SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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DAVID MERCEDES,

Plaintiff,

Index No. 162055/2015
Motion Sequence 003, 005

-against-

Decision, Order and Judgment

MATRIX CROSSROADS, LLC AND LIBERTY ELEVATOR CORPORATION,

Defendants.

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MATRIX CROSSROADS, LLC,

Third-Party Plaintiff,

-against-

PAYCHEX OF NEW YORK, LLC,

Third-Party Defendant.

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CARMEN VICTORIA ST. GEORGE, J.S.C.:

Currently, the Court has two motions before it. In motion sequence number 003, third-party defendant Matrix Crossroads, LLC (Matrix) seeks dismissal of the third-party complaint under CPLR 3211, for failure to state a claim. In motion sequence 005, third-party plaintiff Paychex of New York, LLC (Paychex) moves for summary judgment in its favor on the third-party complaint.

The Court consolidates motion sequence numbers 003 and 005, and, for the reasons below, grants motion sequence number 003 and denies motion sequence number 005.[1]

Around October 14, 2014, plaintiff David Mercedes allegedly was struck by an elevator door in a building purportedly owned by Matrix. Paychex is a lessor in the building, and plaintiff was one of its employees. The original lease governing the landlord-tenant relationship is dated February 22, 1990 and was between Paychex, Inc. and 93 Center Co. Paychex is the successor in interest to Paychex, Inc. 1300 Veterans Associates, L.P. succeeded 93 Center Co. as landlord in 2005. Matrix and Paychex dispute their liability under the lease and further dispute the issue of whether Paychex has a contractual obligation to Matrix.

I. Paychex's Liability Under the Lease

In support of its motion to dismiss, Paychex relies on several portions of the lease. Article 31 states:

> Tenant shall . . . indemnify Landlord against all fines, costs, liabilities, expenses, attorneys' fees, losses and damages . . . incurred . . . by Landlord as a result of (a) Tenant's breach, violation or non-performance or any covenant or provision of this lease; (b) Tenant's use or occupancy hereunder; (c) any accident, injury or damage to persons or to property due to Tenant's carelessness, negligence or fault. . . .

Article 32 states:

> If at the time of the making of this lease, or in the future, there are upon any floors, or portions thereof, spaces used for hallways, passageways, stairways, elevators, . . . or other building facilities or for other means of access or utility or other common or reserved areas, they shall nevertheless be reserved for the use of the Landlord and/or all tenants, as the case may be, and shall not be considered a portion of the leased property, notwithstanding the fact that the gross footage contained in such areas may be used by Landlord in

[1] The Court notes that originally Matrix moved for summary judgment in motion sequence number 004, but that motion was withdrawn by stipulation and order and replaced with motion sequence number 005.

> computing the basis upon which Tenant shall be charged for matters such as increased taxes and operating expenses or otherwise.

Article 34 states:

> All . . . facilities [and improvements] if, as and when furnished by Landlord in or near the Building or the Center, including without limitation . . . areas and improvements provided at Landlord's sole discretion for the general non-exclusive use, in common, of tenants, their officers, agents, employees and invitees, shall at all times be subject to the exclusive control and management of Landlord. . . . Landlord will operate and maintain the common facilities referred to above in such manner as Landlord, in its sole discretion, shall determine from time to time. . . . Landlord shall have the full right and authority to employ all personnel and to make all rules and regulations pertaining to and necessary for the proper operation and maintenance of the common areas and facilities.

Paychex finally cites to the February 20, 2003 lease rider, at paragraph 15. This paragraph provides that Matrix is responsible for providing janitorial services in the building and for using "commercially reasonable efforts to ensure" management oversight over the quality of such services. Among the janitorial services to be provided concerning the elevator were 1) vacuuming the interior carpets, 2) cleaning and polishing the inside surfaces on an as needed basis, 3) cleaning the door tracks, and 4) clearing any debris from the interior phone boxes.

Based on the above provisions, Paychex argues it has no liability for the accident because it was not responsible for maintaining or providing insurance for the elevator. Citing *Axelrod v Maryland Cas. Co.* (209 AD2d 336, 336 [1st Dept 1994]), among other cases, for the proposition that when a plaintiff's injury occurs outside of the demised premises the lessee is not responsible for indemnification (*See 625 Ground Lessor LLC v Continental Cas. Co.*, 131 AD3d 898, 898 [1st Dept 2015], *lv denied*, 26 NY3d 916 [2016]). It further contends that the law does not require it to defend and indemnify on the sole basis that plaintiff was its employee and the injury occurred in the course of his employment (Citing, inter alia, *Rensselaer Polytechnic Inst. V Zurich American Ins. Co.*, 176 AD2d 1156 [3rd Dept 1991]). It submits the

affidavit of David M. Martin, Paychex's real estate manager, who states it had no responsibilities with respect to the elevator. Citing *Witty v Matthews* (7 Sickels 512 [1873]), among other cases, it states that it is improper to enlarge Paychex's express contractual obligation.

