

Westra v Ten's Cabaret, Inc.

2009 NY Slip Op 31521(U)

July 10, 2009

Supreme Court, New York County

Docket Number: 113093/06

Judge: Carol R. Edmead

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number: T13093/2006
WESTRA, NICOLE
 vs.
TEN'S CABARET
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 3/24/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

FILED
 JUL 13 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

PAPERS NUMBERED _____

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by Gramercy for pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims as against Gramercy is granted; and it is further

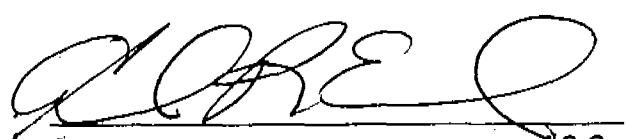
ORDERED that the branch of the motion by Gramercy for pursuant to CPLR § 3212 for summary judgment on its claims for contractual and common law indemnification as against co-defendant Ten's Cabaret Inc., is granted only as to Gramercy's claim for contractual indemnification; and it is further

ORDERED that Gramercy shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that The Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 7/10/09


 HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
NICOLE WESTRA,

Plaintiff,

-against-

TEN'S CABARET INC. d/b/a ROCK CANDY and L F
GRAMERCY PROPERTY CO., LLC,

Defendants.

HON. CAROL R. EDMEAD, J.S.C.

Index No. 113093/06

DECISION/ORDER

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this personal injury action, defendants L F Gramercy Property Co., LLC ("Gramercy") moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint of the plaintiff Nicole Westra ("plaintiff") and all cross-claims against it, or in the alternative, granting Gramercy summary judgment on its claims for contractual and common law indemnification as against co-defendant Ten's Cabaret Inc. ("Ten's").

Factual Background

Plaintiff commenced this action to recover for personal injuries she allegedly sustained on April 12, 2005 on a staircase located inside the Rock Candy Nightclub located at 31 East 21st Street, New York, New York, which was operated by co-defendant Ten's pursuant to its lease (the "Lease") with Gramercy, the owner of the premises.

At plaintiff's deposition, she testified that on the night of her accident, she went to the Rock Candy Nightclub with her friend Melanie (p. 16). After their arrival, she and Melanie sought out a group of Melanie's friends, and found them sitting at a table in a lounge that was on a raised level from the club's dance floor (p. 20). The plaintiff and Melanie walked up a set of

steps to meet Melanic's friends (p. 25). After about five minutes, the plaintiff and Melanie decided to go to the bar to get some drinks (pp. 27-28). As the plaintiff was walking down the steps to reach the bar, her heel got caught on a step and she fell (pp. 27-28). There "wasn't any real lighting" (p. 28) and there "was no railing or anything to hold onto" (p. 25) in the area of plaintiff's fall.

Gramercy's superintendent for the building, Melvin Lichtman, testified at his deposition that Ten's was a commercial tenant located on the first floor of the building and that the Rock Candy Nightclub took up about sixty percent of the space leased by Ten's (p. 7). Mr. Lichtman confirmed that a photograph marked at his deposition depicted one of two sets of interior stairs in the club (pp. 14-15). One set of steps was located near a DJ booth and the other near "some benches" (pp. 14-16). Prior to opening the Rock Candy Nightclub, Ten's performed cosmetic remodeling to the ceiling, booths and floors (pp. 13 & 22).

At the deposition¹ of the President of Ten's, Chris Reda ("Mr. Reda"), Mr. Reda testified that the Rock Candy Night Club had two sets of steps that led to an elevated "VIP" area for patrons of the club (pp. 21-23). Prior to opening the Rock Candy Nightclub, Ten's performed renovations to the club (p. 52).

