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

PRESENT: MARCY S. FRIEDMAN Justice PART 57

Index Number : 118883/2002
KEW MANAGEMENT CORP INC
VS
QBE INSURANCE CORP.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

n this motion ~~to~~/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause — Affidavits — Exhibits~~ & cross-motion	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
NOV 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/30/07

MARCY S. FRIEDMAN 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 – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

KEW MANAGEMENT CORP., INC.,
Plaintiff(s),

- against -

QBE INSURANCE CORPORATION, WASHINGTON HEIGHTS ARCADE, INC., METROPOLITAN TRANSPORTATION AUTHORITY and ANNA PEREZ-CHICON,

Defendant(s).

Index No.: 118883/2002

DECISION/ORDER

In this declaratory judgment action, plaintiff Kew Management Corp., Inc. ("Kew") seeks a declaration that it is entitled to a defense from defendants QBE Insurance Company ("QBE") and Washington Heights Arcade, Inc. ("Washington") in an underlying personal injury action entitled Ana Perez-Chicon v New York City Transit Authority and Kew Mgt. Corp., Supreme Court, New York County, Index No. 101580/00 ("underlying action"). In that action, the plaintiff sought damages for a slip and fall at Kew's premises on July 16, 1999. QBE moves for summary judgment on its cross-claims for common law indemnification against defendant Metropolitan Transportation Authority ("MTA"), and for summary judgment dismissing Kew's complaint against it and Washington. Kew cross-moves for summary judgment on its complaint against QBE and Washington. By separate motion, Washington moves for summary judgment dismissing Kew's complaint against it.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion,

regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

It is undisputed that Kew is the owner of a premises located at 181st Street and St. Nicholas Avenue in Manhattan, and that Washington is the tenant of a commercial unit in the premises under a lease with Kew. QBE is the general liability insurer of Washington. Kew claims that it is entitled to its costs for defense of the underlying action from Washington or QBE.

In the underlying action, plaintiff alleged that she fell while walking down stairs that led from Kew's building to a New York City subway station. While the papers are not clear as to which of several subway entrances was the location of plaintiff's accident, Washington concedes that it occurred on subway stairs that Washington was obligated to clean and maintain pursuant to paragraphs 37 and 38 of its lease with Kew.[1] (Washington Reply Aff., ¶12.) The parties dispute, however, whether the MTA closed the stairway prior to the accident, in connection with a subway renovation, thus preventing Washington from performing its maintenance obligations.

As to the branch of QBE's motion against MTA for indemnification, it is well settled that "in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the

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[1] Paragraph 37 provides in pertinent part that "*[t]enant shall maintain at its own cost* and expense: (a) public liability insurance * * * ; liability policy shall include Tenant's obligations to maintain the stairs and passageways leading to the premises as outlined elsewhere in this lease." (QBE Motion Ex. F.) Paragraph 38 provides that "[t]enant shall maintain and clean the entrance and vestibule from street and stairs leading to its premises, also subway entrance from Transit Authority's approach platform to Tenant's premises. * * * Tenant shall maintain, at its own cost and expense, the lighting fixtures of the subway approach and the stairs leading to the subway." (Id.)

proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law." (Correia v Professional Data Mgt., Inc., 259 AD2d 60, 65 [1st Dept 1999].) Here, QBE has demonstrated as a matter of law that neither Kew nor Washington was negligent, as summary judgment in the underlying action was granted in their favor, by order of this Court (Lippman, J.), dated February 19, 2004.

On this record, however, QBE fails to show as a matter of law that the MTA was negligent or that its negligence was the proximate cause of the accident. That issue was not resolved in the underlying action, as the complaint against the MTA was also dismissed based on a defect in the notice of claim, by order of this Court (Lippman, J.), dated May 24, 2001. Nor is this showing made on this record. As the MTA points out, the cause of plaintiff's accident is not clear, given the disparity between Ms. Perez-Chicon's deposition testimony that she fell on wet construction debris (see Perez-Chicon Dep. at 28, 29) and her bill of particulars which alleges that she fell because the stairs had been permitted to become worn smooth, and because there was insufficient illumination in the stairwell. (See Bill of Particulars, ¶8.) In light of this conflicting evidence as to the cause of the accident, QBE's motion for common law indemnification is premature.[2] (See Correia, 259 AD2d at 65.)

The court now turns to the branch of QBE's motion for summary judgment dismissing Kew's complaint against it and to Kew's cross-motion for summary judgment. QBE acknowledges that Kew is an additional insured under QBE's insurance policy with Washington,

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[2] To the extent that QBE seeks contractual indemnification as the beneficiary of a letter agreement between MTA and Kew dated September 7, 1999, that claim is premature. The agreement provides that the MTA will indemnify only for work "arising out use [sic] of the Approach [stairway] from any act or omission of the Authority." (QBE Motion Ex. J.) As held above, triable issues of fact exist as to the cause of the accident. (See Zeigler-Bonds v Structure Tone, Inc., 245 AD2d 80 [1st Dept 1997].)

but asserts that it cannot be liable to Kew for indemnification under the policy because the policy does not cover the subject stairway. In support of this contention, QBE cites the additional insured endorsement of the policy which designates the premises as the "part leased by you" and defines an insured as "the person or organization shown in the Schedule but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule." QBE further claims that it was not obligated to provide indemnification in the underlying action under this provision because, while the lease required Washington to maintain the stairway where the plaintiff had her accident, Washington did not lease that stairway. In opposition, Kew argues that the obligation to defend it is broader than the duty to indemnify. Although this contention is unquestionably true, the duty to defend applies only where the complaint "suggests a reasonable possibility of coverage." (Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 [2006].) The complaint in the underlying action is buried in the papers (see Ex. A to Kew's cross-motion), and neither party discusses the allegations of the complaint or whether they meet this standard. The parties also fail to discuss the effect of the lease provision requiring Washington to procure insurance for the stairway that Washington was obligated to maintain. Nor do they address the proper construction of the policy, given that there are provisions that define the insured premises as the address of the building (see Schedule L), and not merely as the premises leased by Washington. On this inadequately briefed record, the court declines to grant summary judgment to either QBE or Kew as to QBE's obligations for defense costs under the policy.

Finally, the motions all seek a determination as to Washington's liability for contractual indemnification under its lease with Kew. Paragraph 8 of the lease provides that "[t]enant shall indemnify and save harmless Landlord against and from all liabilities, obligations, damages,

penalties, claims * * * for which Landlord shall not be reimbursed by insurance, including reasonable attorneys fees, * * * incurred as a result of any breach by Tenant * * * of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant." In moving for summary judgment dismissing the complaint, Washington argues that it cannot be held liable under this provision because it was barred from the stairway by the MTA prior to plaintiff's accident and therefore could not have performed its maintenance obligations under the lease. However, this argument ignores the concluding provision of paragraph 8 of the lease that "[i]n case any action or proceeding is brought against Landlord by reason of any such claim, Tenant, upon written notice from Landlord, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Landlord in writing." Kew also fails to address the latter provision. The two provisions of paragraph 8 are seemingly inconsistent. Both Washington and Kew fail to address the issue of the proper construction of the lease and, indeed, conflate their arguments concerning indemnification under the lease and indemnification under the policy. The court declines to grant summary judgment to any party on the contractual indemnification claim on this inadequately briefed record.

By separate order of the same date, this action is transferred to the Civil Court pursuant to CPLR 325(d). (See New York City Civil Court Act § 212-a.)

It is accordingly hereby ORDERED that the motions of QBE and Washington, and the cross-motion of Kew, are denied in their entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
October 29, 2007

MARCY FRIEDMAN, J.S.C.