

**Dukuly v Harlem Ctr., LLC**

2010 NY Slip Op 32433(U)

August 11, 2010

Sup Ct, NY County

Docket Number: 117466/08

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
*Justice*

PART 5

Index Number : 117466/2008  
**DUKULY, MASANYEA**  
VS.  
**HARLEM CENTER**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT  
  
**CAL# 40**

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion is for summary judgment

PAPERS NUMBERED

1  
2

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

AUG 16 2010

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 8/11/10  
AUG 11 2010

[Signature]  
BARBARA JAFFE *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 5

-----X

MASANYEA DUKULY,

Plaintiff,

-against-

HARLEM CENTER, LLC, HARLEM CENTER  
CONDOMINIUM ASSOCIATION, INC., FOREST  
CITY RATNER COMPANIES, WASHINGTON  
MUTUAL BANK, and CITY OF NEW YORK,

Defendants.

-----X

BARBARA JAFFE, J.:

**For Washington Mutual Bank:**  
Wendy Tobias, Esq.  
Cullen and Dykman LLP  
177 Montague St.  
Brooklyn, NY 11201-3602  
718-855-9000

Index No. 117466/08

Argued: 6/29/10  
Mot. Seq. No.: 001

**DECISION AND ORDER**

**FILED**

AUG 16 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**For defendants Harlem and Forest City:**  
Malik Pearson, Esq.  
Wilson, Elser, *et al.*  
3 Gannett Drive  
White Plains, NY 10604-3407  
914-323-7000

By notice of motion dated April 1, 2010, J.P. Morgan Chase Bank, N.A. (movant), the acquirer of certain assets and liabilities of defendant Washington Mutual Bank f/k/a Washington Mutual Bank, FA and the receiver for WAMU s/h/a Washington Mutual Bank (WAMU) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it and granting it common law and contractual indemnification as against defendants Harlem Center, LLC, Harlem Center Condominium Association, Inc., and Forest City Ratner Companies (collective, Harlem defendants), including but not limited to, reimbursement of attorney fees incurred by WAMU in connection with the instant action. The Harlem defendants partially oppose the motion.

## I. BACKGROUND

By lease dated October 23, 2001, Harlem Center, LLC c/o Forest City Ratner Companies, LLC (landlord) leased to The Dime Savings Bank, WAMU's predecessor (tenant), the premises at Harlem Center on 125<sup>th</sup> Street and Malcolm X Boulevard in Manhattan. (Affirmation of Wendy Tobias, Esq., dated Apr. 1, 2010 [Tobias Aff.], Exh. F). As pertinent here, the lease requires the landlord to keep the exterior of the premises in good condition and to make any necessary repairs. (*Id.*). It also provides that:

Landlord shall defend, indemnify and save Tenant . . . harmless from legal action, damages, loss, liability and any other expense, including reasonable defense costs, in connection with the loss of life, bodily or personal injury or property damage, arising from or out of all acts, failures, omissions or negligence of Landlord, its agents, employees, contractors or subcontractors which occur [on the premises], unless such legal action, damages, loss, liability or other expense, including reasonable defense costs, results from the act, omission or neglect of Tenant . . .

(*Id.*).

On October 9, 2007, plaintiff was injured when she fell on the sidewalk in front of the WAMU branch on 105 West 125<sup>th</sup> Street in Manhattan. (*Id.*, Exh. A). On November 6, 2009, Thomas Foti, an employee of Harlem Center, LLC, testified that Harlem Center, LLC owns the premises at 105 West 125<sup>th</sup> Street and that he or another employee would have repaired the condition on the sidewalk if they had discovered it. (*Id.*, Exh. D).

On April 2, 2010, the Harlem defendants agreed to indemnify WAMU. (Affirmation of Malik K. Pearson, Esq., dated May 25, 2010).

## II. CONTENTIONS

Plaintiff does not oppose the motion to dismiss the complaint against WAMU and co-defendants do not oppose the motion to dismiss the cross-claims. Also undisputed is the duty of

the Harlem defendants to indemnify WAMU.

Consequently, the sole issue remaining for resolution is whether WAMU is entitled to reasonable attorney fees incurred in its defense. The Harlem defendants argue that WAMU is entitled only to a portion of the fees incurred. While the lease requires that they indemnify and defend WAMU from injuries arising from their negligent acts, they argue that it was not until Foti's deposition that it became clear that they may have been negligent in failing to maintain the sidewalk. The Harlem defendants thus assert that WAMU should be reimbursed for the attorney fees incurred between November 6, 2009, the date of Foti's deposition, and April 2, 2010, when they agreed to indemnify WAMU.

In reply, movant argues that the lease does not require a determination that the Harlem defendants are liable before having to indemnify and defend WAMU, and that evidence submitted before the deposition, including plaintiff's bill of particulars, photographs, and 50-h transcript, all annexed to plaintiff's discovery response dated April 23, 2009, establish that the action arose from the Harlem defendants' negligence. (Reply Affirmation dated June 14, 2010). It also contends that the Harlem defendants could have questioned Foti before his deposition.

### III. ANALYSIS

A contractual assumption of an obligation to indemnify another "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Talapin v One Madison Ave. Condominium*, 63 AD3d 909, 911 [2d Dept 2009]).

Here, the lease does not provide that the duty to indemnify arises only upon a prior determination of negligence. Rather, it requires indemnification for any acts arising from the Harlem defendants' negligence. As it was the Harlem defendants' duty to maintain the sidewalk

\* 5]  
in good condition, and as they were aware, by April 23, 2009, that plaintiff was alleging that she had tripped and fallen on a defect on the sidewalk, their duty to indemnify and defend then arose. Movant has thus established that it is entitled to reimbursement of its attorney fees incurred in its defense in this action commencing April 23, 2009.

IV. CONCLUSION

Accordingly, it is hereby

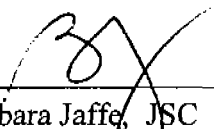
ORDERED, that movant's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant Washington Mutual Bank with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that movant's motion for indemnification is denied as moot; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that movant shall, within 30 days of the date of this order, submit to this court an affirmation, on notice to the other parties, setting forth the attorney fees it has accrued in its defense of this lawsuit.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: August 11, 2010  
New York, New York

**AUG 11 2010**

**BARBARA JAFFE  
J.S.C.**

**FILED**

**AUG 16 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**