Gramercy's Motion to Dismiss

Gramercy argues that as an out of possession landlord, it is not liable for plaintiff's accident, as the alleged defect does not involve a structural defect that violates the Administrative Code. As an out-of-possession landlord with the right of re-entry, Gramercy will only be liable

¹ The caption on Mr. Reda's transcript bears the caption of a declaratory judgment action initiated by Ten's and Gramercy against American Safety Insurance Services, Inc., the insurance carrier for Ten's. However, counsel for all parties to this lawsuit, including Plaintiff, were present for that proceeding.

for the injuries sustained on the property if the injury resulted from a significant structural defect which was a violation of the Administrative Code. According to plaintiff's Bill of Particulars, plaintiff alleges that the steps upon which she fell were in violation of Administrative Code § 27-375. However, Gramercy argues, plaintiff's accident took place on a set of steps that are not considered to be an "interior staircase" under the Building Code of the City of New York (the "Building Code"), but rather a series of steps, landings, and/or platforms that constitute a step assembly provided to allow travel between the first floor dance floor and the a lounge area of the premises. Because the configuration and location of the steps is not at issue, the applicability of the requirements of the Administrative Code for "interior stairs" is a question of law to be resolved by the Court.

Gramercy contends that the step at issue is not an "interior stair" as defined by the Administrative Code because it did not serve as an "exit." The steps used by plaintiff as depicted in the photograph marked at Gramercy's deposition merely ran from the dance floor to lounge area set up for club patrons. It did not serve as a means of egress to an open exterior space on either end. As such, the safety requirements of Administrative Code §27-375 governing the condition of "interior stairs" are inapplicable. Accordingly, summary judgment dismissing plaintiff's complaint and all cross claims is warranted.

Gramercy also argues that in the event that the complaint is not dismissed, Gramercy is entitled to contractual and common law indemnification as against Ten's, as any negligence would have been that of Ten's. Paragraph 64 of the rider to the Lease states that the "Tenant shall, and does hereby, indemnify and save harmless Owner . . . against and from any and all claims, liability, suits, damages, judgments, costs, fines, penalties or expenses (including

reasonable attorney's fees) (a) arising from the conduct or management of the demised premises or of any business therein.” Thus, as the language of the contract between Gramercy and Ten's demonstrated the intention of Ten's to indemnify Gramercy for claims such as those asserted by the plaintiff, Gramercy should be granted summary judgment on its contractual indemnification claims against Ten's.

Gramercy is also entitled to common law indemnification from the actual wrongdoer, Ten's, who by actual misconduct caused the plaintiff's injuries. As stated above, Ten's, as was its right under the Lease, performed renovations to the floors of the Rock Candy Club prior to its opening. As such, Ten's is liable for any negligence in the performance of those alterations. Accordingly, pursuant to the principles of common law indemnification and contribution, summary judgment should be granted to Gramercy on the claims asserted against Ten's.

Opposition by Plaintiff

Plaintiff argues that Gramercy's motion must be denied because (a) defendant's motion is actually a CPLR 3211 motion to dismiss; (b) the essence of the defendant's motion is its assertion that the accident occurred on stairs that are not "interior stairs" under the law; (c) under any reasonable interpretation of the statutes, the stairs in issue are "interior stairs.”

It is undisputed that there were no handrails on either side of the stairs, that the risers were of different heights, and that New York City Administrative Code § 27-375 (e)(2),(f), entitled "Interior Stairs" provides that "[r]iser height and tread width shall be constant" and the "[s]tairs shall have...handrails on both sides except that stairs less than forty-four inches wide may have a handrail on one side only.” Once the violation of the safety statute is established, the only issue for the jury concerning the liability phase of the trial is the issue of fact related to

proximate cause. Of the three categories of stairs found in the Administrative Code, "interior stairs" is the only category that applies to the stair at issue, and the definition of "interior stair" does not require that an "exit" be immediately adjacent to or connected to the "interior stair." From the band and bar area, a patron must use the subject stairs to reach the dance floor of the club that contains the only two doors that open to the outside. They are the only stairs that serve those exits. Indeed, it is clear that the subject stairway cannot be an "exterior stair" or "access stair" and must be an "interior stair" under the Administrative Code. Furthermore, the cases cited by defendant are utterly inapposite.

