

**Monahan v 102-116 Eighth Ave. Assoc., L.P.**

2010 NY Slip Op 31730(U)

June 30, 2010

Sup Ct, Richmond County

Docket Number: 103288/07

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3

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Index No.:103288/07  
Motion No.:001,002,003

CRAIG MONAHAN, and  
SHARIN MONAHAN,

*Plaintiffs*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

*against*

102-116 EIGHTH AVENUE ASSOCIATES, L.P., and  
15<sup>TH</sup> STREET BRIGHT AND CLEAN, INC.,

*Defendant*

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The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed (001)	1
Answering Affidavits	2
Replying Affidavits	4
Notice of Cross-Motion (002)	5
Notice of Cross-Motion (003)	6
Answering Affidavits to Cross-Motion (003)	7
Affirmation in Opposition to Cross-Motion (003)	8
Affidavit in Opposition to Cross-Motion (003)	9
Replying Affidavits	10
Affidavit in Response	11
Memorandum of Law	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, 15<sup>th</sup> Street Bright and Clean, Inc., (“Bright and Clean”) moves for an order granting it summary judgment dismissing the plaintiff’s complaint and all cross-claims asserted against it by the co-defendant, 102-116 Eighth Avenue Associates, L.P. (“Eighth Avenue Associates”) pursuant to CPLR § 3212. Eighth Avenue Associates Cross-Moves for an order granting it conditional indemnification. Bright and Clean cross-moves for to dismiss all of

Eighth Avenue's cross-claims. Eighth Avenue Associates cross-motion for conditional indemnity is granted, all other motions are denied.

### **Facts**

Craig Monahan, a firefighter, is suing the defendants for personal injuries allegedly sustained when he responded to a fire at a property owned by Eighth Avenue Associates and leased to Bright and Clean for use as a laundromat.

It is alleged that a fire started in the clothes dryer at Bright and Clean when a customer placed a nylon sheet into the dryer. The Fire Department of New York's Incident Report states that equipment at Bright Clean was not being operated properly as a factor contributing to ignition. Craig Monahan was one of the New York City firefighters that responded to the call.

At the scene, the plaintiff was directed to vent the building from the outside. According to testimony, the only place for venting to take place was in the rear courtyard behind the laundromat. To access the courtyard the plaintiff had to entered the building adjacent to Bright and Clean. The plaintiff testified that in order to reach the rear courtyard he had to squeeze through the back door of an adjacent building. Upon reaching the back door the plaintiff testified that there were bags, black garbage bags and loose rubbish all around him. As he proceeded to the steps the plaintiff states that the garbage collapsed. The plaintiff testified that

I got to the top of the steps and the garbage collapsed and there was garbage in front of me and now the garbage behind me knocked me over the garbage in front of me and I fell straight down.

The plaintiff sustained various injuries from the fall. As a result of the injuries sustained from this accident, the plaintiff was found to be unfit for full fire duty and was granted an accident disability retirement.

The defendant, Eighth Avenue Associates, cross-moves for an order granting conditional indemnification pursuant to paragraph 46 of the lease between Bright and Clean and Eighth Avenue Associates. Furthermore, Eighth Avenue Associates claims that pursuant to the same lease agreement paragraph 12 requires that Bright and Clean obtain insurance in favor of it.

Having failed to raise any arguments in support of its initial motion to dismiss Eighth Avenue Associates cross claims, Bright and Clean attempts to cross-move arguing that indemnity is an all or nothing concept. And that the terms of the indemnity clause are void as against public policy.

### **Discussion**

It is well established that summary judgment should be granted only if there are no material and triable issues of fact. Summary judgment is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the evidence presented should be scrutinized carefully in the light most favorable to the party opposing the motion.<sup>1</sup>

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of a triable issue of fact.

