Baer v 180 Varick LLC
2016 NY Slip Op 32290(U)
November 14, 2016
Supreme Court, New York County
Docket Number: 158789/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ELLEN BAER,

Plaintiff,

-against-

180 VARICK LLC, OLMSTEAD PROPERTIES, INC., and MARIO'S GENERAL CONTRACTING, INC.,

Defendants.

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180 VARICK LLC and OLMSTEAD PROPERTIES, INC.,

Third- Party Plaintiff,

-against-

MARIO'S GENERAL CONTRACTING, INC.,

Third- Party Defendant.

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Index No. 158789/2014

DECISION/ORDER

Motion Sequences 001 and 002

HON. CAROL ROBINSON EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action arising out of a trip and fall accident, defendant Mario's General Contracting, Inc. ("General Contracting") moves for summary judgment (sequence 001) dismissing plaintiff's complaint and all cross-claims against. Defendants 180 Varick LLC ("180") and Olmstead Properties, Inc. ("Olmstead") (collectively, the "Owner/Manager") join in General Contracting's motion to dismiss the complaint and all cross-claims asserted against it.

The Owner/Manager separately moves for summary judgment on its cross-claims against General Contracting for breach of contract, indemnification, contribution, and attorneys' fees (motion sequence 002). General Contracting opposes the motion, and cross moves to dismiss the

cross-claims and third party complaint against it.[1]

Factual Background

Plaintiff alleges that on August 15, 2013, she tripped and fell due to an uneven, broken, raised and unsafe condition of the hallway flooring on the fourth floor of 180 Varick Street, New York, New York (the "building"). Plaintiff claims that 180, as owner of the building, Olmstead, as building manager, and General Contracting, the contractor working at the accident location, were negligent.

In support of its motion to dismiss the complaint and all cross-claims, General Contracting argues (and the Owner/Manager concurs) that the alleged dangerous condition was trivial and not actionable as a matter of law. Plaintiff testified to an "unevenness" under her foot when she fell and the indentations in the area were a quarter of an inch; she could not say whether the indentations were more than a half inch. General Contracting's carpenter, Nicholas Perry, who was performing work in the area in the hallway at a doorway away from the area, stated that he had cleaned the area when plaintiff fell and that he observed no tripping hazard in the area. Further, 180's Building Administrator Jordan Hathaway stated that she had shown space to a prospective tenant earlier in the day, and the floor was uncoated, but no one had difficulty walking on the floor and there were no complaints about the condition of the floor before the accident. There is no evidence that General Contracting caused or created the condition and the testimony shows that there was no debris in the area.

In opposition, plaintiff argues that the testimonies and statements by the parties and four non-party eyewitnesses establish that the dangerous condition was not trivial and that the

[1] Motion sequence 001 and 002 are consolidated for joint disposition herein.

Owner/Manager had prior notice of the dangerous condition.

In reply, General Contracting argues that the nonparty witnesses do not provide any reliable measurements contradicting that there were no floor defects of any substantial height. Any alleged debris remaining in the hallway was of unknown origin, and General Contracting had no duty to clean an other debris in the hallway. The only work performed by General Contracting on the day of the accident was the removal of an exit door, and the jackhammer was not used, and no concrete had been cut yet. General Contracting's owner also stated that he did not know when jackhammering was performed. 180's building manager toured the floor before leaving at 5:00 p.m. and saw no unsafe condition.

The Owner/Manager's separate motion for judgment on its cross-claims argues that the construction Contract and subsequent Proposal with General Contracting governed the work for the fourth floor corridor renovation at the building. Based on the affidavit of Olmstead's Executive Managing Director (Steven Marvin), and deposition testimonies of 180's Building Manger (Cesar Vasquez) and Administrator (Jordan Hathaway), and General Contracting's owner (Marijan Juncaj) and carpenter (Nicholas Perry), plaintiff's injury arose out of or was related to General Contracting's work under the contract. Plaintiff's injury did not arise out any acts or omissions on the part of the Owner/Manager. Thus, the Owner/Manager is entitled to common law and contractual indemnification and contribution by General Contracting. The record also establishes that General Contracting was contractually obligated to procure insurance in favor of the Owner/Manager. However, General Contracting's insurer, Northfield Insurance Company ("Northfield Insurance") denied the Owner/Manager's tender for defense and indemnification on the ground that the Owner/Manager was neither listed nor qualified as an

additional insured on the subject policy.