Opposition by Ten's

Ten's argues that there are issues of fact that preclude summary judgment and that Gramercy failed to establish that it is free from liability for plaintiff's injuries.

There are no conclusive documents and/or evidence, set forth by either Gramercy or plaintiff, that the subject stairs are interior stairs or not; rather, based on the arguments set forth by both plaintiff and Gramercy it stands to reason that an issue of fact has arisen which precludes the entry of summary judgment at this juncture. As such, Gramercy's application for summary judgment is premature until such point as the issue of a structural deficiency is conclusively ruled upon by the trier of fact. Both Gramercy and plaintiff failed to conclusively prove or disprove whether the subject stairs are interior stairs as defined by the applicable provisions of the Administrative Code.

Further, Gramercy's motion is premature in that there has been no determination, by the trier of fact, as to whether there is a causal connection between the subject occurrence (which gave rise to the personal injury) and a violation of the building code. Until such a determination

is made, Gramercy is subject to liability for any injuries that were proximately caused by any structural deficiencies.

Ten's also argues that Gramercy failed to meet its burden for summary judgment. In support of its motion for summary judgment, Gramercy submitted an affirmation by counsel, who lacks personal knowledge of the facts of the instant case. Such attorney affirmation is inadequate to demonstrate entitlement to summary judgment. Here, both Gramercy and plaintiff failed to submit evidence, in admissible form, that supports their respective positions in order to determine the ultimate question of fact. Furthermore, the evidence submitted with counsel's affirmation does not support defendants' entitlement to summary judgment.

Plaintiff's Reply to Opposition by Ten's

In further opposition, plaintiff notes that there is no issue of fact concerning the nature and appearance of the stairs in issue and its location in the subject building. The Court may not defer to the jury, but must decide the legal question of whether the stairs in issue are interior stairs under the law. Further, it is clear that the stairs in issue are interior stairs, that there were no hand rails adjacent thereto, and that the risers were not of even or constant height.

Gramercy's Reply

Gramercy points out that neither plaintiff nor Ten's has served any opposition addressing that portion of Gramercy's motion seeking contractual and common law indemnification as against Ten's. Accordingly, should the Court deny Gramercy's motion to dismiss plaintiff's complaint and all cross-claims against it, Gramercy should be granted summary judgment on its indemnification claims against Ten's.

Gramercy also argues that plaintiff offers no argument to support her contention that

the instant motion should be denied because it is actually a CPLR § 3211 motion. As such, this argument is without support or merit. However, if the Court finds that the instant motion is actually a motion pursuant to CPLR § 3211, it is respectfully submitted that the Court should use its discretion to change the instant motion to a CPLR § 3211 motion and thereafter dismiss plaintiffs complaint and all cross-claims as against Gramercy.

Further, interior stairs are defined as a stair that "serves as a required exit" and it is uncontested that an "exit" is defined as a "means of egress from the interior of a building to an open exterior space." Here it is undisputed that the stairs where this accident allegedly took place lead from the dance floor to a lounge area set up for club patrons. These stairs did not serve as a means of egress to an open exterior space on either end.

Gramercy also argues that the contention that, because plaintiff needed to step down these stairs to reach the dance floor in order to then walk to an exit, they must be considered "interior stairs" flies in the face of logic. Indeed, to adopt this strained interpretation of the statute would be to include any step within a building that someone could use to eventually reach an exit. The wording of the statute is clear. In order to be considered "interior stairs," the stairs must provide "[a] means of egress from the interior of a building to an open exterior space" and here, that is simply not the case.

Turning to the opposition put forth by Ten's, the testimony of plaintiff and defendants in this case, as well as the photographs of the subject stairs, establish that these stairs are not "[a] means of egress from the interior of a building to an open exterior space" as required under Administrative Code § 27-232. Rather, they provide a means to step down onto the dance floor from a lounge area.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d

546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Summary Judgment Dismissing Complaint and Cross-Claims

Under Administrative Code § 27-128, an "owner shall be responsible at all times for the safe maintenance of the building and its facilities." When an out-of-possession owner of demised property retains a right to reenter the premises to inspect and make necessary repairs he shall be “for any structural defects, design defects, violations of the Multiple Dwelling Law, and violations of the Administrative Code, absent the assumption to make repairs” (*Rodriguez v. E & P Assocs.*, 20 Misc 3d 1129, 872 NYS2d 693 [Sup Ct Bx County 2008] *citing* *Guzman v Haven Plaza Housing Dev. Fund Co.*, 69 NY2d 559 [1987]; *Nameny v The East New York Savings Bank*, 267 AD2d 108, 699 NYS2d 412 [1st Dept 1999] [the out-of-possession owner "may be held liable for negligence with respect to the condition of property even after the transfer of possession and control to the tenant where the landlord 'has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision']). The defect must violate a specific statute, and the violation itself constitutes constructive notice upon the landlord

(*Rodriguez v E & P Assocs.*, 20 Misc 3d 1129).²

It is uncontested that the Lease states, in pertinent part:

Access to Premises: 13. Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

As plaintiff alleges that Gramercy's liability is predicated upon Administrative Code § 27-375, liability may be imposed upon Gramercy, an out-of-possession landlord, if plaintiff's fall on the subject stairway of a resulted from Gramercy's failure to comply with the Administrative Code. Statutory interpretation is a question of law that should be decided by the court (*DeRosa v City of New York*, 30 AD3d 323, 817 NYS2d 282 [1st Dept 2006] citing *Robbins v County of Broome*, 87 NY2d 831, 834, 637 NYS2d 679 [1995]). The question of whether the Administrative Code requires a staircase to have a particular type of handrail is one of law, not of fact, and that it is error for a trial court to submit that issue to a jury (*DeRosa v City of New York*, *supra*).

It is uncontested that the subject stairs were not exterior or access stairs. Plaintiff's claim is dependent upon Administrative Code §§ 27-232, 27-375(f)(1) and 27-376. Administrative Code §§ 27-232 defines an interior stair as "a stair within a building, that serves as a required exit." An exit, in turn, is defined as "[a] means of egress from the interior of a building to an

² Administrative Code § 27-375, entitled "Interior Stairs" provides that "[r]iser height and tread width shall be constant" and the "[s]tairs shall have...handrails on both sides except that stairs less than forty-four inches wide may have a handrail on one side only" (Administrative Code §.27-375(e)(2),(f)).

open exterior space which is provided by the use of the following, either singly or in combination: . . . interior stairs, [or] exterior stairs.” An “open exterior space” is “A street or other public space; or a yard, court, or plaza open on one or more sides and unroofed or open on all sides, which provides egress to a street or public space”; “[p]ublic space” is “[a]n open space outside of a building. . . .” Finally, exterior stair is defined as “[a] stair open to the outdoor air, that serves as a required exit.”

Here, the unrefuted deposition testimony establishes that the stairs in question led to and from an elevated lounge area inside the Club and a lower dance floor inside the Club (“We were standing on the dance floor. As we were . . . starting to go up the steps, I grabbed [Melanie’s] hand right at the base of the steps” (p. 27); plaintiff remained in the lounge area for five minutes before proceeding to walk “down the stairs” where she “thought [she] was stepping onto the dance floor” (p. 28))). Thus, the subject stairs did not provide a means of egress to the street or public area outside of the premises (*see Mansfield v Dolcemascolo*, 34 AD3d 763, 826 NYS2d 115 [2d Dept 2006] [finding that stairway which ran from an opening in the floor behind the bar to the basement floor and did not serve as a means of egress to an open exterior space on either end was not an “interior stair” because it did not serve as a required “exit”]; *Schwartz v Hersh*, 50 AD3d 1011, 856 NYS2d 640 [2d Dept 2008] [staircase plaintiff was descending in a building did not qualify as “interior stairs” because it did not serve as a required exit from the building]).

