SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Acting Justice

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LAKISHA SIMS,

Plaintiff,

- v -

ASHKENAZY ACQUISITION CORP.,

Defendant.

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INDEX NO. 160043/2016

MOTION DATE N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

ASHKENAZY ACQUISITION CORP.

Plaintiff,

-against-

RTM OPERATING COMPANY, LLC, ARBY'S RESTAURANT GROUP, INC., ARBY'S LLC

Defendant.

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Third-Party
Index No. 595091/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 62, 63, 64, 65, 66, 67, 68, 69, 72, 74

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions are determined as follows:

This action arises out of an accident that occurred on May 30, 2016 at an Arby's Restaurant located at 611 Eighth Avenue New York, New York. Plaintiff asserts she was caused to slip and fall on water that accumulated on the floor due to a leak in the roof in the Arby's Restaurant. The premises were owned by Defendant 39 & 8th Fee Owner, LLC ("Fee Owner") which contracted with Defendant Ashkenazy Acquisition Corp., ("Ashkenazy") to be the property manager. The Arby's Restaurant was operated by Defendants RTM Operating Company LLC and Arby's Restaurant Group and Arby's LLC (collectively known as "RTM/Arby's"). At the time of this accident, Plaintiff was employed by RTM/Arby's.

On December 1, 2016, Plaintiff commenced this action alleging one cause of action in negligence against Defendant Ashkenazy. On February 6, 2018, Ashkenazy commenced a third-party action against RTM/Arby's for contribution, common-law and contractual indemnification and breach of contract for failure to maintain insurance. In 2019, Plaintiff commenced a second negligence action against Fee Owner under New York County Index Number 155199/2019 which was consolidated with this action by order of the court dated September 14, 2020.

Now, RTM/Arby's move (Motion Seq. No. 2) for summary judgment dismissing the Third-Party complaint. In a separate motion (Motion Seq. No. 3), Ashkenazy moves for summary judgment dismissing Plaintiff's complaint or, in the alternative, conditional summary judgment against RTM/Arby's on its third-party claims.

As to the branch of Ashkenazy's motion dismissing Plaintiff's complaint, while it is ultimately the Plaintiff's burden at trial to establish a *prima facie* case of negligence against the Defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557). In support of its motion, Ashkenazy was required to demonstrate *prima facie,* that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, supra at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce proof, in admissible form, which establish the existence of material issues of fact (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of this branch of the motion, Ashkenazy posits that it owed no duty to Plaintiff as it was an out-of-possession landlord as well as that it did not create the alleged dangerous condition nor did it have actual or constructive notice of same.

It is well established that a "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk," (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008] *citing Basso v Miller,* 40 NY2d 233, 241 [1976]). That duty is premised upon the landholder's exercise of control over the premises since "the person in possession and control of property is best able to identify and prevent any harm to others" (*see Butler v Rafferty*, 100 NY2d 265, 270 [2003]). "Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). However, an out-of-possession landlord can remain liable if: "(1) [it] is contractually obligated to make repairs or maintain the premises, or (2) [it] has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*see Ledesma v AMA Grocery, Corp.,* 145 AD3d 477 [1st Dept 2016], *citing Vasquez v The Rector*, 40 AD3d 265 [1st Dept 2007].

In support of its motion, Ashkenazy relied on, among other evidence, the lease agreement between the parties, the deposition testimonies of Jeffrey Price ("Price"), a property manager for Ashkenazy, Christian Starkes ("Starkes"), Director of Operations for Arby's, and Plaintiff.

The lease between the Defendants and Third-Party Defendants as it relates the property is governed by their 10-year lease agreement dated June 26, 2015. The lease states it is "between 39th and 8th Fee Owner c/o Ashkenazy Acquisition Corporation . . . ("Landlord") and RTM Operating Company LLC . . . [a] wholly owner of subsidiary Arby's Restaurant Group Inc". It is uncontested, that RTM/Arby's leased the entire premises referred to in the lease as the "Retail Space" and the "Basement Space". As concerns maintenance, Article X of the lease reads in pertinent part:

> SECTION 10.01. LANDLORD OBLIGATIONS FOR MAINTENANCE. Landlord shall keep and maintain the roof covering the Building, all structural portions of the premises and all utility lines to the point of connection to the leased premises (exclusive of doors, door frames, door checks, other entrances, windows frames and storefronts) in good repair, except that Tenant shall be liable for and shall reimburse Landlord for any such repairs or improvements occasioned by the acts or negligence of Tenants.
>
> SECTION 10.02. TENANT OBLIGATIONS FOR MAINTENANCE. [a] Tenant, at Tenant's expense, shall keep and maintain the Leased Premises in good order, condition and repair (including replacement of parts and equipment, if necessary), including, without limitation, the interior of the exterior walls… all plumbing, sprinkler and sewage facilities from the point which such facilities connect to the Leased Premises, fixtures, heating and air conditioning serving the Leased Premises and electrical systems, and all other repairs, replacements, renewals and restorations, to the interior, ordinary and extraordinary, foreseen and unforeseen, and all other work performed by or on behalf of Tenant as Tenant's Work or otherwise in accordance with the provisions of this Lease."

With respect to the operation of the business by RTM/Arby's the lease provides under Section 7.02[a], in pertinent part, that:

> "…Tenant, at Tenant's expense, shall promptly comply with all present and future laws, ordinances, orders, rules, regulations and requirements of all governmental authorities having jurisdiction, affecting or applicable to the Leased Premises or the cleanliness, occupancy and use of the same, whether or not any such law, ordinance, order, rule, regulation or requirement is substantial, or foreseen or unforeseen, or ordinary or extraordinary…"

As to the occurrence of the accident, Plaintiff testified that she was the on-site PM shift manager on the day of the incident. She averred that there were Arby's employees that were responsible for cleaning the premises. Furthermore, she was informed by one of her employees that the ceiling at Arby's was leaking the day of the incident while it was raining. She stated that

the ceiling leaked every time it rained from January 2016 until the date of her deposition. On the day of the accident, Plaintiff testified she informed "Greg" the manager about the leak, but she was unaware who he spoke to about the leak. Plaintiff testified that just prior to the accident, she was following closing protocols, turned off the lights, turned on the alarm and walked towards the exit of the building. Plaintiff stated, as she was walking towards the front of the restaurant, she slipped and fell into a puddle.

In his deposition, Price testified that the terms of the lease were in effect at the time of the accident which obligated Ashkenazy to maintain the roof and stated that he would be responsible for the inspection of the building. Price testified that if the roof needed to be inspected, he "could just do it, and no access was needed from Arby's". Price claims he was "actively involved" with Arby's construction renovations prior to its opening and was aware that when RTM/Arby's was required to install specialized air conditioning units in addition to the HVAC components on the roof for the restaurant to meet its cooling requirements. Price asserted that no repairs or maintenance was performed on the roof between the last tenant vacating and Arby's taking possession.

Price denied knowing about any roof leaks prior to the accident. He averred that the prior lessee, Payless Shoes, did not report any leaks. During multiple trips to the premises, including when it was raining and once before Arby's took possession, he did not notice any water leaks. Price acknowledged that Arby's informed him about roof leaks in November or December 2016, a year after the store opened, and that a roofing company, Infinity Management, was hired to inspect roof leaks. Another company, Bass Construction, conducted a more comprehensive roof inspection and eventually resolved the issue through a tar restoration. Price admitted he received emails regarding leaks at Arby's after the accident.

Starkes testified that in November 2016, shortly after he became director of operations, he received a complaint from the subject store manager about a roof leak which he reported to RTM/Arby's leasing department, the division of Arby's that administers the complaints landlords. Starkes also said Kelly Anderson, the area supervisor for Arby's at the time, reported the roof leak to him. Starkes said he was unaware if the manager complained to the owners of the building and admitted he personally made no complaints to Price about the roof leaking. Starkes understood that roof maintenance was the landlord's responsibility. Starkes averred that when he visited the subject location in December 2015, the week when the store opened, he did not notice any water leaks and he could not say anyone complained to him of same. Concerning inspection and repair of the roof, Starkes testified that his first inspection of the roof was in 2017 and that thereafter multiple repairs to the roof were made by contractors retained by the landlord. Starkes claimed, Arby's was not responsible for invoicing any repairs on the roof and did not do so at the time of the incident. He stated that the only time he would have a direct contact with the repairman or roofer is if Arby's was responsible for the invoicing.

In support of its motion, Ashkenazy established that it leased the entire subject premises where the accident occurred to RTM/Arby's, but it failed to demonstrate, as a matter of law, it did not have a duty imposed by contract to remedy the specific defective condition Plaintiff alleged to have caused her accident (*see eg Quituizaca v Tucchiarone*, 115 AD3d 924 [2d Dept 2014]; *Ever Win, Inc. v. 1-10 Indus. Assoc.*, LLC, 33 AD3d 845 [2d Dept 2006]). Under the

lease, Ashkenazy retained the obligation to structurally maintain the premises and that duty expressly included the "roof" of the premises (*see Vaughan v Triumphant Church of Jesus Christ,* ____AD3d____, 2021 NY Slip Op 02560 [2d Dept 2021]; *Negri-Riglos v First N. Star, LLC*, 187 AD3d 1200 [2d Dept 2020]). Ashkenazy also retained a contractual right to reenter the premises and Price admitted that he could enter the premises to inspect the roof without the prior consent of RTM/Arby's.

Ashkenazy's arguments that the leaking roof was caused by RTM/Arby's installation of an HVAC unit on the roof and its failure to keep the premises free of accumulations of water on the floor are unavailing. Since there can be multiple causes of an accident, and Ashkenazy has not demonstrated that only one conclusion may be drawn as to the cause of the accident, at best an issue of fact as to the cause of Plaintiff's accident is raised by these claims (*see Bush v Mechanicville Warehouse Corp.*, 69 AD3d 1207 [3rd Dept 2010]; *see also Derdiarian v Felix Contractor Corp.*, 51 NY2d 308 [1980]).

"Thus, to prevail on [its] motion, [Ashkenazy was] required to establish that they neither created the alleged dangerous or defective condition nor had actual or constructive notice thereof" (*Quituizaca v Tucchiarone*, supra at 926). Ashkenazy demonstrated with Price's testimony that it did not create the leaking condition of the roof nor did it have actual or constructive notice of same. Price averred Ashkenazy performed no work on the roof prior to Arby's taking possession. Also, he specifically denied having been notified that the roof leaked prior to the accident by either Payless or RTM/Arby's and indicated he inspected the roof before RTM/Arby's took possession and noticed no issues (*see Espinal v Six Flags, Inc.*, 122 AD3d 903 [2d Dept 2014]; *Nelson v Cunningham Assoc., L.P.*, 77 AD3d 638 [2d Dept 2010]; *see also Cotto v New York City Hous. Auth.,* 155 AD3d 937 [2d Dept 2017]).

By the testimony of Plaintiff, there was proof that a leaking condition existed at the premises when the Arby's store opened some four months before the accident and proof by testimony and e-mails that a number of Arby's personnel were aware of the problem. However, there is no evidence this condition was ever reported to Price or Ashkenazy. Even if Ashkenazy could be charged with constructive awareness of some deficiency in the roof, that would merely prove a "general awareness" of a problem and would neither constitute constructive notice of the particular accumulation of water that caused Plaintiff to fall nor an awareness of a recurrent leaking condition (*see Vaughan v Triumphant Church of Jesus Christ,* supra).

In opposition, Plaintiff failed to raise an issue of fact. Plaintiff's assertion that constructive notice based upon the existence of a statutory violation existed is not established. The affidavit of Plaintiff's expert, Jacques P. Wolfner, is conclusory and is based primarily on photographs, not a personal inspection (*see Houck v Simoes*, 85 AD3d 967 [2d Dept 2011]). Wolfner's conclusion that roof drains were the cause of the leak is not substantiated as he admits "[f]rom the data, it cannot be determined whether the roof drain had been installed properly". Further, the alleged statutory violations cannot form a predicate for liability as New York City Administrative §28-301.1 is "insufficiently specific to impose liability on an out-of-possession landlord" (*Sapp v S.J.C. 308 Lenox Ave. Family Ltd. Partnership*, 150 AD3d 525, 528 [2017]) and sections 28-216.1 and 28-217.1 are not applicable as there is no proof that the premises was structurally compromised and/or requiring demolition. Plaintiff's reliance on *Hakim v 65 Eighth*

Ave., LLC, 42 AD3d 374 [1st Dept 2007] for authority is unavailing as the statutes at issue in that case, New York City Administrative Code §27-127 and §27-128 were repealed before the present accident occurred.

As to RTM/Arby's motion for summary judgment dismissing Ashenazy's third-party complaint, Plaintiff failed to establish *prima facie* entitlement to dismissal of the breach of contract claim for failure to obtain insurance since no argument on this issue was proffered and no proof that insurance was obtained was annexed to the moving papers (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]; *Rubinstein v 115 Spring Street Owners Corp.*, 146 AD3d 618 [1st Dept 2017]).

The common-law indemnification and contribution claims are dismissed as Workers' Compensation Law §11 precludes liability for same absent a grave injury. RTM/Arby's demonstrated with Plaintiff's bill of particulars and deposition testimony that she was its employee at the time of the accident and did not sustain a grave injury under WCL §11 (*see Aramburu v Midtown West B, LLC*, 126 AD3d 498, 501 [1st Dept 2015]; *Perillo v Durr Mechanical Const., Inc.*, 306 AD2d 25, 26 [1st Dept 2003]). Moreover, to the extent this branch of the motion was opposed, no question of fact was raised (*see Aramburu v Midtown, supra*).

On Ashkenazy's contractual indemnification claim, General Obligations Law § 5-321 does not operate here as this was a lease negotiated at arm's length between sophisticated business parties, the lease indicated that indemnification which arose "out of the sole negligence or willful misconduct of [Ashkenazy]" was exempted and was coupled with an insurance indemnification provision (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419[2006]; *Reynoso v Global Mgt. Enters., LLC*, 154 AD3d 446 [1st Dept 2017]). In any event, based upon the Court's determination on Ashkenazy's motion, indemnification for Ashkenazy's own negligence is no longer an issue.

Accordingly, based on the foregoing, it is

ORDERED that Defendant Ashkenazy Acquisition Corp.'s motion for summary judgment is granted and Plaintiff's complaint is dismissed as against Ashkenazy only, and it is

ORDERED that Third-Party Defendant RTM Operating Company, LLC, Arby's Restaurant Group, Inc. and Arby's LLC's motion for summary judgment is granted only to the extent that the claims for common-law indemnification and contribution are dismissed.

5/11/2021
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION	
		GRANTED	DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE

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