In opposition, General Contracting argues that the Owner/Manager's motion is moot in light of the trivial nature of the alleged defect. In any event, the Owner/Manager was aware of the alleged conditions and took no remedial action when it found the area safe and that no remedial action was necessary. The accident occurred after General Contracting's work was completed for the day, and after the flooring was cleaned. And, plaintiff's accident occurred on the natural topography of the floor. Since the Owner/Manager is ultimately liable for the condition of the common hallway, and failed in its obligation to undertake protective measures, there is no basis for contractual or common law indemnity. Further, the indemnification and insurance procurement clauses do not apply to the work at issue. Nothing in the Proposal contains any indemnification or insurance obligations, or indicates that there were any prior agreements that are incorporated for the job being performed at the time of the accident. And, the Owner/Manager's witnesses lack personal knowledge of the purported agreements. Even if the Contract applies to the work, the indemnification clause exempts liability for the negligence of the proposed indemnitees; and, General Contracting was not negligent. Plaintiff's fall occurred beyond the area where General Contracting's workers were performing work and Perry and Hathaway stated that there was no debris in the subject area. And, the cross-claims against General Contracting must be dismissed because there is no occasion for the Owner/Manager to held liable for the acts or omissions of General Contracting. Alternatively, any grant of indemnification is premature as there is no determination of liability. Further, General Contracting obtained an appropriate insurance policy, and the Owner/Manger never answered Northfield Insurance's offer to provide a defense on a co-primary basis. Any damages for failing

to procure insurance is limited to the cost of any increased premiums, which has not been demonstrated.

The Owner/Manager opposes General Contracting's request to dismiss the former's cross-claims, maintaining that plaintiff's accident arose out of General Contracting's work under the Contract and Proposal. And, plaintiff's claim arose out of General Contracting's work and its failure to leave the area safe for pedestrians. In the event the Owner/Manager is held liable for plaintiff's injuries, General Contracting is required to indemnify it.

In reply, General Contracting argues that any debris in the corridor is of unknown origin.

Discussion

A defendant who moves for summary judgment in a trip-and-fall action "has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 962 NYS2d 46 [1st Dept 2013]; *Pfeuffer v New York City Housing Auth.*, 93 AD3d 470, 940 NYS2d 566 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 927 NYS2d 49 [1st Dept 2011]). Once a defendant establishes *prima facie* entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" *(Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, *supra, citing Rodriguez v 705-7 E. 179th St. Hous. Dev Fund Corp.*, 79 AD3d 518, 913 NYS2d 189 [1st Dept 2010], *citing Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden 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]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

The question of "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977, 688 NE2d 489 [1997] *citing Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*Trincere v Cnty. of Suffolk*, *supra* at 977; *see e.g., Boynton v Haru Sake Bar*, 107 AD3d 445, 968 NYS2d 430 [1st Dept 2013] ("an alleged hazardous one-half-inch differential between the level of the sidewalk and the frame to the cellar hatch doors fails. Photographic evidence shows that the height differential is trivial, and an insufficient basis for finding liability on the part of defendant"); *Fayolle v East West Manhattan Portfolio L.P.*, 108 AD3d 476, 970 NYS2d 186 [1st Dept 2013] (the "alleged defect—a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs—was 'trivial' and therefore nonactionable); *Riley v City of New York*, 50 AD3d 344, 854 NYS2d 400 [1st Dept 2008]). It is

well settled that "[t]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Tineo v Parkchester South Condominium,* 304 AD2d 383, 759 NYS2d 9 [1st Dept 2003]). In determining whether a defect is trivial in nature, the court must examine the facts of each case "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v Cnty. of Suffolk, supra*).