### **Bright and Clean's motion to dismissing the plaintiff's complaint and all cross claims Motion 1**

The plaintiff withdraws its negligence cause of action against Bright and Clean. This

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<sup>1</sup> *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

leaves only the plaintiff's statutory cause of action pursuant General Municipal Law (GML) § 205-a. GML § 205-a permits firefighters injured in the line of duty to recover compensation from "any person who fails to comply with the requirements of any of the statutes, ordinances, rules, orders, and requirements of the federal, state, county, town or city governments, when such persons neglect, omission, willful or culpable negligence causes the firefighters injury." Where liability is found, it must generally rest upon causes other than those having to do with the inception of the fire and the ordinary hazards pertinent to the fighting and the spreading of the fire and the protecting of property.<sup>2</sup>

To establish entitlement to judgment as a matter of law, a defendant must show either that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries.<sup>3</sup> The defendant offers only conclusory statements as to why it did not violate any government provision. In particular, at paragraph 32 the defendant's affirmation in support states "It is clear that the plaintiff can not maintain an action against he defendant 15<sup>th</sup> Street based on General Municipal Law § 205(a). The plaintiff can not show how the defendant violated any of the above statutes and codes. A majority of the Codes are only applicable to the owner of the premises, defendant Eighth Avenue. As the tenant, defendant 15<sup>th</sup> Street, is not responsible for any structural defects."

The defendant fails to reference the "majority" these Codes that relate solely to owners, nor does the defendant demonstrate, as a matter of law, that it did not violate any of the Administrative Codes cited by the plaintiffs in their bill of particulars. As such, the court finds that the Bright and Clean did not satisfy its prima facie burden.

However, had Bright and Clean met its burden going forward, the plaintiff demonstrated an issue of fact exists with respect to the violation of The New York City Administrative Code

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<sup>2</sup> *McGee v. Adams Paper and Twine Co., Inc.*, 26 AD2d 186 [1<sup>st</sup> Dept 1966].

<sup>3</sup> *Giuffrida v. Citibank Corp.*, 100 NY2d 72, 82 [2003].

§§ 27-127 and 27-128. In particular with respect to Administrative Code § 27-128 that “the owner shall be responsible at all times for the safe maintenance of the building and all its facilities” the fire department found that dryer owned by Bright and Clean and located within the premises was not operated appropriately.

That portion of the Bright and Clean’s motion to dismiss the cross-claims asserted by the co-defendant Eighth Avenue Associates against it is denied as Bright and Clean failed to offer any argument in support of its motion. Its subsequent cross-motion (Motion 3) seeking the same relief is denied a being procedurally defective. Even had this court considered the merits of the procedurally defective cross-motion it would still have denied Bright and Clean’s motion for summary judgment dismissing Eighth Avenue Associates cross claims as issues of fact exist. The court will consider Bright and Clean’s purported cross-motion as opposition to Eighth Avenue Associates’ cross motion for conditional indemnification.

#### **Eighth Avenue Associates’ Cross-Motion for conditional indemnification (Motion 2)**

Eighth Avenue Associates moves for an order granting conditional indemnity in the event there is a finding of liability against it pursuant to General Municipal Law § 205-A. Eighth Avenue Associates base its motion on the indemnity provision at paragraph 46 in the lease executed between Bright and Clean and Eighth Avenue Associates.

Eighth Avenue Associates’ motion is granted to the extent that Bright and Clean shall indemnify it if the jury finds liability against pursuant to General Municipal Law § 205-a predicated on a violation of any relevant government provision by Bright and Clean.

Accordingly, it is hereby:

ORDERED, that 15<sup>th</sup> Street Bright and Clean, Inc.’s motion for summary judgment dismissing the plaintiffs’ complaint and the co-defendant’s cross claims is denied in its entirety; and it is further

ORDERED, that 102-116 Eighth Avenue Associate, L.P.'s motion for conditional indemnification is granted to the extent that 15<sup>th</sup> Street Bright and Clean, Inc. shall indemnify it if the jury finds liability against pursuant to General Municipal Law § 205 predicated on a violation of any relevant government provision by Bright and Clean; and it is further

ORDERED, that 15<sup>th</sup> Street Bright and Clean, Inc.'s cross-motion to dismiss the co-defendant's cross-claims is denied as procedurally defective; and it is further

ORDERED, that the parties shall return to DCM Part 3 on **Monday, July 26, 2010 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: June 30, 2010

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Joseph J. Maltese  
Justice of the Supreme Court