absence of a basis for holding it liable for the alleged dangerous condition on the property and abutting sidewalk. (*See Hart v Marriot Intl., Inc.*, 304 AD2d 1057, 1058-1059 [3d Dept 2003] [franchise agreement provided that franchisee, as independent contractor, "was responsible for the daily maintenance, management and operation of the (franchise)" and thus established *prima facie* that defendant-franchisor had no duty to injured plaintiff]; *see also Schoenwandt v Jamfro Corp.*, 261 AD2d 117, 117 [1st Dept 1999] [summary dismissal warranted where relationship between defendants was that of franchisor-franchisee, and no showing "of the means by which (franchisor) purportedly exercised complete domination and control of (franchisee's) daily operations or how such control resulted in plaintiff's injury"]).

The photographs allegedly depicting the site before the accident, along with plaintiffs' bare assertion, advanced by counsel, that Jackson owned the sign, raise no triable issue, and to the extent probative, are undermined by the franchise agreement which obligated AST, not Jackson, to purchase and place the sign.

B. Cross claims

While Jackson advances no argument in support of dismissal of AST's cross claims,

absent a duty owed to plaintiffs (*supra*, III.A.), and as plaintiffs seek to hold AST liable not vicariously, but for its own alleged wrongdoing, AST's cross claim for common-law indemnification fails. (*See Dreyfus v MPCC Corp.*, 124 AD3d 830, 830-831 [2d Dept 2015] [common-law indemnification claims properly dismissed where evidence of liability of defendant/third-party plaintiff "would be based on its actual wrongdoing in failing to properly maintain the property, not on any theory of vicarious liability for (third-party defendant's) conduct"]).

AST's claim for contribution also fails as Jackson establishes that it owed no duty to plaintiffs and thus cannot be held liable for the accident, even though it obligated AST to purchase and maintain the sign on which Wasneuski allegedly tripped. (*See Nassau Roofing & Sheet Metal Co., Inc.*, 71 NY2d at 603 [no claim for contribution where alleged contributor "had nothing to do" with circumstances giving rise to plaintiff's injury, and even to extent it negligently advised other tortfeasor, would not "have augmented the damages for which (other tortfeasor) may be held responsible"]; *see also Desena v N. Shore Hebrew Academy*, 119 AD3d 631, 636 [2d Dept 2014] [no contribution claim where defendants established they were not "responsible for the happening of the accident"]).

C. Third-party action

1. Contractual indemnification

a. Contentions

Jackson argues that the indemnification provision is triggered, given AST's "act or omission," and/or that there is a claim asserted against it seeking to hold it vicariously liable for AST's actions. (NYSCEF 85).

In support of its motion to dismiss the third-party action, AST contends that the indemnification provision is unenforceable under General Obligations Law § 5-322.1, as the provision obligates it to indemnify Jackson regardless of its own lack of fault and in the event of Jackson's own negligence. Even if enforceable, AST argues, absent any claimed act or omission by AST, its customers, current or former employees, owners, officers, directors, or agents, any act or omission occurring in AST's franchise, any act or omission with respect to the franchise, and any claims against Jackson as franchisor relating to AST's operations, including claims seeking to hold Jackson vicariously liable for AST's actions, the provision is not triggered. Alternatively, it contends that the provision is ambiguous. (NYSCEF 56).

In response, Jackson disputes that the statute applies, as its agreement with AST is not a construction contract, and that in any event, it neither caused nor created the condition resulting in Wasneuski's injuries. Jackson also asserts that only one of the triggering events set forth in the agreement need occur for the provision to apply. (NYSCEF 85).

b. Analysis

As the broad indemnification clause unambiguously obligates AST to indemnify Jackson for expenses in defending claims asserted against it related to the operation of AST's business, Jackson is entitled to costs and attorney fees notwithstanding the dismissal of the complaint against it. (*Perchinsky v State of New York*, 232 AD2d 34, 39 [3d Dept 1997], *lv dismissed* 91 NY2d 830 [pursuant to broad indemnity agreement between parties, indemnitee entitled to "costs, including counsel fees, incurred in the defense of the primary action even though that action was dismissed"]; *DiPerna v Am. Broadcasting Cos., Inc.*, 200 AD2d 267, 270 [1st Dept 1994] [same]).

Moreover, as there is no construction contract in issue here, and absent a finding of fault on Jackson's part, General Obligations Law § 5-322.1 does not apply. (*See generally Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 180-181 [1990] [prohibition against indemnitee passing the risk for own negligence to others inapplicable absent finding indemnitee at fault]; *Goll v Am. Broadcasting Cos., Inc.*, 10 AD3d 672, 674 [2d Dept 2004] [indemnification clause in contract for trucking services between defendant and third-party defendant not covered by GOL § 5-322.1, which pertains to contracts for "construction, alteration, repair or maintenance of a building"]).

2. Remaining claims

As the complaint is dismissed as against Jackson, and to the extent its third-party claims or cross claims relate solely to its putative liability in the main action, the branch of Jackson's motion seeking summary judgment on its claims of common-law indemnification and contribution are academic. (*See eg, Parabit Realty, LLC v Town of Hempstead*, 113 AD3d 661, 662 [2d Dept 2014] [as complaint was dismissed as against defendants, branch of their cross motion for summary judgment on cross claim for common-law indemnification moot]).

