

<b>Rodriguez v C &amp; F Unisex Hair Salon, Inc.</b>
2018 NY Slip Op 32785(U)
October 30, 2018
Supreme Court, New York County
Docket Number: 154923/2015
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: Hon. \_\_\_\_\_ Robert D. KALISH**  
*Justice*

**PART 29**

**AURORA RODRIGUEZ,**

**INDEX NO. 154923/2015**

**Plaintiff,**

**MOTION DATE 10/29/18**

**- v -**

**MOTION SEQ. NO. 001**

**C & F UNISEX HAIR SALON, INC. et al.,**

**Defendants.**

**NYSCEF Doc Nos. 52-75 were read on this motion for summary judgment.**

Motion by defendant Finger Management Corp. ("Finger") pursuant to CPLR 3212 for an order granting Finger summary judgment dismissing the complaint and all cross-claims is granted, there being no opposition submitted. That branch of the motion by Finger for an order granting Finger's cross-claim for contractual indemnification as against defendants C & F Unisex Hair Salon, Inc., C & F Unisex Hair Salon Inc. d/b/a D'Yoryi Hair Salon, and D'Yoryi Hair Salon (collectively, "C&F") and requiring C&F to defend, indemnify, and pay the attorney's fees incurred by Finger pursuant to a lease is granted to the following extent.

**BACKGROUND**

Plaintiff Aurora Rodriguez commenced the instant action on May 15, 2015, by e-filing a summons and complaint. In her complaint and at her deposition, Plaintiff alleged, in sum and substance, that she was injured while at a salon by the release of a toxic level of carbon monoxide (also known by its chemical abbreviation, "CO") due to the negligence of Defendants.

In the first instance, Plaintiff has already executed a stipulation of discontinuance of the action as against all defendants except Finger, has executed a release as to all defendants except Finger (C&F and, together with defendant/owner 1885-93 7th Avenue Housing Development Fund Corporation ["HDFC"], the "Released Defendants") and has not submitted any opposition to the instant motion. The only opposition submitted on the motion is put in by the Released Defendants, and it is only in opposition to that branch of the motion which seeks indemnification.

As to the merits of the case, in summary, in accordance with the depositions taken in this matter, all parties concede that the CO was released and that certain natural gas heating ductwork, installed, controlled, and maintained exclusively by C&F, and without any notice to or involvement by HDFC or Finger, was to blame for the CO's release.

In the branch of the motion seeking summary judgment dismissing the complaint, Finger argues, in sum and substance, that it had nothing to do with the subject heating element. Finger, as managing agent for HDFC, did have an obligation to maintain the premises under a lease between HDFC and C&F, but C&F, as tenant, took complete control of that obligation with respect to any heating elements within the demised premises, which all parties agree with, and which the deposition testimony confirms. All parties also agree that the demised premises included the salon and the attendant ductwork that allegedly injured Plaintiff. As such, Finger argues it had nothing to do with the ductwork, had no notice of a dangerous condition, and did not cause or create the dangerous condition or launch a force or instrument of harm.

In the branch of the motion seeking contractual indemnification, Finger argues, in sum and substance, that the lease between HDFC and C&F provided that C&F was to indemnify both HDFC and C&F for any liability resulting from C&F's negligence. Such indemnity was to include reasonable attorney's fees. (See Jordan affirmation, exhibit J, ¶ 8 [Lease].)

In opposition, the Released Defendants argue that a plain reading of the clear, unambiguous language of the Lease indicates that the agreement required C&F to indemnify "Owner", only. Finger is not mentioned by name, although the phrase "or its agents" does appear in the insurance paragraph, but not in direct reference to any obligation to insure any agent. As HDFC is both the Owner the Landlord as defined in the Lease rider, State Farm accepted a tender and has represented both C&F and HDFC in this matter but refused to accept a tender for Finger on this basis. The Released Defendants further argue that GOL § 15-108 (b) relieves C&F from any claims of common-law indemnity or contribution to Finger.

In reply, Finger urges that the branch of the motion for summary judgment in its favor be granted because Plaintiff has not submitted opposition. Finger then reiterates the arguments in its moving papers as to indemnification. Notably, Finger does not address GOL § 15-108. Rather, Finger, indicates that the phrase "or its agents" in the Lease must have some meaning, and to ignore it would be an unfair reading of the Lease. Finger argues that the inclusion of "or its agents" in the paragraph relating to indemnification indicates that C&F, as Tenant, was required to indemnify Finger in the same manner as HDFC.