Here, plaintiff testified that as she was leaving the office and walking towards the stairwell, "something uneven under my foot, it felt like just unevenness and rubble, and my . . . foot just gave out, and I fell forward" (EBT, p., 42). She repeated, "it was almost like I was dealing with unevenness. So there was rubble or something. Underneath. . . . And I sort of became unsteady on the, on the rubble"; she later described the loose debris as "Loose particles" (EBT, pp. 42, 159). She later stated, ". . . The floor, essentially, was debris" (EBT, pp. 47-48). When asked if there was rubble or debris there, plaintiff replied, "yes" (EBT, pp. 152-153). According to plaintiff, ". . . there was sort of rubble there, um, big, bigger stones and smaller stones and dust, and it was very uneven" (EBT, pp. 140-141). When describing indentations in the floor, plaintiff stated "They were like little ridges" more than a quarter inch (EBT, p. 160). She did not know whether the ridges were less than half an inch (*id.*). When asked if her foot got caught, plaintiff replied, "Got - - yeah" (EBT, p. 162). There was no other way to walk around in the hallway to avoid the rubble area (EBT, p. 155). She had seen the bigger and smaller stones prior to the date of her accident" (EBT, p. 141). The floor had rubble on it the day before (EBT, p. 153).

Defendants' contention that the condition complained of did not present a trap or snare or

an actionable defect lacks merit. General Contracting reliance on *Trincere (supra* ("cement slab that was elevated at an angle 'a little over a half-inch above the surrounding paving slabs'" was a trivial defect) and *Forrester v Riverbay Corp.* (135 AD3d 448, 21 NYS3d 890 (Mem) [1st Dept 2016] (finding that "uneven floor on which the fur from plaintiff's slippers got caught was a trivial defect and not actionable as a matter of law") is misplaced. Such cases involved an alleged dangerous condition consisting of either an approximate half inch height differential, or a mere uneven floor. Neither case involved debris and loose pieces of concrete coupled with an uneven floor, as plaintiff herein described. Further, the photographs submitted by General Contracting are unclear in several areas and do not demonstrate the absence of an actionable defect. Likewise, *Hutchinson v Sheridan Hill House Corp.*, cited by the Owner/Manger, is factually distinguishable (26 NY3d 66, 41 NE3d 766, 19 NYS3d 802 [2015]) (where surface surrounding lone, protruding object, protruding only about a quarter of an inch above the sidewalk in a well lit area not giving rise to distractions caused by any crowds or physical surroundings, was not uneven)). Therefore, defendants failed to establish that the condition on which plaintiff's allegedly fell constituted a trivial defect. In any event, plaintiff's submission of the affidavit of Lauren Racusin, who states that there was a depression about one inch deep in the floor where plaintiff fell (¶7) raises an issue of fact as to whether the depth, elevation, irregularity and appearance of the condition was dangerous (*see Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 924 NYS2d 38 [1st Dept 2011] ("Plaintiff's testimony that the concrete in the depressed area was eroded, broken up and uneven, with exposed, protruding stone creates an issue of fact whether the defect was trivial"); *Webb v Audi*, 208 AD2d 1122, 617 NYS2d 958 [3d Dept 1994] (" "loose gravel" in the general area, and given Audi's acknowledgement that there may have

been cracks in the floor and chips of concrete--the size and amount are not described in the record and are undiscernible from the photocopy of the scene reproduced in the record--the record evidence, viewed in the light most favorable to plaintiff, could support a reasonable inference that it was the presence of loose pieces of rock or concrete in the immediate vicinity, on an otherwise dry floor, that caused plaintiff's foot to slip out from under him")).

