

**Admiral Ins. Co. v Marriott Intl., Inc.**

2009 NY Slip Op 31859(U)

August 14, 2009

Supreme Court, New York County

Docket Number: 114048/06

Judge: Louis B. York

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

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Justice

*Admiral Insurance Company  
et al.,*

INDEX NO. 114048/06

MOTION DATE 6/10/09

*Marratt International, Inc.,  
et al.*

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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 to dismiss against the Marratt defendants is decided in accordance with the accompanying decision. The court's claim is denied. The motion continues against the remaining defendants.

**FILED**

AUG 19 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/14/09

*LY*

**LOUIS B. YORK** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : LAS PART 2

----- X

ADMIRAL INSURANCE COMPANY, TOWNHOUSE  
MANAGEMENT COMPANY, BRAWNMADE  
CONSTRUCTION LLC, 554 FWR LLC, 554 R&D LLC,  
and 554 OWNER LLC,

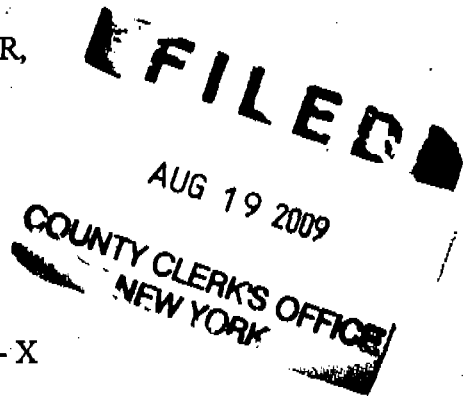
Plaintiffs,

INDEX NO.  
114048/06

-against-

MARRIOTT INTERNATIONAL, INC., EXECUSTAY  
CORPORATION, MARRIOTT EXECUSTAY, EAGLE  
ONE ROOFING CONTRACTORS, INC., ABC INSURER,  
DEF INSURER, GHI INSURER, JKL INSURER, PINE  
EQUITY N.Y., INC., PINE EQUITY INTERNATIONAL  
LLC and FAITH S. LUCK,

Defendants.



----- X

**LOUIS B. YORK, J.:**

Defendants Marriott International, Inc., Marriott International, Inc. s/h/a Marriot  
Execustay and Execustay, LLC s/h/a Execustay Corporation (collectively "Marriott") move for  
an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and  
any cross-claims asserted against them.

Plaintiffs Admiral Insurance Company ("Admiral") and Townhouse Management  
Company ("Townhouse") cross-move for an order pursuant to CPLR 3212 granting them  
summary judgment against Marriott.

This is an action for a declaratory judgment and/or damages stemming from an

\* 3.]  
underlying personal injury action brought by Faith Luck ("Luck") based on injuries she allegedly sustained on October 29, 2003, while employed by Marriott, when she slipped and fell in a puddle on the 25<sup>th</sup> floor of a recently constructed 26-story residential building located at 554-556 Third Avenue in Manhattan. The building, which was built to serve as part of Marriott's inventory of temporary executive residences, was owned by 554-556 Third Avenue LLC ("Third Avenue LLC") and leased to Marriott (Execustay Corporation) pursuant to a Master Lease Agreement (the "Lease") dated August 8, 2000. Third Avenue LLC and Townhouse, the managing agent for the building, were among the defendants in the underlying action.

Townhouse's carrier, Admiral, provided for its defense. Townhouse brought a third-party action (presumably paid for by Admiral) against the roofing contractor ("Eagle One") and Marriott seeking contractual indemnification as well as additional insured coverage under policies allegedly issued to Eagle One and Marriott. Thereafter, Townhouse settled with Luck, Admiral paid the settlement, Luck discontinued her action against Townhouse, and Townhouse discontinued its third-party action against Eagle One and Marriott.

Prior to Townhouse's settlement in the underlying action, Admiral and Townhouse (collectively "plaintiffs") commenced this action<sup>1</sup> against Marriott, Eagle One, and their insurance companies seeking a declaration that they are entitled to reimbursement of all defense costs and settlement monies paid in connection with the underlying action. Alternatively, plaintiffs seek a judgment for money damages based on their expenditures in the underlying action. Marriott has now moved for summary judgment dismissing plaintiffs' causes of action for contribution, common law indemnification, contractual indemnification, and breach of

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<sup>1</sup>Although Admiral claims to be Townhouse's subrogee, it is not suing as such.

\* 4 ]  
contract (failure to procure insurance) upon which the complaint is founded.<sup>2</sup>

Marriott contends that plaintiffs' claims against it for contribution and common law indemnification must be dismissed because Luck, who was employed by Marriott at the time of her accident, did not sustain a "grave injury" as defined by section 11 of the Workers Compensation Law. Marriott's contention is undisputed. Accordingly, those claims will be dismissed.