On October 29, 2018, the parties appeared at oral argument and reiterated the arguments in their respective papers. Notably, the Court indicated, and the parties did not dispute, that GOL § 15-108 (b) may relieve a released tortfeasor from a claim of contribution, but not a claim of common-law indemnity.

### DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact

from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.*) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

In the first instance, the Court finds that movant has shown prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross-claims based upon the deposition transcripts annexed to the moving papers. The record as submitted shows that any duty Finger may have had regarding maintenance of the subject heating element was fully assigned to C&F in the Lease. Further, the record shows that C&F installed and maintained the subject heating element that allegedly caused Plaintiff’s injury without noticing Finger. Moreover, the record establishes that Finger had no actual or constructive notice of an allegedly dangerous condition related to Plaintiff’s injury. In short, Finger had nothing to do with the Plaintiff’s accident.

The burden having shifted to Plaintiff, and there being no opposition submitted as to that branch of the motion that is for summary judgment dismissing the complaint, the complaint shall be dismissed as against Finger.

Further, as Plaintiff has executed a stipulation of discontinuance and a release as against C&F and HDFC, the main action, as brought by Plaintiff and as against Defendants, is over.

Further, as the Released Defendants have not opposed that branch of the motion that is to dismiss their cross-claims against Finger, those cross-claims are also dismissed.

What is left at this point is a cross-claim by Finger against C&F for contractual indemnification.

Preliminarily, Finger has not alleged common-law indemnification in its moving or reply papers, nor has it addressed the opposition’s GOL § 15-108 argument that the release protects C&F against common-law indemnity and contribution. As such, the Court will consider Finger’s cross-claim as a claim for contractual indemnification, only, and has analyzed the motion on that basis.

Based upon the parties’ arguments and the Court’s review of the Lease, the Court finds that Finger has properly asserted that it should prevail on its claim for contractual indemnity, albeit on a basis with which the Court disagrees.

The paragraph at issue in the Lease as relied upon by movant is paragraph 8, titled “Tenant’s Liability Insurance Property Loss, Damage, Indemnity [sic]”. The first two sentences of the paragraph have to do with the liability of HDFC, as Owner, and its agents, one of which, it is undisputed, is Finger. As is relevant in this action, the first sentence essentially says that HDFC and Finger will not be liable for any injury or damage to a person or property unless it is caused by or due to the negligence of HDFC or its agent, Finger, or any other agents, servants, or employees of HDFC.

Beginning with the third sentence, the lease provides that C&F agrees to maintain general public liability insurance in a standard form and in favor of Owner and Tenant. All subsequent clauses in paragraph 8 relating to indemnification, holding harmless, attorney’s fees, etc., all relate to Owner and Tenant, only. Owner’s agents are not mentioned again in paragraph 8 of the Lease. Moreover, the Lease rider provision cited to in the Released Defendants’ opposition papers enhances the indication that this provision is to apply to HDFC, only, as it uses the other term for HDFC, “Landlord”, and specifically states that the policy is to name Landlord and Tenant, only. (Lease ¶ 49.)

In *Williams v Jeffrey Mgmt. Co.* (29 Misc3d 1214 [A] [Sup Ct, NY County 2010, Wooten, J.]), a motion court interpreted a lease provision similar to paragraph 8 of the Lease. In *Williams*, the motion court held that where a managing agent is not specifically referenced in a lease where a tenant agrees to indemnify an “owner” or “landlord”, and where the only reference to the owner’s “agents” is as an exception to a general liability statement of the type in the Lease, the indemnification clause in the lease is inapplicable to the managing agent. The motion court was distinguishing the facts of its case from another case, *Picchione v Sweet Constr. Corp.* (60 AD3d 510 [1st Dept 2009]), in which the Appellate Division, First Department held that an agent was indemnified under a certain lease between owner and tenant where the lease specifically indemnified the owner’s agent. Here, the Lease provisions referenced by the parties in their papers seem to the Court suggest that the Lease does not require C&F to indemnify Finger. As such, based solely upon the arguments as set forth by the parties, the Court might have denied summary judgment to Finger and may have been empowered to grant it to HDFC dismissing Finger’s cross-claim.