IV. AST'S MOTION

A. First-party action

1. Contentions

In support of dismissal of the complaint, AST denies that it owed a duty to plaintiffs as its lease did not commence until February 1, 2014. It relies on the lease and the November 4, 2015 affidavit of its COO, denying that it owned, occupied, controlled, or had responsibility for maintaining the premises and public sidewalk at the time of the accident. (NYSCEF 56, 64).

In response, plaintiffs observe that the 2014 lease is not signed by Shabbah and references the "main lease" which AST does not provide. They thus claim that further discovery is needed, and offer photographs purporting to depict the presence of a Jackson Hewitt sign on the property before the commencement of the lease, claiming that even if the lease had not commenced by the time of the accident, AST's ownership of the sign on which Wasneuski allegedly tripped provides a predicate for finding it liable, or alternatively, for permitting discovery on the issue. (NYSCEF 108).

In reply, AST observes that absent mention in the pleadings of the Jackson Hewitt sign and the snow and ice on the sidewalk, and as the allegations are advanced solely by the attorney with reliance on unauthenticated photographs which reflect no identification of the location depicted, or depiction of the fallen sign, plaintiffs' evidence falls short. Moreover, by affidavit dated March 2016, AST's COO acknowledges that while the lease references a "main lease," there is no other lease than the one addressed, and that its lease contains a merger clause. She also denies that Shabbah provided her with a fully executed lease, and that AST ever bought a Jackson Hewitt sign or placed any signs on the sidewalk before the accident. (NYSCEF 114-115).

2. Analysis

As the lease is not signed by Shabbah, and is thus by its terms, ineffective, it lacks probative value. (*See eg, Hernandez v Seminatore*, 48 AD3d 260, 260 [1st Dept 2008] [unsigned apartment lease not probative of establishing plaintiff's residence for purposes of retaining Bronx County as place of venue]; *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 156 [1st Dept 2003] [unsigned brokerage agreement lacked probative value on issue of identity of plaintiff's

principal]). Moreover, even if enforceable, neither it nor the March 2014 check preclude AST's occupation or control of the premises before February 1, 2014, particularly as the lease references a "main lease," purportedly executed before the February 2014 lease, and as the franchise agreement obligates AST to open or maintain an office beginning on January 2 of each year. Notwithstanding the COO's denial that AST occupied the premises or owned the sign before the accident, the franchise agreement, whereby AST is required to, *inter alia*, maintain an office and sign as early as January 2, 2012, along with the purported existence of a "main" lease, are sufficient to raise a triable issue, and/or alternatively, constitute sufficient grounds to warrant further discovery.

B. Third-party action/cross claims

1. Failure to procure insurance

AST alleges that as it obtained liability insurance for January 2014 through January 2015, with a blanket endorsement for contractually designated additional insureds, Jackson's claim that it failed to procure insurance naming it as an additional insured is baseless. (NYSCEF 56). In response, Jackson argues that, notwithstanding AST's purchase of insurance, no insurance has been provided. (NYSCEF 85).

AST provides proof in admissible form that it purchased insurance designating Jackson as an additional insured, notwithstanding that its insurer may have refused to indemnify Jackson. (*See Perez v Morse Diesel Intl., Inc.*, 10 AD3d 497, 498 [1st Dept 2004] [record established that third-party defendant purchased insurance with additional insured endorsement, and insurer's refusal to indemnify third-party plaintiff under coverage was immaterial]).

2. Remaining claims

Given my determination on Jackson's contractual indemnification claim (*supra*, III.C.1.), and as Jackson's remaining cross claims and third-party claims are predicated on a finding of its liability in the first-party action, which has been dismissed as against it, dismissal of those claims is warranted.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that AST Tax Services Inc.'s motion for summary judgment is granted to the extent that Jackson Hewitt Inc.'s third-party claims/cross claims for common-law indemnification, contribution, and a failure to procure insurance are dismissed, and the motion is otherwise denied; it is further

ORDERED, that Jackson Hewitt Inc.'s motion for summary judgment is granted to the extent that the complaint, and AST Tax Services Inc.'s cross claims for common-law indemnification and contribution, are dismissed as against it, and judgment is granted in favor of Jackson Hewitt Inc. on its cross claim/third-party claim for contractual indemnification as against AST Tax Services Inc., and the motion is otherwise denied as academic; it is further

ORDERED, that the issue of the amount of the award on Jackson Hewitt Inc.'s cross claim/third-party claim for contractual indemnification is referred to a special referee to hear and report, and counsel for Jackson Hewitt Inc. shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (copies are available in Room 119 at 60 Centre Street, and on the Court's website), upon the Special Referee Clerk's Office (Room 119M), who is directed to place this matter on the calender of the Special

Referee Part for the earliest convenient date, and upon receipt of the report from the Special Referee, this court shall make a final determination as to the amount of the award; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

DATED: October 11, 2016
New York, New York