Marriott then contends that plaintiffs' causes of action for contractual indemnification and breach of contract, which are based on provisions in the Lease, must be dismissed because the Lease was not in effect on the date of Luck's accident. Marriott alternatively argues that even if the Lease were in effect, plaintiffs' claims for contractual indemnification should be dismissed because Luck's alleged accident resulted from the negligence of Townhouse while it was in possession and control of the premises. In opposition and in support of their cross-motion for summary judgment (for unspecified relief), plaintiffs argue that their claims for contractual indemnification are viable because the Lease was in effect in October 2003. Plaintiffs do not mention their breach of contract claim or address the issue raised by Marriott of Townhouse's purported negligence. Plaintiffs alternatively argue that, at the least, an issue exists with respect to the commencement date of the Lease. They also contend that Marriott's motion is premature because discovery has yet to be undertaken.

The threshold issue before the court is whether the Lease was in effect on October 29, 2003, the date of Luck's accident. Section 2.10 of the Lease (Marriott's exhibit 11) provides in

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<sup>2</sup>Eagle One, whose default was vacated by this court's order dated April 1, 2009, has not been heard from.

[\* 5.]  
pertinent part as follows:

Lease Commencement Date. The Lease Commencement Date shall be the earlier to occur of (i) the first Business Day, that is at least 30 calendar days after the Improvements are Substantially Completed (provided Landlord shall have given Tenant 30 days advance written notice of the anticipated date of Substantial Completion), or (ii) the date on which any Apartment is occupied by Tenant or Tenant's Associates for residential purposes.

Section 2.11 provides in pertinent part:

Substantial Completion. The Improvements will be deemed to be "Substantially Completed" on the first Business Day which is at least ten (10) calendar days after Landlord has caused the Improvements to be constructed, fitted and furnished, including the installation of the Appliances and the Unit Property and Furnishings, in accordance with the Plans and Specifications, except for Punch list Items, and the terms and conditions of this Lease and the Seller has received certificates from the Architect, the Engineer, the General Contractor and the Interior Designer as described below and a certificate of occupancy authorizing occupancy and use of the Building and the Apartments for the purposes contemplated herein.

"Improvements" is defined in the Lease as "The Building, the Building Amenities, the Apartments, the Common Areas and the contents thereof as required hereunder, including the Fixtures, the Appliances, and the Unit Property and Furniture" (*id.*, p 4).

Depositions were taken in the underlying action which are relevant to the issue before this court. Luck testified that in October 2003 she saw water damage and buckets on the 25<sup>th</sup> floor (see Marriott's exhibit 12, pp 30-34). David Cohen, a vice president of Brawnmade Construction LLC (the construction manager), testified that in October 2003 floors 17 through 21 were "on its [sic] way to substantial completion" and "much more complete" than the floors above 21 which were still under construction (see Marriott's exhibit 13, p 15). Gregory Maidman, a vice-president of Townhouse, testified that on the date of Luck's accident construction on the lobby through the 15<sup>th</sup> floor was substantially complete and that Marriott took possession of those

[\* 6.]  
floors on December 1, 2003 (see Marriott's exhibit 14, pp 34-36). He testified further that Marriott did not take possession of the building until March 1, 2004 (*id.*, p 80).

The court finds that the Lease was not in effect on October 29, 2003, the date of Luck's accident. As a result, plaintiffs cannot benefit from the indemnification provision contained therein. Plaintiffs' claim that they need discovery is a red herring. Townhouse, as managing agent for the building and a defendant and third-party plaintiff in the underlying action, has first-hand as well as vicarious knowledge of the pertinent information. Its own vice president has already testified that Marriott was unable to take possession of certain floors until December 1, 2003 and did not take possession of the entire building until March 1, 2004. The construction manager's vice president has already testified that work was being done on the 17<sup>th</sup> through 21<sup>st</sup> floors and that the floors above were still under construction in October 2003. There is no claim by plaintiffs that the apartment units were fitted with appliances and furnished as required by section 2.11 of the Lease. There is no claim that any of the apartments were occupied by Marriott for residential purposes on the date of Luck's accident (see § 2.10, *supra*). Finally, plaintiffs do not claim that a certificate of occupancy had been issued for the building and apartments as required by section 2.11. In short, plaintiffs have offered no valid reason to deny Marriott the relief it seeks (see *Friedman v Pesach*, 160 AD2d 460 [1<sup>st</sup> Dept 1990], app disp 76 NY2d 935 [1990] ["It is axiomatic that where there is no genuine issue of material fact, summary judgment must be granted"]). In view of the court's finding, the issue of Townhouse's negligence need not be addressed.

Accordingly, it is hereby

ORDERED that Marriott's motion for summary judgment is granted to the extent that the

[\* 7 ]  
complaint against Marriott is dismissed (there do not appear to be any cross-claims); and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: 8/14, 2009

*Luy*

J.S.C.

**LOUIS B. YORK**  
J.S.C.

**FILED**

AUG 19 2009

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