CPLR 3212 (b) provides, in relevant part, that, “[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” Here, the Court has searched the record, and has conducted a careful review of the Lease, to determine whether summary judgment may be granted to C&F dismissing at this time Finger’s cross-claim for contractual indemnification, which is now essentially a cross-claim for attorney’s fees, or whether summary judgment should be granted to Finger.

Having searched the record, the Court finds that the subject Lease as modified by the Lease rider as annexed to the moving papers along with the Lease in exhibit J does entitle Finger to contractual indemnification against C&F. In the first instance, the Lease rider provides in its first paragraph, paragraph 40, titled “Paramount,” that, “[i]n the event of any conflict or

inconsistency between any provision of this rider and any provision of the printed portion of this lease, the provision of the rider shall govern.”

Upon its careful review of the Lease rider, the Court finds dispositive paragraph 55, titled “Hold Harmless,” which reads,

“[t]he Tenant [here, C&F] shall hold the Landlord [here, HDFC] *and Landlord’s agents* [here, Finger] harmless *and indemnified* from all injury, loss, claims or damage (*including attorneys’ fees and disbursements*) to any person [here, Plaintiff] or property, arising from, related to, or in connection with the use or occupancy of the demised premises or conduct or operation of the Tenant’s business in or about the demised premises.”

(Emphases added.) As the Court stated at oral argument and reiterates here, it should have for the parties, not the Court, to cite to this paragraph. Be that as it may, the undisputed record in this case establishes that C&F acted alone to install and maintain the subject heating ductwork that allegedly caused Plaintiff’s injury. The ductwork was part and parcel of C&F’s operation of its business in the demised premises. That Lease paragraph 49 as cited to in the Released Defendants’ opposition papers obligates C&F to obtain certain liability insurance naming Landlord and Tenant as insureds is of no moment in the instant motion. Finger was not a party to the Lease, and these provisions only contemplate the insurance obligations of C&F fully ascertainable at the times C&F and HDFC executed the Lease and the Lease rider. Paragraph 55, the Hold Harmless provision of the rider, is a forward-looking statement that put C&F on notice that C&F would have to indemnify HDFC’s agents, including Finger. That time has come.

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

CONCLUSION

Accordingly, it is

ORDERED that the branch of the motion by defendant Finger Management Corp. ("Finger") pursuant to CPLR 3212 for an order granting Finger summary judgment dismissing the complaint and all cross-claims is granted, there being no opposition submitted; and it is further

ORDERED that the branch of the motion by Finger for an order granting Finger's cross-claim for contractual indemnification as against defendants C & F Unisex Hair Salon, Inc., C & F Unisex Hair Salon Inc. d/b/a D'Yoryi Hair Salon, and D'Yoryi Hair Salon (collectively, "C&F") and requiring C&F to defend, indemnify, and pay the attorney's fees incurred by Finger pursuant to a lease is granted to the extent that it is

ORDERED that C&F is required to indemnify and reimburse Finger for its reasonable attorney's fees and disbursements incurred in its defense of this action and in its prosecution of the instant cross-claim; and it is further


ORDERED that the issue of the amount of reasonable attorney's fees Finger may recover against C&F is referred to a Special Referee to hear and report, and counsel for movant shall, within 30 days from the date of the decision and order on this motion, serve a copy of this order with notice of entry, together with a completed Information Sheet and any other required papers, upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that the action is dismissed, and movant shall, within 10 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry upon all parties and upon the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that, within 30 days of the date of the decision and order on this motion, C&F and HDFC shall obtain a copy of the oral argument transcript and upload it to NYSCEF.

The foregoing constitutes the decision and order of the Court.

Dated: October 30, 2018  
New York, New York

  
HON. ROBERT D. KALISH  
J.S.C.

- 1. Check one:.....
  - 2. Check if appropriate:..... MOTION IS:
  - 3. Check if appropriate:.....
- CASE DISPOSED       NON-FINAL DISPOSITION
  - GRANTED     DENIED     GRANTED IN PART     OTHER
  - SETTLE ORDER       SUBMIT ORDER
  - DO NOT POST     FIDUCIARY APPOINTMENT     REFERENCE