Plaintiff’s argument that the subject stairs lead to the dance floor that contains the only two doors that open to the public is unpersuasive; to adopt plaintiff’s argument that the subject stairs must be used to exit the premises would improperly expand the definition of internal stairs to include all stairs within a building. Further, although the definition of “interior stair” does not

require that the “exit” be immediately adjacent to or connected to the “interior stair,” the definition makes clear that the stair must be a means of egress from the interior of the premises “to an open exterior space,” and “open exterior space” is defined as a “street” or “other public space” i.e., an “open space outside of a building.” The dance floor or lounge area to which the subject stairs lead does not fall within the definition of “open exterior space.” Accordingly, the requirements set forth in Administrative Code § 27-375(f) governing handrails installed in interior stairs do not apply, and Gramercy, an out-of-possession landlord, cannot be said to have violated the Administrative Code.

As to the procedural issue raised by plaintiff, plaintiff failed to articulate the basis for its claim that Gramercy’s motion, which is supported by deposition testimony, is actually a 3211 motion. In any event, given that Gramercy’s motion rests on deposition testimony and not solely on the complaint, it cannot be said that it would qualify as a 3211 motion (*cf. Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988] [deposition transcripts do not qualify as “documentary evidence” for purposes of 3211(a)(1)]; *Nonnon v City of New York*, 9 NY3d 825 [2007] [on a motion to dismiss for failure to state a cause of action under 3211(a)(7), the Court looks to the four corners of the complaint, accepts the allegations therein as true, and assesses whether the plaintiff has stated a cognizable claim]). Therefore, denial of Gramercy’s motion on this ground lacks merit.

Nor is Gramercy’s motion for summary judgment improper on the ground that it is based on an attorney’s affirmation, given that the affirmation is based upon documentary evidence, *to wit*: deposition testimony (*see Zuckerman, supra* at 563 [“The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle

for the submission of acceptable attachments which do provide “evidentiary proof in admissible form”, e.g., documents, transcripts”]; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999] [a party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence]).

Therefore, the branch of Gramercy’s motion for summary judgment dismissing the complaint of plaintiff Nicole Westra (“plaintiff”) and all cross-claims against it is granted.

Summary Judgment Granting Contractual and Common Law Indemnification

The Court also notes that Gramercy established entitlement to contractual indemnification as against co-defendant Ten’s Cabaret Inc. A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co Inc.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

It is undisputed that the Lease requires Ten’s indemnify Gramercy “against and from any and all claims, liability, suits, damages, judgments . . . [and] reasonable attorney’s fees . . . arising from the conduct or management of the demised premises or of any business therein.” In light of this provision, and the fact that this branch of Gramercy’s motion is unopposed, the branch of Gramercy’s motion seeking contractual and common law indemnification against Ten’s is granted.

In light of the foregoing, the Court does not reach the issue of common law indemnification.

Conclusion

Based on the foregoing, it is hereby

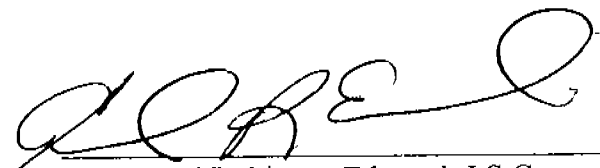
ORDERED that the branch of the motion by Gramercy for pursuant to CPLR § 3212 for summary judgment dismissing the complaint and all cross-claims as against Gramercy is granted; and it is further

ORDERED that the branch of the motion by Gramercy for pursuant to CPLR § 3212 for summary judgment on its claims for contractual and common law indemnification as against co-defendant Ten's Cabaret Inc., is granted only as to Gramercy's claim for contractual indemnification; and it is further

ORDERED that Gramercy shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that The Clerk may enter judgment accordingly.

Dated: July 10, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

JUL 13 2009

COUNTY CLERK'S OFFICE
NEW YORK