

Goldshmidt v Gotlibovsky

2023 NY Slip Op 32633(U)

July 31, 2023

Supreme Court, New York County

Docket Number: Index No. 156674/2015

Judge: James E. d'Auguste

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

PRESENT: Hon. James E. d'Auguste PART 55

Justice

-----X

ANNA GOLDSHMIDT, ELAN STRATT,
Plaintiffs,

- v -

VLADIMIR GOTLIBOVSKY,
Defendant.

-----X

VLADIMIR GOTLIBOVSKY
Plaintiff,

-against-

HLT NY WALDORF LLC D/B/A WALDORF ASTORIA NEW
YORK, WALDORF ASTORIA MANAGEMENT LLC, ANGANG
INSURANCE GROUP CO., LTD.

Defendants.

-----X

HLT NY WALDORF LLC D/B/A WALDORF ASTORIA NEW
YORK, WALDORF ASTORIA MANAGEMENT LLC
Plaintiffs,

-against-

ALEKSANDR COLDSHMIDT

Defendant.

-----X

INDEX NO. 156674/2015
MOTION DATE 05/06/2020
MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595653/2015

Second Third-Party
Index No. 595572/2017

The following e-filed documents, listed by NYSCEF document number (Motion 006) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 211, 212, 213, 214, 215, 216, 217, 218, 219, 225, 227, 228, 239, 240, 241

were read on this motion to/for DISMISSAL

The instant litigation arises from an accidental shooting at a June 13, 2015, wedding event at the Waldorf Astoria Hotel in Manhattan (the “Hotel”). Plaintiffs Anna Goldshmidt (“Anna”) and Elan Stratt (“Elan”) seek damages for negligence and negligent infliction of emotional distress from defendant Vladimir Gotlibovsky (“Vladimir”) accidentally firing a handgun inside the Hotel prior to the scheduled wedding, resulting in the Hotel’s cancellation of their wedding reception. The first and second third-party actions by and against the Hotel’s operators and business partners, in what was planned to be Anna and Elan’s wedding, seek various indemnification and assert contractual and negligence claims arising from the shooting.¹

The Waldorf Entities now move, in Action No. 1 (Motion Sequence No. 006) and Action No. 2 (Motion Sequence No. 001), for summary judgment dismissing all remaining third-party claims and counterclaims against them and granting judgment in their favor on their second third-party claims pursuant to CPLR 3212. Plaintiffs in both actions cross-move to strike the Waldorf Entities’ affirmation and memorandum of law in support of their motion for summary judgment, as well as exhibits EE and LL, which are annexed to the affirmation. Motion sequence number 006 in Action No. 1 (Index No. 156674/2015) and Motion Sequence No. 001 in Action No. 2 (Index No. 156715/2017) are consolidated for disposition.²

I. Background and Procedural History

In July 2014, Inna entered into a “Catering Sales Event Agreement” (“Catering Agreement”) with HLT NY Waldorf LLC to hold her daughter’s wedding (the “Event”) at the Hotel (NYSCEF Doc. No. 133, Catering Agreement). The Catering Agreement is a nine-page

¹ During the pendency of the instant motions, Inna died and has been substituted in both actions by her husband, Aleksandr Goldshmidt, as executor of her estate.

² Citation to documents filed in Action No. 1 is indicated by “NYSCEF Doc. No.” and citation to documents filed in Action No. 2 is indicated by “Action No. 2, NYSCEF Doc. No.”

document, with the first three pages laying out the services to be provided and their cost, with the signature lines appearing at the bottom of the third page. Immediately below the signature lines, in bold text, the Catering Agreement provides that it “is subject to the Terms and Conditions on the following pages” (*id.* at 3). The following six pages contain the Terms and Conditions, which include, in pertinent part, the following:

“15. CONDUCT OF EVENT: You assume full responsibility for the conduct of all persons in attendance at your Event and for any damage done to any part of our premises during the time of your Event, whether caused by you, your agents, employees, contractors or attendees You also agree that your Event will not create any disturbance to other guests or meetings, such as noise, smoke or fog machines, dry ice, confetti cannons, candles, incense, or any activity that generates smells. Hotel reserves the right to end your Event immediately if you do not comply with Hotel’s request to reduce or eliminate any such disturbance, and you will remain responsible for payment of all charges related to your Event and no refunds will be issued by Hotel. . . .

“24. INDEMNIFICATION: To the fullest extent permitted by law, you agree to protect, indemnify, defend and hold harmless the Hotel, Hilton Worldwide Inc. and the Hotel’s Owner, and their respective owners, managers, partners, subsidiaries, affiliates, officers, directors, employees and agents (collectively, the ‘Hotel Indemnified Parties’), from and against any and all claims, losses or damages to persons or property, governmental charges or fines, penalties, and costs (including reasonable attorney’s fees) (collectively, ‘Claim(s)’), in any way arising out of or relating to the Event that is the subject of this Agreement, and regardless of negligence, including, but not limited to, Claims arising out of the negligence, gross negligence or intentional misconduct of Group’s employees, agents, contractors, and attendees; provided, however, that nothing in this indemnification shall require you to indemnify the Hotel Indemnified Parties for that portion of any Claim arising out of the sole negligence, gross negligence or intentional misconduct of the Hotel Indemnified Parties.

“25. INSURANCE: You agree to maintain insurance reasonably commensurate with all activities arising from or connected to your Event, including, but not limited to, Commercial General Liability

insurance with limits not less than Two Million US dollars (\$2,000,000 US) per occurrence covering property damage, products-completed operations, and liability assumed under an insured contract, including the tort liability of another assumed in a business contract. You agree to add Hotel Indemnified Parties as additional insureds under all applicable policies for your Event, and your insurance will apply as primary to any insurance maintained by the Hotel Indemnified Parties. You agree not to endorse or change your insurance to make it excess over other available insurance. Neither your failure to provide, nor our failure to obtain, proof of compliance shall act as a waiver of any of term in this Agreement.” (*Id.*, ¶¶ 15, 24, 25.)

During deposition, Inna testified that she signed the Catering Agreement, but could not recall whether it was a nine-page document when she signed it (NYSCEF Doc. No. 141, Inna Goldshmidt deposition tr at 15, line 3, through 16, line 5). She also admitted that she did not read any portion of the contract prior to signing it (*Id.* at 16, lines 6-18) and that she did not procure any insurance in connection with the Event (*Id.* at 18, lines 6-9).

The wedding took place on June 13, 2015. Vladimir, a relative of the groom, was a guest at the wedding. At 7:19 p.m., during the pre-ceremony cocktail hour, a gun inside Vladimir’s pant pocket accidentally discharged, injuring several people. During the ensuing confusion, Vladimir and his brother, Felix, headed off to the restroom, where Vladimir handed the gun over to Felix and left the venue. Felix then asked their mother, Sofia, to use her purse to conceal the gun. He handed the purse with the gun to Vladimir’s wife, Maya, who then took it back to their Brooklyn home. (*See* NYSCEF Doc. No. 136, Vladimir Gotlibovsky deposition tr at 57, line 25, through 59, line 2; at 73, line 21, through 74, line 4; at 79, lines 4-22; NYSCEF Doc. No. 172, Felix Gotlibovsky deposition tr at 37, line 5 through 43, line 8; at 45, line 18, through 45, line 11; NYSCEF Doc. No 148, Maya Gotlibovsky deposition tr at 53, line 23, through 55, line 22; at 44, line 17, through 46, line 4.)

In the meantime, the police had responded, and Hotel staff showed the police security footage of Vladimir accidentally firing the gun and leaving the hotel. Police officers also interviewed Felix in the presence of Hotel staff, who explained that his brother's gun had accidentally discharged. At 8:45 p.m., the police informed the Hotel that they had arrested Vladimir.

While the police investigated, the wedding guests were contained in the room where the marriage ceremony was to take place, and the ceremony proceeded at approximately 9 p.m. At approximately 9:35 p.m., the Hotel canceled the wedding reception (which had been scheduled to conclude at 3:00 a.m.), allegedly based on safety concerns, as, at that point, the police had not been able to verify Felix's account, and the gun had not been recovered. At 10 p.m., police officers informed the Hotel that the gun had been recovered. The Hotel refused to reconsider its decision, even though many of the guests remained in the lobby of the Hotel for hours after the cancelation was announced, and various family members offered to pay for additional security precautions. (See NYSCEF Doc. No. 103, High Level Incident Report; NYSCEF Doc. No. 143, Oscar Herrera deposition tr at 25, line 3, through 26, line 7; at 30 lines 5-18; at 33, line 11, through 34, line 13; at 50, line 15, through 51, line 12; at 52, line 15, through 53, line 8; at 62, lines 16-23; at 86, line 14, through 87, line 21; at 96, lines 5-19; at 120, lines 5-25; at 134, line 11, through 137, line 12; at 145, lines 16-20; at 150, lines 7-20; NYSCEF Doc. No. 139, Diarmuid Dwyer deposition tr at 30, lines 2-7; at 33, line 7, through 34, line 25; at 51, lines 14 - 24; at 60, lines 4-11; at 92, line 9, through 94, line 8; NYSEF Doc. No. 135, Elan Stratt deposition at 41-43; NYSEF Doc. No. 134, Anna Goldshmidt deposition tr at 62-63.)

Anna and Elan commenced this litigation on July 1, 2015. Vladimir then commenced a third-party action against the Waldorf Entities, alleging that their decision "to cancel the wedding

reception was without justification and negligent” (NYSCEF Doc. No. 8. third-party complaint, ¶ 19). The Waldorf Entities moved to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) (Motion Sequence No. 001). By decision and order dated January 11, 2016 (Kern, J.), the Court dismissed the indemnification claims in their entirety, explaining that since plaintiffs sought to hold Vladimir liable for his own negligence, “third-party plaintiff had no right to common law indemnification” (NYSCEF Doc. No. 23, 01/11/2016 decision and order at 3). The Court also dismissed the contribution claim for punitive damages, as “punitive damages are not subject to contribution among tortfeasors” (*Id.* at 4, citing *Felice v. Delporte*, 136 A.D.2d 913, 914 [4th Dep’t 1988]). Similarly, it held that “to the extent plaintiffs [sought] to recover in negligence against [Vladimir] for the cost of the wedding and economic damages flowing from its cancellation, [Vladimir] [did] not have a viable claim for contribution against the Waldorf [Entities] as contribution may not be sought for economic damages” (*Id.*). “[T]he only remaining claim in the third-party complaint [was] a claim for contribution based on plaintiffs’ claims of negligent infliction of emotional distress and the non-economic damages flowing therefrom” (*Id.* at 5).

The Waldorf Entities filed their third-party answer on February 17, 2016 (NYSCEF Doc. No. 34). Then, on July 19, 2017, the Waldorf Entities commenced their second third-party action against Inna (NYSCEF Doc. No. 48). Inna filed her second third-party answer on September 28, 2018 (NYSCEF Doc. No. 56). The Waldorf Entities filed their reply on October 10, 2017 (NYSCEF Doc. No. 57).

On July 26, 2017, Inna and Aleksandr Goldshmidt commenced Action No. 2. Vladimir, MVG trust, Frank and Bianca answered on September 1, 2017 (Action No. 2, NYSCEF Doc. No. 2). Felix, Sofia, and Maya answered on September 5, 2017 (Action No. 2, NYSCEF Doc. No.

3). Vladimir, MVG Trust, Frank and Bianca then commenced a third-party action against the Waldorf Entities, seeking contribution for any amounts that plaintiffs recovered in non-economic damages flowing from plaintiffs' claims for negligent infliction of emotional distress (Action No. 2, NYSCEF Doc. No. 4). The Waldorf Entities answered the third-party complaint on November 22, 2017, asserting various affirmative defenses, as well as counterclaiming against the third-party plaintiffs for indemnification and contribution (Action No. 2, NYSCEF Doc. No. 9). The Waldorf Entities then commenced their second third-party action against Inna (Action No. 2, NYSCEF Doc. No. 12). Inna answered on January 17, 2018.

By decision and order dated February 23, 2018, this Court granted the Waldorf Entities' unopposed motion to consolidate Action No. 1 with Action No. 2 for purposes of a joint trial (NYSCEF Doc. No. 65).³

II. Analysis

As a preliminary matter, the Court addresses technical issues with the parties' filings. First, the failure to file opposition and cross-motion papers in Action No. 2 falls well within the purview of CPLR 2001, which provides that "mistake[s] in the filing process" that do not prejudice "a substantial right of a party . . . shall be disregarded . . ." (CPLR 2001). Second, Waldorf Entities filed sur-reply papers and plaintiffs filed reply papers on their cross-motion, which are both impermissible without court permission. While the Court has considered the parties' respective positions given the lack of prejudice, they are cautioned to adhere to procedural rules more closely.

³ During the pendency of this motion, the primary plaintiffs and defendants in both actions stipulated to a discontinuance with prejudice of all claims against defendants in both actions (NYSCEF Doc. Nos. 223-224).

A. Plaintiffs' Cross-Motion

Plaintiffs seek to strike the Waldorf Entities' affirmation (NYSCEF Doc. No. 114) and memorandum of law (NYSCEF Doc. No. 157) in support of their motion for summary judgment, because these submissions: (1) exceed the page limits set in Local Rule 14(b); and (2) fail to cite to admissible evidence. Plaintiffs also seek to strike Exhibits EE and LL (NYSCEF Doc. Nos. 145, 152), two discovery responses which are annexed to the affirmation, arguing that these consist of nothing more than unauthenticated and inadmissible discovery responses.

The Waldorf Entities respond that their memorandum of law complies with page limits and request that the Court disregard the excessive length of the affirmation, as well as any failure to cite to the record, arguing that these defects should be excused, because: (1) papers were prepared early in the pandemic, without hard copies of the exhibits and with limited computer capacity to access them; and (2) a single set of papers addresses claims in two actions. They also argue that the exhibits should be considered because they were previously exchanged with plaintiffs' counsel.

Pursuant to Rule 14(b) of the Local Rules, "memoranda of law shall not exceed 30 pages each (exclusive of table of contents and table of authorities) and affidavits/affirmations shall not exceed 25 pages each." While the Waldorf Entities' 29-page memorandum of law is in compliance with the rule, their 35-page affirmation in support of the motion is not. However, the affirmation does address two actions, which do not share a complete identity of parties or claims. As such, the Waldorf Entities could have split their arguments into two documents with 25 pages in total length, and, thus, the Court will consider the affirmation (*see* CPLR 2001).⁴

⁴ Notably, in support of their contentions, plaintiffs mistakenly cite to the practice rules for the appellate division (*see* NYSCEF Doc. No. 169, ¶ 79, citing 22 NYCRR 670.10.3 [a] [3], 670.10.1 [f]).

To the extent that the papers fail to provide adequate citation to the record, plaintiffs point to no authority requiring rejection of the papers on that ground. The authority plaintiffs do cite is inapposite, as it deals with appellate procedure (*see* NYSCEF Doc. No. 169, ¶ 75).

As to Exhibits EE and LL to the motion, it is not clear why these exhibits were included as part of the motion for summary judgment as the Waldorf Entities make no reference to them in support of their motion. In any event, the Exhibits were previously exchanged in discovery, and Exhibit EE, in particular, is a response to a notice to admit, which operates to generate admissions, unless denied under oath. Therefore, further authentication was unnecessary. Having considered the arguments advanced in support of the cross-motion, plaintiffs' application to strike is denied.

B. The Waldorf Entities' Motion for Summary Judgment

Pursuant to CPLR 3212(b), “[t]o obtain summary judgment, the movant ‘must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 A.D.3d 606, 607 [1st Dep’t 2012], quoting *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Once satisfied, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut a plaintiff’s prima facie case for the purpose of summary judgment (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

i. The Gotlibovsky Defendants' Third-Party Claims and Inna's Counterclaims against the Waldorf Entities

The Waldorf Entities argue that they are entitled to summary judgment dismissing all remaining claims against them in each action, because: (1) the Hotel’s cancellation of the

wedding reception was not sufficiently outrageous to sustain a claim for negligent infliction of emotional distress; (2) the cancellation was not a breach of duty, rather, it was conduct that was permitted under paragraph 15 of the Catering Agreement and in keeping with the duty of care the Hotel owed to its patrons and staff to protect them from reasonably anticipated dangers; (3) Vladimir's negligence in discharging the firearm, and his family's concealment and removal of the firearm from the Hotel, were the sole proximate cause of plaintiffs' damages; (4) the cancellation of the reception was reasonable, as a matter of law; and (5) a medical evaluation established that neither Anna nor Elan sustained a psychological or a psychiatric disability. They also argue that, to the extent that third-party plaintiffs seek contribution for economic and punitive damages, and indemnification in Action No. 2, they are not entitled to these for the same reasons stated in the January 11, 2016, decision and order. As for any remaining claim for contribution for non-economic damages, the Waldorf Entities argue that it should be dismissed because the underlying relationship is contractual (i.e., Inna may bring a claim for breach of the Catering Agreement, rather than negligent cancellation of the reception), and does not support a claim for contribution.

In opposition, plaintiffs and the Gotlibovsky Defendants argue that numerous issues of fact exist as to whether the Hotel acted reasonably in cancelling the wedding reception and, later, in refusing to reconsider its decision.

“The critical requirement for apportionment by contribution under CPLR Article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v. Braun*, 90 N.Y.2d 177, 183 [1997] [internal quotation marks and citation omitted]). To prevail on “a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a

duty of reasonable care independent of its contractual obligations, . . . or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries” (*Santoro v. Poughkeepsie Crossings, LLC*, 180 A.D.3d 12, 17 [2d Dep’t 2019] [internal quotations marks and citations omitted]; see *Chunn v. New York City Hous. Auth.*, 83 A.D.3d 416, 417 [1st Dep’t 2011] [internal citation omitted] [denying a claim for contribution, where “(the third-party plaintiff) failed to raise an inference that (the third-party defendant) owed it a duty of reasonable care independent of its contractual obligations, or that (the third-party defendant) owed a duty directly to plaintiff, and that a breach of either duty contributed to plaintiff’s injuries”]).

First, the only claim for contribution in both actions is for damages plaintiffs may recover for their non-economic losses arising from their claims for negligent infliction of emotional distress. The January 11, 2016, decision and order in Action No. 1 dismissed all other claims for indemnification and contribution, and the third-party complaint in Action No. 2 mimics the language of that decision in its request for relief (see Action No. 2, NYSCEF Doc. No. 4 at 4 [seeking contribution for “damages sustained by plaintiffs as a result of the cancellation of the wedding reception based on plaintiffs’ claims for damages for negligent infliction of emotional distress and all non-economic damages flowing therefrom”]). In any event, for the same reasons given in the January 11, 2016, decision and order, to the extent that third-party plaintiffs in Action No. 2 seek contribution for economic or punitive damages, or seek to be indemnified, they are not entitled to such relief (see January 11, 2016, decision and order discussion, *supra* at 7).

With respect to the limited claim for contribution for non-economic damages flowing from plaintiffs’ claim for negligent infliction of emotional distress based on the cancellation of

the wedding reception, the Waldorf Entities have demonstrated, prima facie, their entitlement to summary judgment dismissing the third-party claim in both actions. They correctly argue that the cancellation of the wedding reception was not a breach of a duty. It was, at most, a breach of the Catering Agreement.

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.” (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 [1987] [internal citations omitted].)

What is more, “[a] breach of a contractual obligation will give rise to tort liability vis-a-vis injured third parties [such as plaintiffs in Action No.1] only in limited circumstances” (*Cresvale Intl. v. Reuters Am.*, 257 A.D.2d 502, 504 [1st Dep’t 1999]).

While plaintiffs and third-party plaintiffs claim that issues of fact exist as to whether the Waldorf Entities were negligent in cancelling the wedding reception, they never identify any duty extraneous to the Catering Agreement upon which to base a claim for contribution. “Merely charging a breach of a ‘duty of due care’, employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim” (*Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 390). As “[a] claim for contribution rises and falls based on the existence of separate tortfeasors” (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 594 [2005]; *see also Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 28 [1987] [“the existence of some form of tort liability is a prerequisite to application of (CPLR 1401)”]), the absence of a non-contractual theory of liability against the Waldorf Entities requires dismissal of the third-party claims for contribution in both actions (*see Board of Mgrs. of A Bldg. Condominium v. 13th & 14th St. Realty LLC*, 137 A.D.3d

505, 507 [1st Dep't 2016] [dismissing contribution claim where, among other things, it was premised on theories of “negligence, professional malpractice, and negligent misrepresentation (that) all sound(ed) in breach of contract”]; *87 Chambers, LLC v. 77 Reade, LLC*, 122 A.D.3d 540, 542 [1st Dep't 2014] [holding that “(t)he contribution cross claims should have been dismissed because (the co-defendant) owed no duty to the other defendants or to plaintiffs”]; *cf. Baumann v. Hanover Community Bank*, 100 A.D.3d 814, 816 [2d Dep't 2012] [internal quotation marks and citations omitted] [dismissing claims for “negligent and intentional infliction of emotional distress” that were premised on a contractual relationship, “which (did) not give rise to a duty which could furnish a basis for tort liability”]).

Having determined that the Waldorf Entities owed no duty to plaintiffs or third-party plaintiffs to support a claim for contribution, the Court need not address the parties' remaining contentions. Based on the foregoing, the Waldorf Entities are also entitled to summary judgment dismissing Inna's counterclaims in Action No. 1 for negligence, as well as intentional and negligent infliction of emotional distress (*see Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 389; *Baumann*, 100 A.D.3d at 816).

Notably, in their moving papers, the Waldorf Entities seek sanctions against the Gotlibovsky Defendants for pursuing frivolous third-party actions. However, in light of the fact that the third-party complaint in Action No. 1 was not dismissed in its entirety, and that the contribution claim of the third-party complaint in Action No. 2 mirrored the language of January 11, 2016, decision and order, it cannot be said that the Gotlibovsky Defendants “engage[d] in frivolous conduct” (22 NYCRR 130-1.1[a]) that “[was] completely without merit in law” (*Id.*, [c]). Accordingly, the request for sanctions is denied.

ii. The Waldorf Entities' Second Third-Party Claims Against Inna

The Waldorf Entities argue that they are entitled to summary judgment on their claims for defense and, assuming any claims against them survive the instant motion, indemnification under the Catering Agreement. They also argue that they are entitled to summary judgment on their failure to procure an insurance claim, as Inna admitted that she did not obtain any insurance in connection with the Event.

In opposition, plaintiffs argue that the Waldorf Entities have failed to establish, prima facie, that Inna had entered into a contract with respect to indemnification and insurance. They point to Inna's testimony that she could not recall being presented with the Terms and Conditions and argue that the Waldorf Entities cannot demonstrate that they provided her with the full Catering Agreement. Plaintiffs also argue that Inna's first language is Russian and that the Hotel's representative neither counseled her as to her obligations under the Terms and Conditions, nor advised her to seek legal counsel prior to signing the Catering Agreement. Lastly, they argue that, should the Court find that a contract exists, then summary judgment should be denied, as the Waldorf Entities have not incurred any damages.

“[A]s a general rule, the signer of a written agreement is conclusively bound by its terms, unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract” (*State Bank of India, N.Y. Branch v. Patel*, 167 A.D.2d 242, 243 [1st Dep't 1990] [internal quotation marks and citations omitted]). “That his mind never gave assent to the terms expressed is not material. Not to have read the contract or to have had it read to him before signing . . . furnishes no basis for his repudiation of any of its terms” (*James Talcott, Inc. v.*

Wilson Hosiery Co., 32 A.D.2d 524, 525 [1st Dep't 1969] [internal quotation marks and citations omitted]).

Here, the Catering Agreement expressly provides—in clearly visible, bold text, immediately below the signature lines—that it “is subject to the Terms and Conditions on the following pages” (Catering Agreement at 3). It is uncontested that Inna signed the agreement (Inna Goldshmidt deposition tr at 15, lines 7-18). To the extent that plaintiffs imply that Inna’s grasp of English was inadequate to read and understand the Catering Agreement, nothing in the record supports that. To the contrary, her deposition, which was conducted in English, indicates that Inna did not face a language barrier (*see* Inna Goldshmidt deposition tr at 23, line 14, through 24, line 19). Nor does the record support plaintiffs’ contention that Inna was not provided with a copy of the Terms and Conditions. Inna merely testified that she had no recollection concerning the Catering Agreement’s length, and that she signed it without reading any portion of it (*id.* at 15, line 24, through 16, line 18). In any event, whether she was furnished with the pages containing the Terms and Conditions does not raise an issue of fact as to their binding effect any more than her failure to read or understand those terms does. Plaintiffs do not argue that the transaction involved fraud or duress, or that the Catering Agreement was unconscionable. Inna is, therefore, bound by the all terms of the Catering Agreement (*see Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 11-12 [1988] [holding signer bound by the terms of a security agreement, where he “signed the application form immediately below the bold-face legend stating” that he was bound by such security agreement, despite his testimony that “the security agreement was never called to his attention, that he never read it, that no one read it to him, and that, indeed, he did not know of its existence”]; *Publication Div. of Intl. Transp. Assn., Inc. v. Blakeslee*, 225 App. Div. 229, 231 [1st Dep’t 1929] [internal citations

omitted] [“(w)hen an action is brought on a written agreement which is signed, the paper is proved by proving the signature, and, in the absence of fraud, it is wholly immaterial that the person so signing has not read the agreement and does not know its terms”]).

The Catering Agreement’s indemnification clause contains an express contractual duty to “defend and hold harmless the [Waldorf Entities] . . . from and against any and all claims . . . and costs (including reasonable attorney’s fees) . . . in any way arising out of or relating to the Event” (Catering Agreement, ¶ 24). Thus, even though all third-party claims against the Waldorf Entities have been dismissed and there is no liability to indemnify, they are nonetheless entitled to summary judgment on their first third-party claim against Inna, to the extent they seek reasonable attorney’s fees and costs incurred in both actions (see *Cuomo v. 53rd & 2nd Assoc., LLC*, 111 A.D.3d 548, 548 [1st Dep’t 2013] [granting summary judgment on a third-party claim for contractual defense and indemnification]).

The Catering Agreement also expressly requires that the Waldorf Entities be named as additional insureds on a general liability policy obtained by Inna in connection with the Event (Catering Agreement, ¶ 25). Inna testified that she never procured such insurance (Inna Goldshmidt deposition tr at 18, lines 6-9). Therefore, the Waldorf Entities are entitled to summary judgment on their second third-party claim (see *Jackson v. Manhattan Mall Eat LLC*, 111 A.D.3d 519, 520 [1st Dep’t 2013] [granting summary judgment on the breach of contract claim, “in the absence of evidence that third-party defendant procured the required insurance”]). Because the Waldorf Entities are self-insured (NYSCEF Doc. No. 48, second-third party complaint, ¶ 20), “the proper measure of damages [is] indemnity and defense costs” (*Spector v. Cushman & Wakefield, Inc.*, 100 A.D.3d 575, 575 [1st Dep’t 2012]; see also *Brown v. Shurgard*

Stor. Ctrs. LLC, 203 A.D.3d 453, 454 [1st Dep't 2022]). There being no liability to indemnify, the Waldorf Entities are entitled to recover their defense costs in both actions.

Accordingly, it is hereby

ORDERED that: (1) plaintiffs' cross-motions in Action No. 1 (index No. 156674/2015) and Action No. 2 (index No. 156715/2017) are denied; (2) third-party defendants/second third-party plaintiffs HLT NY Waldorf LLC d/b/a Waldorf Astoria New York and Waldorf Astoria Management LLC's motions for summary judgment are granted and the third-party complaints in Action No. 1 (index No. 156674/2015) and Action No. 2 (index No. 156715/2017) are dismissed with costs and disbursements to third-party defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; (3) second third-party plaintiffs HLT NY Waldorf LLC d/b/a Waldorf Astoria New York and Waldorf Astoria Management LLC's motions for summary judgment on their second third-party complaints in Action No. 1 (index No. 156674/2015) and Action No. 2 (index No. 156715/2017) herein are granted with regard to liability; and (4) the amount of reasonable attorney's fees that HLT NY Waldorf LLC d/b/a Waldorf Astoria New York and Waldorf Astoria Management LLC's may recover against the second third-party defendant Aleksandr Goldshmidt, as executor of the estate of Inna Goldshmidt, shall be determined at an inquest on damages.

This constitutes the decision and order of this Court.

<u>7/31/2023</u> DATE				<u>James d'Auguste, J.S.C.</u>				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	