

Ocean v Strivers Gardens Condominium Assn.

2021 NY Slip Op 32584(U)

December 7, 2021

Supreme Court, New York County

Docket Number: Index No. 154702/2016

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ERIKA EDWARDS</u>	PART 11
	<i>Justice</i>	
-----X		INDEX NO. <u>154702/2016</u>
AMIRA OCEAN,		MOTION DATE <u>07/23/2021, 07/26/2021</u>
Plaintiff,		MOTION SEQ. NO. <u>009, 010</u>
- v -		
STRIVERS GARDENS CONDOMINIUM ASSOCIATION, NEW BEDFORD MANAGEMENT CORP., ROCK GROUP NY CORP., ROCK SCAFFOLDING CORP., YATES RESTORATION GROUP LTD, SUPERSTRUCTURES ENGINEERS AND ARCHITECTS and RB NY ENTERPRISES INC.,		DECISION + ORDER ON MOTION
Defendants.		
-----X		

The following e-filed documents, listed by NYSCEF document number (Motion 009) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 265, 272, 273, 274, 276, 278 were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 266, 267, 268, 269, 270, 271, 277, 279, 280, 281, 283, 284, 285, 286 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the court denies Defendants Strivers Gardens Condominium Association's ("Strivers") and New Bedford Management Corp.'s ("New Bedford") summary judgment motion (Motion Sequence No. 009) and Defendant Rock Group NY Corp.'s ("Rock Group") summary judgment motion (Motion Sequence 010).

Plaintiff Amira Ocean ("Plaintiff") brought an amended complaint against Strivers, New Bedford, Rock Group, Rock Scaffolding Corp., Yates Restoration Group Ltd, Superstructures

Engineers and Architects and RB NY Enterprises Inc.¹ for personal injuries she allegedly sustained on February 24, 2016, when she was struck with a piece of wood from a scaffolding/sidewalk bridge located adjacent to 300 West 135th Street, New York, New York. It is alleged in substance that Strivers is the owner of the building, New Bedford is the management company and that Rock Scaffolding Corp. installed the scaffolding pursuant to a contract with the previous management company, Maxwell-Kates, in 2012. Rock Group bought Rock Scaffolding Corp.'s assets, including the scaffolding, in or about 2013 or 2014.

Strivers and New Bedford now move for summary judgment dismissal of Plaintiff's amended complaint and all cross-claims against them under motion sequence 009. Rock Group opposes the portion of the motion seeking dismissal of the cross-claims and Plaintiff opposes the motion.

Rock Group moves for summary judgment dismissal of Plaintiff's amended complaint and all cross-claims against it under motion sequence 010. Strivers opposes the portion seeking dismissal of the cross-claims and Plaintiff opposes the motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary

¹ The court granted summary judgment in favor of Defendants Yates Restoration Group Ltd and Superstructures Engineers and Architects and dismissed Plaintiff's amended complaint against them. Plaintiff discontinued the action against Defendant RB NY Enterprises Inc.

judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual

indemnification when “the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree “in a clear, complete document, their writing should . . . be enforced according to its terms” (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008] [internal quotation marks and citations omitted]).

Generally, a defendant “whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff’s injuries, and whose liability to the plaintiff is therefore primary” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal quotation marks and citations omitted]). It is premised on “vicarious liability without actual fault,” which requires that “a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common law indemnification “unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*id.* at 377-378).

In applying these principles to the facts of the instant matter, the court denies both motions for summary judgment and finds that neither party demonstrated its entitlement to summary judgment in its favor as a matter of law and that questions of fact exist to be determined at trial. Such questions of fact include, but are not necessarily limited to, which party or parties were responsible for inspection, maintenance and repair of the scaffolding on the date

of Plaintiff's accident; whether one or more Defendants breached a duty owed to Plaintiff; and whether Rock Scaffolding Corp. and/or its successor, Rock Group, caused or created a dangerous condition in its negligent installation of the scaffolding, thus launching an instrument of harm, including, but not necessarily limited to, using wood tie backs instead of metal tie backs to secure the wood planks.

Here, the contract for the installation of the scaffolding was between Rock Scaffolding Corp., which is no longer in business, and Maxwell-Kates, the building's previous management company. None of the parties produced an existing contract in which Strivers, New Bedford or Rock Group were a party, nor sufficient evidence demonstrating that any of the three assumed any responsibilities pursuant to the original contract, nor any subsequent agreements. Even if the contract was binding on these parties, the contract is silent as to which party has a duty to inspect or maintain the scaffolding and as to indemnification.

Rock Group argues in substance that Strivers was responsible for inspecting and maintaining the scaffolding, that it had no duty to inspect or maintain the scaffolding and that it had no notice of the alleged defective condition. Rock Group argues that if the owner or management company notified them that a repair or inspection was needed, then it would have inspected the scaffolding and made the necessary repair.

Strivers and New Bedford argue in substance that they were only responsible for changing light bulbs attached to the scaffolding and that Rock Group was responsible for inspecting and maintaining the scaffolding. The parties also disagree as to whether the 2008 or 2014 Building Code applies, which would require Rock Group to be responsible for maintenance of the scaffolding as the permit holder or the building owner to be responsible for the

maintenance since no construction work was occurring on the property at the time of the accident.

The court has considered all additional arguments raised by the parties not expressly discussed herein and denies both motions.

As such, it is hereby

ORDERED that the court denies both motions for summary judgment under motion sequences 009 and 010.

This constitutes the decision and order of the court.

12/7/2021

DATE



ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE