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

PRESENT: HON. DORIS LING-COHAN PART 36

Justice

Vitra, Inc.,

- v -

Soho House, LLC

INDEX NO. 118259/2003

MOTION DATE

MOTION SEQ. NO. 014

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion by Kaydacsis is decided in accordance with the attached memorandum decision.

FILED
OCT 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9-24-07

HON. DORIS LING-COHAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

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VITRA INC.,

Plaintiff,

INDEX NO.
118259/03

-against-

Motion Seq.
No: 009 - 018

SOHO HOUSE, LLC, SOHO HOUSE U.S. CORP., SOHO HOUSE NEW YORK, LLC, 29-35 EQUITIES LLC, J.R. DALY & SONS, INC., MacARTHUR HOLDINGS, INC., PHILIP KATZ, HOWARD KATZ, CHARLES BLAICHMAN, JOSEPH DALY, WILLIAM SCHAFFEL, BRONX STORE EQUIPMENT CO., INC. and ABC CONSTRUCTION COMPANY, said name being fictitious,

Defendants.

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SOHO HOUSE, LLC, SOHO HOUSE U.S. CORP., SOHO HOUSE NEW YORK, LLC,

Third-Party Plaintiffs,

INDEX NO.
590987/04

-against-

HARMAN JABLIN ARCHITECTS, LLP, LAWRENCE HARMAN, and LEE JABLIN, individually and doing business as HARMAN JABLIN ARCHITECTS, LLP, JAMES RUDERMAN, LLP, HOWARD P. ZWEIG, P.E., FASCE, Managing Partner, and STEVEN A. SMOLINSKY, P.E., FASCE, General Partner, individually and doing business as the office of JAMES RUDERMAN, LLP, JAM CONSULTANTS, INC., LANDIS ENTERPRISES, TLM GROUP, LLC, INC., LAURMAR ASSOCIATES, GYSUM FLOORS OF NEW YORK, INC., GEORGE KAJDACSI, individually and doing business as GEORGE KAJDACSI PLUMBING AND HEATING SERVICE, GK PLUMBING, INC., BAYRIDGE MECHANICAL CORP., TEBO CONSTRUCTION CORP., GARCIA MARBLE & TILE, INC., and WILLIAM DEE INSTALLATIONS, INC.,

Third-Party Defendants.

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DORIS LING-COHAN, J.:

Motion seq. nos. 009 through 018 are consolidated for disposition herein.

The underlying facts are set forth in the court's decision and order dated August 24, 2005 and will be repeated herein only as needed.

Plaintiff brought this action to recover for damages to its leased premises at 29-35 Ninth Avenue in Manhattan which occurred between late February 2003 and July 18, 2005 allegedly as a result of water damage and mold infestation caused by the construction of hotel and spa facilities (the "project") located in Soho House's leased premises directly above plaintiff's premises.

In the action-in-chief, plaintiff seeks compensation from Soho House, Soho House's general contractor, Bronx Store Equipment Co., Inc. ("Bronx Equipment"), the building owner, 29-35 Equities LLC ("Equities"), various entities and individuals affiliated with Equities, and a fictitiously named subcontractor. The first amended complaint alleges that plaintiff, a manufacturer and retailer of furniture, sustained severe water damage and mold infestation to its office, showroom and retail store from February 26, 2003 through July 18, 2005 as a result of the negligent design, construction and maintenance of spa facilities located in Soho House's hotel premises. Causes of action for negligence, nuisance and breach of the covenant of quiet enjoyment are asserted. Plaintiff is seeking compensatory damages of $3,000,000 and punitive damages of $6,000,000.

In the third-party action, Soho House is suing its architects, Harman Jablin Architects, LLP, Lawrence Harman and Lee Jablin, individually and doing business as Harman Jablin Architects, LLP (collectively, "Harman Jablin"); its engineers, James Ruderman, LLP, Howard P. Zweig P.E. FASCE, Managing Partner and Steven A. Smolinsky, P.E., FASCE, General Partner, individually and doing business as the office of James Ruderman, LLP (collectively,

"Ruderman"); an allegedly culpable subcontractor, Gypsum Floors of New York ("Gypsum"); a tile installer, William Dee Installations ("William Dee"); the plumbers, George Kajdacsi, George Kajdacsi Plumbing and Heating Service and GK Plumbing, Inc. (collectively, "Kajdacsi"), Laurmar Associates ("Laurmar") and Bayridge Mechanical Corp.; the carpenters, Tebo Construction Corp.("Tebo"); and various consultants used in the construction project, Jam Consultants ("Jam"), Landis Enterprises ("Landis") and TLM Group, LLC ("TLM"). Soho House's third-party complaint asserts claims for contribution, common law indemnification and contractual indemnification.

Discovery has been completed. Before the Court is a daunting array of motions which are supported by lengthy affirmations, affidavits, thousands of pages of exhibits and numerous depositions. When stacked, the papers before the Court reach a height of five feet. Reposing within that stack are numerous self-serving contradictory versions of the underlying facts buttressed by tailored legal arguments. Many factual issues remain unresolved. As stated by Soho House in its (unnumbered) memorandum of law (in motion seq. no. 017): "the water leaking into Vitra's premises was not caused by a single event or a single party; rather the leaks were the result of a number of different events associated with the construction of Soho House."

Summary judgment has been called "the procedural equivalent of a trial" (*LaGrega v. Farrell Lines, Inc.*, 156 AD2d 205 [1st Dept 1989], citing *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 34 NY2d 338, 341 [1974]). It is a drastic remedy which is properly denied if there is any doubt as to the existence of a triable issue (see Sillman v. Twentieth Century-Fox Film Corp. 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]). Furthermore, the facts must be viewed in the light most favorable to the nonmoving party (see McLaughlin v. Thaima Realty Corp., 161 AD2d 383,384 [1st Dept 1990]). As with any motion for summary

judgment, only where there are clearly no factual issues or where questions can be resolved as a matter of law will the relief sought herein be granted.

In motion seq. no. 009, plaintiff is seeking summary judgment on the issue of liability against Soho House on its causes of action for negligence and creating a nuisance and against the landlord, Equities, on its cause of action for breach of the covenant of quiet enjoyment. Plaintiff is also seeking severance of Soho House's third-party claims pursuant to CPLR 1010. Plaintiff argues that Soho House is liable for negligence either directly or under the principles of *res ipsa loquitur* since the fact of the water leaks is undisputed, and that Soho House is liable for creating a nuisance since chronic leaks causing property damage qualify as such. Plaintiff then argues that Equities' own correspondence and lack of action reflect that it did nothing to protect plaintiff's right to quiet enjoyment of the leased premises. Plaintiff argues further that Soho House's third-party claims should be separately tried because the substantial number of third-party defendants would make a joint trial of plaintiff's and Soho House's claims unwieldy and confusing. As detailed below, plaintiff's motion is denied in its entirety.

This is plaintiff's second motion for summary judgment. The first was denied by the court's decision and order dated August 24, 2005 (Shafer, J). To justify this motion plaintiff contends that since the prior order, "the parties have exchanged thousands of pages of documents, conducted several inspections and tests of both Vitra's premises and Soho House, and deposed nearly two dozen party and non-party witnesses." While plaintiff is true in such assertion with respect to discovery, none of the massive discovery exchanged warrants the granting of summary judgment because the parties continue to present differing versions of the underlying facts. Indeed, virtually all of the defendants and third-party defendants blame each other for plaintiff's damages. Plaintiff's arguments concerning the applicability of the doctrine

of *res ipsa loquitur* have been previously made and rejected. The doctrine permits an inference, rather than a conclusion, of negligence and liability is a question for the jury (see *Dermatossian v. New York City Transit Authority*, 67 NY2d 219, 226 [1986]).

Moreover, in negligence and nuisance cases such as the matter at bar, the issue of liability is fact-dependent and thus unsuitable for adjudication through a motion for summary judgment since "even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 NY2d 471, 474 [1979]; see also *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974] [summary judgment is a "rare event in negligence cases"]). Furthermore, summary judgment is inappropriate where "competing inferences may reasonably be drawn as to whether defendant's conduct constituted negligence" (*Myers v. Fir Cab Corp.*, 64 NY2d 806, 808 [1985]).

Before a defendant may be found liable for negligence, a duty must exist, the breach of which is the proximate cause of plaintiff's injury *(Palsgraf v. Long Island R.R. Co.*, 248 NY 339, 342 [1928]). "If such a duty is found to exist, the question of breach is one of fact for the trier of fact to resolve unless reasonable minds could not differ as to the conclusions to be drawn from the evidence" (*Vogel v. West Mountain Corp.*, 97 AD2d 46, 48 [3rd Dept. 1983]). "The question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" *(Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, 312 [1980]).

With respect to Soho House, plaintiff's upstairs neighbor, it appears that after Bronx Equipment left the project in March 2003, Soho House, through its representative Christopher Sade, attempted to take over as general contractor. Although the matter is disputed, Mr. Sade avers that he did not control the work of the various contractors (see affidavit of Christopher Sade, Soho House exhibit H, ¶ 4). The Court cannot determine credibility on a motion for

summary judgment (see *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation, supra*, 34 NY2d at 341). Here, control remains a central issue. "A landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them" (*532 Madison Avenue Gourmet Foods, Inc. v. Finlandia Center, Inc.*, 96 NY2d 280, 290 [2001], *rearg den* 96 NY2d 938 [2001]). However, "it is well settled that, absent inherently dangerous activity, the responsibility of an owner or general contractor does not include responsibility for injuries which arise as a result of the negligent performance of the work by subcontractors [citations omitted]" (*Old Oaks Country Club v. State University Construction Fund,* 66 AD2d 815, 816 [2d Dept 1978]). Thus, plaintiff's motion for summary judgment with respect to Soho House, is denied.

With respect to Equities, the building owner, plaintiff's lease provides that Equities is only liable for its own negligence, which has not been established in the moving papers as a matter of law (see plaintiff's exhibit 1 § 8; see also lease rider, plaintiff's exhibit 1, item R 20 [landlord not liable for water damages unless caused by its negligence or willful act]). In addition to this potential liability under the lease, Equities may also be liable to plaintiff under common-law principles by virtue of the landlord-tenant relationship, which imposes on landlords the duty to "maintain the property in a reasonably safe condition". Thus, plaintiff's request for summary judgment is denied with respect to Equities.

That portion of plaintiff's motion which seeks severance is also denied. The claims in the main action and third-party action are intertwined and one trial is both appropriate and judicially efficient (see *Erbach Finance Corporation v. Royal Bank of Canada*, 203 AD2d 80 [1st Dept 1994]).

In motion seq. no. 010, third-party defendant TLM, which provided "owner representative

services" to Soho House, moves for an order granting summary judgment dismissing all third-party claims and cross-claims. TLM argues that there is no evidence of negligence and/or breach of contract by it and no triable issue of fact exists as to negligence of TLM because TLM terminated its contract with Soho House and left the project on February 10, 2003, before the leaks started. TLM further argues that it had nothing to do with construction and gave no advice with respect to waterproofing. Soho House's speculative contention that the leaks may have started while TLM was still on the job does not serve to create a factual issue with respect to those leaks or to connect TLM to the leaks which plaintiff alleges began on February 26, 2003. Thus, TLM's motion for summary judgment is granted for the reasons stated by TLM.

In motion seq. no. 011, defendant Bronx Equipment, the general contractor retained by Soho House in July 2002, moves for an order granting partial summary judgment dismissing all claims and cross-claims against it by reason of spoliation of evidence necessary to defend against such claims. The relief sought by Bronx Equipment's is unclear. In its notice of motion it seeks dismissal of "all claims and cross claims."; in its memorandum of law it seeks dismissal of Soho House's cross-claims only. Bronx Equipment contends that it walked off the job in March 2003 because of conflicts with Soho House and that other contractors performed renovation work at the third-floor spa which included removal and discarding of all flooring and tiling thereby destroying evidence which Bronx Equipment would need to inspect to determine whether anything it did or did not do caused or contributed to the leaks. Bronx Equipment concludes that the only appropriate remedy for Soho House's intentional destruction of that critical evidence is dismissal of all claims and cross-claims against it.

The court disagrees. "Spoliation is the destruction of evidence" (*Kirkland v. New York City Housing Authority*, 236 AD2d 170, 173 [1st Dept 1997]). "Under New York law, spoliation

sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (*id.*). However, where the evidence lost is not central to the case or its destruction is not prejudicial sanctions may be inappropriate (*Deveau v. CF Galleria at White Plains LP*, 18 AD3d 695, 696 [2d Dept 2005]). Plaintiff had nothing to do with the alleged spoliation. Furthermore, William Dee contends that its retiling work constituted a remedial effort, not spoliation. Bronx Equipment has not sufficiently demonstrated how discarded flooring is crucial to its defense. The issues in this case involve workmanship as well as materials which were involved. It appears from the papers before the Court that the subject of Soho House's cross-claims involves more than leaks emanating from the spa. According to Soho House it is seeking full contribution and indemnification from Bronx Equipment for all elements of damage claimed by plaintiff, which involves over 50 leaks, many of which were not confined to the spa and were not allegedly caused by faulty waterproofing. Laurmar and Tebo, subcontractors hired by Bronx Equipment, are implicated. Soho House was attempting to deal with a pervasive problem of leaking water. The fact that it did not retain subcontractors' materials that proved ineffective does not warrant dismissal of all claims and cross-claims against Bronx Equipment (cf. *Friel v. Papa*, 36 AD3d 754 [2d Dept 2007]). The motion by Bronx Equipment is therefore be denied.

In motion seq. no. 012 third-party defendant Ruderman, structural engineer for the project, moves pursuant to CPLR 3211(a)(1) and (7) and CPLR 3212 for an order dismissing the remaining cross-claims asserted against it for contribution and indemnification in light of third-party plaintiff Soho House's voluntary discontinuance with prejudice all of its claims against Ruderman. In support of its motion, Ruderman argues that none of the third-party plaintiff's

claims relate in any way to the structural engineering services provided by Ruderman and Ruderman had no privity with and owed no duty to the cross-claimants. This motion by Ruderman, which is unopposed, is granted, as a prima facie entitlement to dismissal has been established.

In motion seq. no. 013 third-party defendant Harman Jablin, the project architect, moves for an order dismissing all cross-claims pursuant to the doctrine of spoliation. Harman Jablin contends that crucial items of evidence pertaining to waterproofing of the third-floor spa of Soho House were destroyed during Christmas week of December 2003, prior to any adverse party or their experts being afforded the opportunity to inspect the spa.

The Court notes that Soho House discontinued its third-party action against Harman Jablin by stipulation dated December 27, 2004. William Dee objects to the characterization of its replacement tiling as spoliation (as opposed to remediation). Now that discovery has been completed, no evidence of negligence by Harman Jablin has been supplied, and Harman Jablin's motion is otherwise unopposed, Harman Jablin's motion to dismiss the cross-claims is granted.

In motion seq. no. 014 Kajdacsi, a project plumber, moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross-claims and counterclaims against it with prejudice on the ground that the pipes installed by Kajdacsi did not leak and it was not responsible for waterproofing. In the alternative, Kajdacsi seeks an order dismissing the third-party plaintiff's complaint against it on the grounds of third-party plaintiff's spoliation of evidence as it existed when Kajdacsi did its plumbing work by causing remediation work to be performed in December 2003 and renovation work in 2005.

Kajdacsi's self-serving statement that it (a plumbing contractor) had nothing to do with

the leaks or waterproofing is not a sufficient basis for summary judgment. From the papers before the Court it appears that Kajdacsi could be found negligent for failure to install sealing or patching around the pipes it installed. There are also other questions as to the work it did perform as well as whether it was obligated to perform other work under its contract with Soho House which bar the relief sought herein. Kajdacsi's alternative request for dismissal based on alleged spoliation will be denied for the reasons stated with respect to the application by Bronx Equipment, *supra*.

In motion seq. no. 015 third-party defendant Garcia Marble & Tile, Inc. ("Garcia"), which provided liquid membrane waterproofing to Soho House in conjunction with its tile installation in certain areas of the spa, moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the amended third-party complaint and all cross-claims against it. In support of its motion, Garcia argues that there is no evidence that Garcia's work was defective or caused water damage; Garcia did not have responsibility for waterproofing the specific areas of the spa where it is claimed that leaks occurred, namely the shower and hot tubs; there was clear spoliation of evidence by Soho House, which ripped out Garcia's work (which was completed in August 2003) in substantial part in December 2003 (through William Dee) and ripped the entire spa out in the summer of 2005, without notice to the parties, before Garcia was brought into this case in October 2005. Garcia contends further that the cross-claims against it should be dismissed because it did not breach a duty owed to Soho House and did not have an independent duty to any other co-defendant.

Upon the submitted papers, there are factual issues concerning whether Garcia's failure to waterproof certain areas and whether its use of the waterproofing membrane Laticrete in other

areas was inappropriate and responsible for some of the leaks; thus, Garcia's motion for summary judgment is denied. Garcia's request for dismissal on the ground of spoliation will be denied at this time because there has been no conclusive showing that Soho House was willful or negligent in failing to retain Garcia's tiles and related material and because Garcia is aware of the materials and methods it employed.

In motion seq. no. 016 third-party defendant William Dee, which redid the waterproofing and replaced tile in the spa in late December 2003, moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the third-party complaint and all cross-claims against it on the ground that based on the deposition testimony and expert opinion herein there is no evidence that it was negligent. In opposition, Soho House questions William Dee's use of Laticrete for waterproofing.

The deposition testimony and expert opinion relied on by William Dee are not dispositive. There are factual issues as to whether William Dee used improper waterproofing materials; thus, William Dee's motion is denied.

In motion seq. no. 017 Soho House moves pursuant to CPLR 3211 and 3212 for an order dismissing plaintiff's punitive damage claim contending that "[i]t has been more than three years since the Complaint has been filed in the above captioned matter and countless depositions have been taken and boxes of documents have been exchanged between the parties, yet Plaintiff has still not produced any evidence that the alleged negligence by Soho House was either wanton or willful, or that Soho House has engaged in a fraud against the public that warrants a deterrent."

Soho House's motion is granted. Punitive damages are not available for ordinary

negligence (see *Munoz v. Puretz,* 301 AD2d 382, 384 [1st Dept 2003]). To recover punitive damages a plaintiff must show by clear and convincing evidence "egregious and willful conduct that is morally culpable or actuated by evil and reprehensible motives [citations omitted]" (*id.*; see also *Walker v. Sheldon*, 10 NY2d 401, 405 [1961] ["such wanton dishonesty as to imply a criminal indifference to civil obligations"]). No such showing has been made herein.

Plaintiff has cross-moved for sanctions pursuant to 22 NYCRR § 130-1.1 contending that Soho House made false representations of fact in its memorandum of law, the most egregious of which was that it spent approximately $90,000 on waterproofing the spa in 2005 when its actual expenditures were approximately $2,200 or at most, $30,000.

Plaintiff's cross-motion for sanctions will be denied. The papers reflect that the $90,000 figure appears to apply to both waterproofing and renovation expenses in 2005, not just waterproofing, and it is arguably conservative.

Third-party defendant Gypsum, the subcontractor that installed gypsum floor slabs throughout Soho House's premises, has cross-moved pursuant to CPLR 3212 for an order granting summary judgment dismissing the amended third-party complaint against it on the ground that after completion of discovery Soho House has no documentary or testimonial evidence to support its allegation that Gypsum discarded or poured concrete or any other material into toilets or any other plumbing fixture thereby causing flooding.

Gypsum's cross-motion is denied. Gypsum appears to have been the only entity that poured concrete. Whether or not it caused concrete to be placed in toilets and waste pipes remains a question of fact.

In motion seq. no. 018 third-party defendant Laurmar, the subcontractor that installed the

plumbing for the cooling, heating and sprinkler systems in the hotel (as opposed to the spa), moves pursuant to CPLR 3212 for an order granting summary judgment arguing that Soho House cannot establish a *prima facie* case of negligence against Laurmar. Laurmar further argues that Soho House cannot establish causation between any alleged negligence of Laurmar and plaintiff's damages since Soho House's claims against Laurmar are limited by its amended third-party complaint and the allegation that while performing a test on the sprinkler system on May 20, 2003 Laurmar permitted water to escape from the system and infiltrate and damage plaintiff's premises. Laurmar's admission concerning the May 20, 2003 test, however, warrants a denial of its motion for summary judgment.

Accordingly, it is

ORDERED that:

Plaintiff's motion (seq. no. 009) for an order granting summary judgment against Soho House and Equities on the issue of liability and severing Soho House's third-party claims is denied.

TLM's motion (seq. no. 010) for summary judgment dismissing all third-party claims and cross-claims asserted against it is granted.

Bronx Equipment's motion (seq. no. 011) for summary judgment dismissing all claims and cross-claims against it by reason of spoliation is denied.

Ruderman's motion (seq. no. 012) for an order dismissing the cross-claims asserted against it is granted without opposition.

Harman Jablin's motion (seq. no. 013) for an order dismissing all cross-claims is granted without opposition.

Kajdacsi's motion (seq. no. 014) for an order granting summary judgment dismissing the third-party complaint and all cross-claims and counterclaims against it is denied.

Garcia's motion (seq. no. 015) for summary judgment dismissing the amended third-party complaint and all cross-claims against it is denied.

William Dee's motion (seq. no. 016) for summary judgment dismissing the third-party complaint and all cross-claims against it is denied.

Soho House's motion (seq. no. 017) for an order dismissing plaintiff's punitive damage claim is granted.

Plaintiff's cross-motion (seq. no. 017) for sanctions against Soho House is denied.

Gypsum's cross-motion (seq. no. 017) for summary judgment dismissing the amended third-party complaint is denied.

Laurmar's motion (seq. no. 018) for summary judgment is denied.

This constitutes the decision and order of the court.

DATED: September 24 , 2007

Hon. Doris Ling-Cohan, J.S.C.