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| American Guar. & Liab. Ins. Co. v Federico's Salon, Inc. |
| 2008 NY Slip Op 30736(U) |
| March 12, 2008 |
| Supreme Court, New York County |
| Docket Number: 0114127/2004 |
| Judge: Edward H. Lehner |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EDWARD H. LEHNER
Justice

PART 19

Index Number : 114127/2004
AMERICAN GUARANTY & LIABILITY
vs
FREDERICO'S SALON
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/25/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

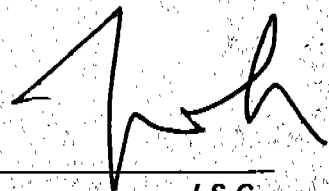
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance

_____ with accompanying memorandum decision

FILED
MAR 17 2008
NEW YORK
COUNTY CLERK'S OFFICE



Dated: MAR 12 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
AMERICAN GUARANTY & LIABILITY INSURANCE
COMPANY as subrogee of Tom James Company d/b/a
Oxford Clothes,

Plaintiff,

- against -

FEDERICO'S SALON, INC. and SOLIL
MANAGEMENT, LLC,

Defendants.
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EDWARD H. LEHNER, J.;

Before the court is a motion by Federico's Salon, Inc. ("Federico") for summary judgment dismissing the complaint and any cross-claims against it, and a cross-motion by Solil Management, LLC ("Solil") for summary judgment i) dismissing the complaint and any cross-claims against it, and ii) granting it common-law and contractual indemnity against Federico.

Plaintiff is the property insurer for Tom James Company doing business as Oxford Clothes ("Oxford") (complaint, ¶ 6). Oxford was occupying the basement, first and second floors of the building known as 36 East 57th Street (the "Premises") on May 17, 2004 when a water leak occurred causing damage to its property (Bill of Particulars, Items 1, 2). Plaintiff paid \$2,000,000 to Oxford pursuant to its policy (tr. p. 6) and seeks recovery of said sum from Federico and Solil.

Plaintiff contends that: a water leak ran for several hours from the bathroom of the vacant fourth floor of the Premises (Bill of Particulars Item 2); that Federico Calce ("Calce"), who is the principal of Federico, was renovating his salon on the fifth floor and therefore had no water (Bill of Particulars, Item 3); that Calce therefore used the vacant fourth floor bathroom (Calce EBT, p. 33); that the super of the Premises advised that construction rubbish wrapped in white paper was removed from the toilet and that it caused the blockage that led to the water leakage (George Mattos EBT, pp. 15, 16); and that Solil inadequately monitored the activities of the tenants of the Premises (Alec Hicks report, Conclusion 3).

Federico contends: that Calce was unaware of any contractors using the fourth floor bathroom on the evening of May 16, 2004 (Calce EBT, p. 16); that the fourth floor door and elevator door were unlocked (Id., p. 24); that when Calce was leaving between 12:30 a.m. and 1:30 a.m., he went to the fourth floor bathroom and rinsed his hands with water (Id. pp. 16-17, 33), but did not use the toilet (Id. 16, 17); and that when Calce then left he was the only person in the building (Id. , p. 41). Federico also asserts that Calce did not give the contractors doing the renovation access to the fourth floor bathroom (Id., p. 24).

Solil contends: that it manages and acts as a paymaster for the Premises and other properties owned by the Estate of Sol Goldman (Kathleen Weeks affidavit, ¶ 2); that Andres Cabreja is a part-time porter for the Premises who does not have keys to any of the tenants'

spaces and his duties involve cleaning the entrance vestibule, elevator and emergency stairwell (Id. ¶¶ 3, 4); that each floor stairwell had separate keys (Cabreja EBT, p. 5); that Federico's space had been undergoing renovation since January 2004 (Id. p. 4); that the water had not been shut off to the fourth floor (Id. p. 9); and that Solil did not provide any paper towels to the tenants (Id. p. 12).

"(T)o establish its entitlement to judgment as a matter of law, the defendant was required to show it did not cause the defect and had no actual or constructive notice of the allegedly defective (condition) in reasonably sufficient time to remedy it" [Ever Win, Inc. v. 1-10 Industry Associates, LLC, 33 AD3d 845, 846 (2nd Dept. 2006)]. See also, Viera v. Riverbay Corporation, 44 AD3d 577 (1st Dept. 2007)]; Danielson v. Jameco Operating Corp., 20 AD3d 446 (2nd Dept. 2005).

In opposition to Solil's motion, plaintiff presents only the unsworn report of an expert that asserts Solil inadequately monitored the tenants (Alec Hicks report, Conclusion 3). Since the court concludes that Solil has shown that it neither created nor had actual or constructive notice of the purportedly defective condition, its motion to dismiss the complaint as against it is granted.

As to Federico, plaintiff "is proceeding under the circumstantial evidence doctrine of *res ipsa loquitur* ... that a toilet does not get clogged with paper towels or construction debris ... so as to cause the water to run without any absence of someone's negligence" (William Clark affirmation, ¶¶ 55, 56). It has been stated that this doctrine "simply

recognizes what we know from our every day experience: that some accidents by their very nature would ordinarily not happen without negligence Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstances of the occurrence (To apply), '(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff'" [Dermatossian v. New York City Transit Authority, 67 NY2d 219, 226 (1986)]. In this case, there is no evidence that Calce used the toilet, and clearly Federico did not have exclusive control over the fourth floor bathroom. Therefore, the doctrine is inapplicable and, in the absence of any evidence of negligence on the part of Federico, the complaint is dismissed as against it.

Solil also seeks common-law and contractual indemnity against Federico. It is not entitled to "common-law indemnity, which, in addition to requiring proof of (its) freedom from negligence, requires proof of some negligence that contributed to causing (the) accident on the part of (the) proposed indemnitor" [Priestley v. Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493, 495 (1st Dept. 2004)]. Here, it has not shown evidence of negligence by Federico.

The lease for the fifth floor space demised to Federico provides:

"The tenant covenants and agrees to indemnify and hold the Landlord harmless from any

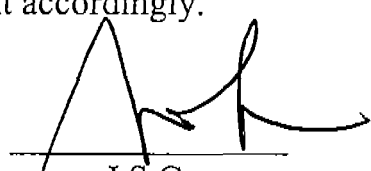
and all claims arising during the term of this lease for damages or injuries to goods, wares, merchandise and property ... in, upon or about the demised premises other than claims arising as a result of the gross negligence (or) wilful misconduct of Landlord and its agents" (¶ 43). The lease identifies the Tenant as Federico and the Owner as 36 East 57th Street LLC.

Solil asserts that other articles of the lease refer to the Owner, its agents, servants or employees and this "demonstrates it was the intent of the parties to the lease that both the landlord and (Solil) be protected equally" (A. Jeffrey Spiro affirmation dated October 5, 2007, ¶ 34). However, "(w)hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty that the parties did not intend to be assumed (Where) the language of the parties is not clear enough to enforce an obligation to indemnify (the Court should not) rewrite the contract and supply a specific obligation that the parties themselves did not spell out" [Tonking v. Port Authority of New York and New Jersey, 3 NY3d 486, 490 (2004)]. Article 43, the provision addressing indemnification, provides that the tenant shall "hold the Landlord harmless" and does not extend this protection to any other party. Since Solil is not the Landlord, it is not entitled to contractual indemnity.

In sum, plaintiff's complaint is dismissed, the cross-claims between Federico and Solil are dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: March 13, 2008

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