Further, issues of fact exist as to whether General Contracting caused or created the alleged dangerous condition. Although General Contracting contends that its carpenter Perry cleaned the area and saw no tripping hazard in the subject area, Perry testified as to the terracota pieces of the door he took down (EBT, p. 83), which picked up with his hand (EBT, p. 85). It is unclear whether such debris is the rubble of which plaintiff testified. Although Perry testified that he did not see anything that would cause her to fall (EBT, pp. 89-90), and had not used the jackhammer (EBT, pp. 41, 55), Racusin and another non-party witness, Renee Schoonbeck, attested that the gravel had been there for days "and the depression had gravel in it" (Schoonbeck, ¶6).

Therefore, General Contracting's motion for summary judgment dismissing plaintiff's complaint and all cross-claims, and the Owner/Manager cross-motion for the same relief on the ground that there is no actionable defect, are denied.

Turning to the Owner/Manager's motion for summary judgment against General Contracting for common law indemnification and contribution, 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]). However, a "party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Esteva v Nash*, 55 A.D.3d 474, 866 N.Y.S.2d 186 [1st Dept 2008] *citing Mathis v Central Park Conservancy*, 251 A.D.2d 171, 172, 674 N.Y.S.2d 336 [1998]). In other words, a party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification or contribution (*Mathis v Central Park Conservancy*, 251 A.D.2d 171, 674 N.Y.S.2d 336 [1st Dept 1998] *citing Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 453-454). Here, the amended complaint does not propound any theory that the Owner/Manager is vicariously liable to plaintiff by General Contracting's actions or omissions. Instead, the Amended Complaint alleges that the Owner/Manager was negligent in that it created or failed to correct a dangerous condition of which it had prior notice and that its negligence caused plaintiff's injuries. As a result, the Owner/Manager is not entitled to common-law indemnification or contribution from General Contracting, and the cross claims asserting same are dismissed (*see Bleecker St. Health & Beauty Aids, Inc. v Granite State Ins. Co.*, 38 AD3d 231, 233, 834 NYS.2d 1 [2007]).

As to the Owner/Manager's motion for contractual indemnification, 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 AD3d 593, 988 NYS2d 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]).

According to Steven H. Marvin, the Executive Managing Director and Partner at Olmstead, General Contracting executed a written contract, entitled "Contractor Agreement," on June 17, 2010, providing as follows:

> This agreement is being provided for Owner, by Mario's General Contracting, Inc., hereafter referred to as Contractor, in full agreement to the insuring and hold harmless conditions outlined below, and *pertains to all work performed for Owner by Contractor at any time, whether via written or verbal arrangements* . . . .
>
> Prior to commencement of any work done for Owner, *Contractor shall . . . effect and maintain the following insurance* on its own behalf, and furnish to the Owner certificates of insurance evidencing same and reflecting the effective date of such coverage as follows:
>
> * * * * *
>
> 6. Owner and its officers . . . partners, representatives, agents and employees, shall be named as Additional Insureds on a primary basis. . . .
>
> * * * * *
>
> HOLD HARMLESS:
>
> To the fullest extent permitted by applicable law, Contractor will indemnify and hold harmless Owner . . . from and against any and all claims, suits . . .damages . . . including legal fees and all court costs and liability . . . arising in whole or in part and in any manner from injury and/or death of a person . . . resulting from the acts, omissions, breach or default of Contractor . . . in connection with the performance of any work by or for Contractor pursuant to any contract Purchase Order and/or related Proceed Order . . . . Contractor will defend and bear all costs of defending any actions or proceedings brought against Owner . . . arising in whole or in part out of any such acts, omission, breach or default.
> (Emphasis added)

Three years later, General Contracting executed a Scope of Work "Re: 180 Varick Street - 4th Floor Corridor" dated June 24, 2013, proposing as follows:

> We, the undersigned visited the job site and examined all conditions hereby propose to furnish labor, materials, equipment, insurance to complete all work *as per contract document*, on regular time. . . .
>
> * * * * *

Will strip concrete corridor floor . . . .
(Emphasis added)
The "Grand Total for 4th Floor Corridor" was listed a $103,829 of which "$9,439" is listed for *"Insurance, General conditions* and profit." (Emphasis added)