In opposition and in support of its own motion for summary judgment, Matrix cites to Article 14 of the lease, which states, in pertinent part, that the tenant, in this case Paychex, must maintain "a comprehensive liability policy of insurance protecting Landlord, its designees, and Tenant against any liability for inury to persons and/or property . . . of any persons occurring in, on or about the Building . . . ." It argues that Article 31, which Paychex cites, actually supports its claim for indemnification, and it cites Paragraph 11 of the lease renewal rider for the argument that Paychex's policy is the primary one. In support, Matrix points to *Great Northern Ins. v Interior Constr. Corp.*, 7 NY3d 412 [2006]), stating that it allows Matrix to shift the liability when one of Paychex's employees is involved. It contends this is true because in this circumstance, the incident results from the employee's use of the premises.[2] It states that a provision that requires Paychex to indemnify it for liabilities which occur in the Health Club when the injuries occur "as a result of [Paychex] and [its] employees use of the Health Club" (Matrix's Aff in Opp, at ¶ 10) further supports its argument.

II. Paychex's Contractual Obligation to Matrix

Paychex also disputed its obligation to indemnify Matrix because it contends that its original 1990 lease is with 93 Center Co., and its modified Lease, dated November 18, 2005, names 1300 Veterans Associates, L.P. ("Veterans") as successor in interest. As this lease was in effect on the accident date, it contends, Paychex had no contractual obligations with Matrix at that time.

Matrix's motion, sequence 005, challenges Paychex's argument on this issue. It contends that it purchased the building in 2013 and assumed all obligations and rights of the prior landlord, including those

[2] Matrix raises this argument in the opposition it filed on April 26, 2017 – which replaced its April 10, 2017 opposition but came after Paychex had replied.

relating to the contract with Paychex. In support, it submits a copy of the June 24, 2013 agreement between Matrix and Veterans.[3] It reiterates the arguments it made in opposition to Paychex's motion.

Paychex opposes and "cross-moves" in further support of its own motion, sequence 003, which the Court has discussed above. In opposition, it argues that the June 24, 2013 lease has no evidentiary value because it is not properly authenticated (Citing *Irb-Brasil Resserguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637, 637-38 [1st Dept 2011] [document used to establish payment of debt not considered where not authenticated])[4]. It additionally reiterates the arguments in favor of its original motion to dismiss, which this Court has discussed. Matrix replies that the assignment in question is signed by representatives of both Matrix and Veterans, and as such should be sufficient to reflect the transfer for the purposes of this motion.

Discussion

Initially, the Court notes that in opposition to Paychex's argument that there was no contract transferring ownership to Matrix, Matrix should have provided a copy of the assignment which has evidentiary value. Even if it initially provided an unauthenticated copy, in response to Paychex, Matrix should have corrected the defect. This is true notwithstanding the stage of discovery, as this is the only document on which Matrix relies for this point. If the Court were to decide this critical issue, it would direct Matrix to provide an authenticated copy of the assignment agreement rather than deny a dispositive motion outright.

It is not necessary to issue such a directive, however, because the Court finds that Paychex is not liable to indemnify Matrix against its own negligence in an area of the building that is under Matrix's control. "If a policy insures a portion of a building, it does not cover an injury occurring in another portion of the building" (*Seneca Ins. Co. v Cimran Co., Inc.*, 106 AD3d 166, 170 [1st Dept 2013]). Article 31 of the lease, on which both parties rely, only requires Paychex to indemnify

[3] The Assignment also names Crest Plaza, LLC as a tenant-in-common with Matrix.
[4] It also cites *Hedges v East River Plaza, LLC* (126 AD3d 582 [1st Dept 2015]), but that decision simply affirms the denial of a defendant's motion to dismiss the complaint and cross-claims.

Matrix if the incident in question was "a result of (a) Tenant's breach, violation or non-performance or any covenant or provision of this lease; (b) Tenant's use or occupancy hereunder; (c) any accident, injury or damage to persons or to property due to Tenant's carelessness, negligence or fault" (relying on *Axelrod*, 209 AD2d at 336). Matrix has provided no evidence indicating that Paychex was in any way responsible for the accident. Matrix's reliance on *Great Northern Ins.* is misplaced, because – as Paychex points out – that case does not provide that a landlord can shift liability for its own negligence. Instead, it holds that a lease which transfers the risk of liability to a tenant is enforceable to the extent that it "obligates the tenant to indemnify the landlord for its share of the liability . . . ." (*Great Northern*, 7 NY3d at 415). The Court need not consider the significance of Article 14 of the lease, because Matrix cannot insulate itself from liability for its own negligence (*Id.*).

Accordingly, it is

ORDERED that motion sequence 003 is granted, and the third-party complaint is dismissed in its entirety; and it is further

ORDERED that the third-party action is severed and dismissed, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption shall be amended to reflect the dismissal and all future papers filed with the court bear the amended caption; and it is further

ORDERED that motion sequence 005 is denied.

Dated: 12/13, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.