SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12M**

Justice

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SARINA EVERETT,

Plaintiff,

- v -

MF ASSOCIATES OFNEW YORK LLC, HEALTH INSURANCE PLAN OF GREATER NEW YORK, AND LENNOX HILL HOSPITAL

Defendant.

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INDEX NO. 158163/2019

MOTION DATE 06/13/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108.

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

The action arises out of a personal injury claim of negligence. Plaintiff Sabrina Everett (plaintiff) alleges she was injured when a ceiling tile fell on her at AdvantageCare Physicians (AdvantageCare), a medical office where she worked, on March 25, 2019. AdvantageCare was a subtenant of the ground-floor medical office space that Defendant MF Associates of New York LLC (MFA) leased to Defendant Health Insurance Plan of Greater New York (HIP) in the building at 215 East 95th Street in Manhattan (the premises).

Defendant MFA now moves pursuant to CPLR 3212 for summary judgment dismissing all claims and crossclaims against it and granting summary judgment on its cross-claim for contractual indemnification against HIP.

I. Alleged Facts

Plaintiff was employed as a medical receptionist at AdvantageCare for more than 15 years. *See* NYSCEF Doc. No. 79, at 13. On March 25, 2019, plaintiff arrived for work at approximately

7:40 am, when she alleges that she felt something hit the back of her head and shoulder, causing her to collide with the nearby wall, fall back into her office chair, and land on the floor. *Id* at 29. Plaintiff alleges a ceiling tile fell, striking her and causing injury. *Id.* Plaintiff's coworkers called maintenance to clean the tile and accompanying debris. *Id* at 35.

Plaintiff initiated the present action by filing a Summons and Complaint against defendants on April 5, 2019.

II. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989), quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

A. MFA'S Duty to Plaintiff

MFA alleges that, as an out-of-possession landlord of the premises, it owed no duty to plaintiff for repairs and maintenance of the premises. *See NYSCEF* Doc. No. 71. MFA further alleges that HIP's Assistant Vice President of Real Estate Facilities acknowledged that HIP was responsible for the maintenance and repairs at the premises, which is subleased to AdvantageCare,

including the ceiling tiles. *See NYSCEF* Doc. No. 81. MFA alleges that AdvantageCare also had an in-house maintenance staff that addressed maintenance issues. *See NYSCEF* Doc. No. 71. Additionally, MFA maintains that there is no allegation or evidence that it had actual or constructive notice of any defect that caused the ceiling tile to fall, nor is there any allegation or evidence that it caused the tile to fall. *Id.* As such, MFA argues that even if it somehow had a maintenance duty with respect to the tile, none of the other basic elements of common law negligence exist against it.

Plaintiff argues that MFA's motion should be denied as numerous questions of fact exist to whether MFA was actually an out-of-possession landlord at the time of the accident, and if MFA or its agents caused and/or created the defective condition involved in the accident. Plaintiff asserts that under the lease between MFA and HIP, MFA was required to make all repairs: (i) to Building facilities; (ii) "the structural elements of the Building"; and (iii) "any restorations or replacements of Building Systems" and as such, under the terms of the lease, MFA had a duty to maintain the premises. Additionally, Plaintiff argues that in her deposition, plaintiff testified that in the week or two prior to her accident she had seen 1 to 4 building workers come into the suite where the accident occurred, moving ceiling tiles and pulling wires from the ceiling surrounding her desk where the accident occurred, and while she did not see the workers remove the specific tile which fell on her, she had observed debris on her desk and the floor in the area. *See NYSCEF* Doc. No. 79. Plaintiff was adamant that the workers she observed did not work for AdvantageCare. *Id.*

Peter Jungkunst, Assistant Vice President of Real Estate Facilities for Emblem Health, who managed and oversaw the premises, testified that AdvantageCare's maintenance staff was solely responsible for housekeeping and reporting maintenance issues to HIP. *See NYSCEF* Doc. No. 81.

Mr. Jungkunst further testified that he reviewed the HIP maintenance records and saw nothing to indicate that HIP had performed work on the AdvantageCare ceiling. *Id.*

HIP also opposes MFA's motion, arguing that there is a question of fact as to whether MFA caused and/or created the defective condition involved in the accident, and contends that MFA was more than a simple "out-of-possession landlord". HIP cites to the relevant lease agreement between MFA and HIP, which contains the following provision:

> **Section 6.02**. Landlord at its sole cost and expense, shall make all repairs, restorations and replacements (collectively, "Repairs"), structural and otherwise, of which it shall have notice (or of which its failure to have notice is itself negligent), necessary to keep in good order and repair the exterior of the Building and the public and common areas and facilities of the Building and the structural elements of the Building (including the structural elements of the Demised Premises), and any restorations or replacements of Building Systems…(*See* NYSCEF Doc. No. 83, Exhibit L).

HIP further argues that MFA clearly retained control of the premises as it had a managing agent, Ogden CAP Properties, that oversaw and managed all the operations for MFA's properties, including the commercial spaces at the subject premises. *See* NYSCEF Doc. No. 80, Exhibit I, pp. 24-25. HIP cites to the deposition of Bianca Pulsoni, a managing agent for MFA, who said that there were two other property managers and a resident superintendent for the subject premises, that she managed and operated the subject building, oversaw the commercial space, and in particular, oversaw the day-to-day operations with the building staff, spoke to tenants regarding any issues, including maintenance, and handled issues regarding lease agreements. *See* NYSCEF Doc. No. 80, Exhibit I, pp. 9. Ms. Pulsoni also testified that MFA has a right to enter and inspect the premises. *Id.* at 19.

This Court finds that triable issues of material fact exist as to whether MFA had a duty to plaintiff, whether MFA caused and/or created the accident-inducing condition, and whether MFA had contractual obligations to maintain the ceiling at the premises.

B. Indemnity Cross-Claims

MFA argues that it is entitled to contractual indemnification from HIP as a matter of law, because HIP allegedly expressly agreed to indemnify MFA for any personal injury claim or injury that occurred at the premises during the term of the lease.

MFA also asserts that HIP's cross-claim for common law indemnification and contribution against MFA is legally and factually meritless and must be dismissed. It argues that HIP is being sued for its own negligence rather than vicarious liability, which precludes common law indemnification. Moreover, MFA's lack of negligence precludes both common law indemnification and contribution since actual negligence is a necessary element of both theories of liability. MFA further asserts that HIP's cross-claim is baseless since the lease between MFA and HIP did not contain any sort of indemnification provision in favor of HIP, and MFA did not agree to indemnify HIP through any other document.

HIP contends that the relevant indemnification provision between itself and MFA has not been triggered herein, and, as such, MFA's motion for summary judgment on its contractual indemnification claim must be denied. *See NYSCEF* Doc. No. 102 at 12.

As HIP asserts MFA is negligent in the instant action, it also asserts that MFA is not entitled to indemnification for its own negligence. *See* New York Obligations Law § 5-322.1, which prohibits parties from being indemnified for their own negligence. *See Spielmann v 170 Broadway NYC LP*, 187 AD3d 492 at 494 (1st Dept 2020).

This Court find that there are triable issues of fact as to whether MFA was negligent, which would trigger New York Obligations Law § 5-322.1.

III. Conclusion

As based upon the foregoing, it is hereby:

ORDERED that MFA's motion for summary judgment dismissing plaintiff's claims against it is denied; and it is further

ORDERED that MFA's motion for summary judgment dismissing HIP's cross-claims for indemnification against MFA is denied; and it is further

ORDERED that MFA's motion for summary judgment on its cross-claims for indemnity against HIP is denied.

The forgoing constitutes the Order and Decision of the Court.

4/14/2024
DATE

HON. LESLIE A. STROTH
J.S.C.

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