Inasmuch as the Contract (and indemnification and insurance clauses) pertain to "all work performed for Owner by Contractor at any time," and it is uncontested that General Contracting was performing renovation work at the subject location on the day of plaintiff's accident, albeit under the Proposal, the record demonstrates a clear intention by General Contracting to indemnify the Owner/Manager for claims arising out of or in connection with its work. General Contracting's owner, Marijan Juncaj, testified that the the Proposal "was the scope of work that we performed on the fourth floor" in August of 2013 (Juncaj EBT, pp. 16-18). The work consisted of "Beautification of public corridor" which included "Plastering, painting . . . refinishing the floor" (Juncaj EBT, p. 15). These facts are uncontested.

The plaintiff testified that at or about the time of her accident, the hallway, walls, and floors were being upgraded (EBT, p. 28). On the day of her accident, plaintiff was leaving the office to go home, and walked towards the stairwell (EBT, pp. 22-24, 31, 41). The "floor was torn up" (EBT, p. 33), and construction had been "going on" for "weeks" (EBT, p. 37). As she was walking in the hallway on route to the stairwell, she allegedly fell due to unevenness and rubble (consisting of big and small stones) on the flooring (EBT, p. 162). Plaintiff did not see any debris or stones on the floor before the renovation began (EBT, p. 142). Jordan Hathaway, 180's Building Administrator, testified that earlier in the day, he saw that the corridor "looked like a construction site" with Nicholas Perry and Israel Estefas working, "doing something in the ceiling" (EBT, pp. 27-29). The floor was "uncoated," and without "epoxy," or "sealing" (EBT,

p. 30). According to carpenter Perry, he was assigned to work on the 4th floor on the day of the accident, and was responsible for cleaning up the area at the end of his work day (Perry EBT, pp. 83-84). When asked if whether anyone from the building did any of the clean up in the subject corridor while he was working, Perry replied, "No. I cleaned it all up." (EBT, p. 84). The record also demonstrates that neither 180 nor Olmstead performed any renovation work on the fourth floor, or controlled the means and methods of the renovation work. The record establishes that neither 180 nor Olmstead provided any labor, equipment or materials to General Contracting at the worksite, or provided any instructions on how to perform the work (*see* affidavit of Steven H. Marvin, ¶¶ 16-17; Perry EBT, pp. 32-33).

Therefore, based on the above, the Owner/Manager met its initial burden of showing that plaintiff's accident arose in whole or in part from the acts or omissions of General Contracting in connection with General Contracting's performance of its work pursuant to the Proposal, and is therefore, entitled to contractual indemnification by General Contracting.

The Owner/Manager also established that the Contract requires General Contracting to obtain certain insurance, and the Owner/Manager established, on its motion, General Contracting failed to obtain and maintain the required insurance naming the Owner/Manager as an additional insured.

However, in opposition, General Contracting raised an issue of fact as to whether it caused or created the alleged dangerous condition and whether the Owner/Manager failed to remedy the debris/rubble condition of which it had notice. Perry testified that the General Contracting engages a different company to work on the flooring, which gets "sanded and polyurethaned" (EBT, pp. 14-16). The only work Perry performed on the date of the accident

was the removal of an exit door on the fourth floor (EBT, p. 36). In removing the exit door, Perry explained, "We have to cut around the concrete . . . and then we chop it out with a small jackhammer" (EBT, p. 38). When asked if gravel or little chips land on the ground from chopping the concrete, Perry replied, "Yes. . . ." (EBT, pp. 39-40). However, "On the day of the accident, I used the jackhammer *after the fact. There was nothing being chopped when the accident happened*" (EBT, p. 41). Perry stated that he was "probably working in the office" 418 at the time, "sheetrocking, I think" (EBT, p. 42). Perry was "getting ready to work . . to start cutting the door, and the guy that was working with me, Israel, heard her [plaintiff] scream" (EBT, p. 54). Perry and Juncaj stated that *there were no tripping hazards at the area of the accident* (Perry EBT pp. 89-90; Juncaj EBT, pp. 100-101) (emphasis added). Also, issues raised by non-party witnesses as to the presence of the alleged dangerous condition, and

Further, Building Manager Vasquez "toured the [fourth] floor" approximately 3:00 to 4:30 before he went home at 5:00 p.m. (EBT, pp. 60-61) and the floor did not appear uneven or had any cracks; however, the floor had a "small indentation" from "when the cement is poured" and "small bubbles of air pop up" creating small indentations (EBT, p. 76). Yet, the floor "seemed to be safe" (EBT, pp. 97-98). Further, the Owner/Manager hired a building maintenance contractor to sweep and mop hallways every night from Monday to Friday (EBT, pp. 128-129). In addition, an employee of the building owner also swept the hallways during the day "If needed." (EBT, p. 132). The record raises issues as to the Owner/Manager's knowledge of the condition of the floor that allegedly caused plaintiff's injuries, and whether the condition was visible and apparent, and existed for a sufficient length of time prior to the accident to permit the Owner/Manager to discover and remedy the condition. To constitute constructive notice of a

dangerous condition, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v American Museum of Natural Hist.*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). Issues of fact exist as to whether the Owner/ Manager was aware of the allegedly dangerous condition of the flooring and whether the Owner/Manager breached its common-law duty to maintain the area in a reasonably safe condition.

Therefore, in light of the broad indemnification clause in the Contract, and issues of fact as to the negligence of the Owner/Manager, the Owner/Manager is entitled to conditional summary judgment on its contractual indemnification cross-claim (*see Auliano v 145 East 15th Street Tenants Corp.*, (holding that "145 East is entitled to conditional summary judgment on its cross claim for contractual indemnification against Master, given the broad indemnification clause in the contract between the parties, which does not purport to indemnify 145 East for its own negligence, and given that issues of fact exist as to 145 East's negligence")). Consequently, General Contracting's motion to dismiss the contractual indemnification cross-claim is denied.

As to the Owner/Manager's claim of the failure to obtain insurance, the record also establishes that General Contracting was contractually obligated to procure insurance in favor of the Owner/Manager. The record also establishes that Northfield Insurance denied the Owner/Manager's tender for defense and indemnification on the ground that the Owner/Manager was not an additional insured on the subject policy. However, in opposition, General Contracting

contends that Northfield Insurance offered a defense to the Owner/Manager. Summary judgment in favor of the Owner/Manager and summary dismissal of the claim in favor of General Contracting are unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by Mario's General Contracting, Inc for summary judgment dismissing plaintiff's complaint (motion sequence 001) is denied; and it is further

ORDERED that the branch of the motion by Mario's General Contracting, Inc. for summary judgment dismissing all cross-claims against it (motion sequence 001) is denied as to the contractual indemnification and breach of contract cross-claims, and granted as to the common law indemnification and contribution cross-claims, and the common law indemnification and contribution cross-claims asserted by defendants 180 Varick LLC and Olmstead Properties, LLC against Mario's General Contracting, Inc. are severed and dismissed; and it is further

ORDERED that the cross-motion (sequence 001) by defendants 180 Varick LLC and Olmstead Properties, LLC for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the branch of the motion by defendants 180 Varick LLC and Olmstead Properties, LLC for summary judgment on its cross-claims against co-defendant Mario's General Contracting, Inc. ("Mario's Contracting") (sequence 002) is denied as to the common law indemnification, contribution, breach of contract and attorneys' fees cross-claims; and it is

further

ORDERED that the branch of the motion by defendants 180 Varick LLC and Olmstead Properties, LLC for summary judgment on its cross-claim for contractual indemnification (sequence 002) is granted solely to the extent that conditional summary judgment against defendant Mario's General Contracting, Inc. is granted; and it is further

ORDERED that Mario's General Contracting, Inc. 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: November 14 , 2016

Hon. Carol Robinson Edmead, J.S.C.

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