

Raccah v Barbizon Hotel Assoc., L.P.

2010 NY Slip Op 32587(U)

September 15, 2010

Sup Ct, NY County

Docket Number: 106287/2008

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JESSICA RACCAH,
Plaintiff,

INDEX NO. 106287/2019²⁰⁰⁸

-against-

MOTION DATE _____

MOTION SEQ. NO. 001

**BARBIZON HOTEL ASSOCIATES, L.P.,
EASTERN MILLWORK, INC. and PAVARINI
McGOVERN, LLC,**
Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion by defendant(s) for an order for summary judgement pursuant CPLR 3212.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	_____	FILED SEP 21 2019 NEW YORK COUNTY CLERKS OFFICE	PAPERS NUMBERED	_____
Answering Affidavits — Exhibits (Memo)	_____		_____	
Replying Affidavits (Reply Memo)	_____		_____	

Cross-Motion: Yes No

Defendants Barbizon Hotel Associates, L.P. (Barbizon) and Pavarini McGovern, LLC (Pavarini) move for summary judgment dismissing the complaint, or alternatively, move for summary judgment on their cross claims for contractual and common law indemnification as against defendant Eastern Millwork, Inc. (Eastern).

This is a personal injury action. On December 1, 2007, at approximately 6:00 p.m., plaintiff, a 17-year old girl, was sitting on a low window sill, about 3 to 4 feet from the floor, in the hallway of the eighth floor at the premises located at 140 East 63rd Street, New York, New York. She alleges that she was severely injured when three door panels, which were being stored in the hallway during ongoing construction, collapsed on her right leg.

Prior to the accident, the door panels were allegedly leaning against the wall in the hallway, waiting to be installed. Plaintiff claims that defendants knew that the eighth floor was an occupied floor and that tenants were actively moving about and using the hallway to access

the elevator, staircase and their respective apartments. Moreover, the doors were placed next to a heavy self-closing stairway door that would shake the wall each time it was closed. Plaintiff states that the doors remained stored in the hallway for at least two weeks before the accident. The installation of the doors did not take place until a week after the accident. According to plaintiff, the three door panels, which were laminated and weighed over 600 pounds, were stored "standing straight up," and placed on a carpeted floor. She contends that it was reasonably foreseeable that the panels could tip over and collapse onto a tenant who was frequenting the hallway for ingress and egress into and from the premises.

Barbizon is the owner of the premises. At the time of the accident, and for the preceding two years, there was continual construction and renovation to convert the premises from a hotel to a condominium. Plaintiff refers to Pavarini as the general contractor at the site, although Pavarini considers itself to be the construction manager. Eastern is a subcontractor hired to perform certain functions, including the installation of the doors.

Two of the defendants, Barbizon and Pavarini, move for summary judgment dismissing the complaint, based upon their assertion that they owed no duty of due care toward plaintiff, that they did not breach any duty of due care, and that they had no actual or constructive notice of a dangerous condition at the site of the accident.

Barbizon and Pavarini submit deposition testimony from the parties in this action. First, there is testimony from plaintiff. In her deposition, plaintiff identified the doors from photographs, which are annexed hereto as color laser copies. Plaintiff testified that the photos depicted the doors in the hallway on the date of the accident. Plaintiff emphasized that doors were placed straight up prior to the accident.

The next deposition testimony is from A.B. Olevic, who was a construction superintendent working for Pavarini on the premises. He identified Pavarini as the construction manager in the process of converting the premises from a hotel to a condominium, pursuant to

a contract entered into with Barbizon. Olevic testified that Pavarini entered into a contract with Eastern to conduct certain tasks, including the installation of doors. Pavarini advised Eastern, as it did all subcontractors, that tenants were living on the floors during the duration of the construction. Pavarini advised subcontractors to keep the corridors and stairways clean, and to attempt to limit any work surrounding units where people were living. Olevic explained that initially Interstate Drywall, another subcontractor, was going to install the doors. However, Interstate Drywall was unable to perform the work and, prior to plaintiff's accident, Pavarini hired Eastern to do the work, which included the installation of the doors on the eighth floor.

Olevic testified that he saw Eastern employees bringing doors from the ground floor to the various floors. He also testified that he had seen the doors stored in the hallway, but he had not seen them standing straight up, but leaning against the wall. He claims that Pavarini never received any complaints from tenants on the eighth floor regarding the doors prior to December 1, 2007. Olevic identified the photos that were shown to plaintiff. He testified that Pavarini never instructed anyone specifically how to store the doors. According to him, it was customary in the construction industry to store doors in the hallway where they were to be installed for several days to acclimate the tall thick doors prior to installation.

The next deposition testimony is that of Anthony Monaco, manager of Barbizon. Monaco identified the photos of the doors and denied ever seeing the doors being stored prior to the date of the accident. He testified that he arrived to the facility and the floor where the accident occurred on the evening of the accident. He also testified that he believed that prior to the accident, the doors were leaning against the wall as Olevic had testified, and that he had not seen the doors stacked straight up as plaintiff had described in her testimony.

The next deposition testimony is from Eric Kelm, the Operations Manager and Field Superintendent for Eastern. Kelm testified that Eastern had a contract to perform work on the premises. He stated that he ordered his foreman to deliver the doors to the floor where the

accident occurred. Kelm identified the contract between Eastern and Pavarini, as well as a two-page change order which was previously identified by Olevic. He testified that he believed the order was signed off by Tom Titus, the Vice President of Eastern, on November 15, 2007. According to Kelm, Eastern started work on the doors after they delivered the order, but before the signed contract was received back from Pavarini.

Based on the evidence submitted, Barbizon and Pavarini argue that they were not involved in the stacking and/or installation of the doors. They claim that they did not possess, control, maintain or manage the doors at the time of the accident. They contend that Eastern had control over the doors at the time of the accident. Barbizon and Pavarini argue that they neither created the dangerous condition that led to the accident, nor did they ever notice the doors standing straight up prior to the accident.

If this court denies their motion to dismiss the complaint, Barbizon and Pavarini seek judgment against Eastern based on their cross claims. They cite the indemnification provision in the contract between Eastern and Pavarini, which provides that Eastern agreed to indemnify and hold harmless both parties in the event of actions arising from the performance of work by Eastern or of any accident or occurrence from which work was performed by Eastern. They seek the enforcement of this provision. They also claim that the work order provides for indemnification.

The moving defendants also seek damages from Eastern due to its alleged failure to procure insurance pursuant to the aforesaid contract. They assert that by failing to procure insurance, Eastern is liable for the resulting damages, including the amount of damages awarded to or paid to the injured party in the main action, within the limits of the policy that was to have been procured, as well as the costs incurred in defense of the main action.

In opposition to summary judgment, plaintiff argues that Pavarini, as the general contractor of the job site, exercised control, supervision and management over the construction

work, particularly the storage and installation of the doors at issue, and therefore, had a duty to maintain the premises, including the hallways, in a reasonably safe condition. Plaintiff refers to Olevic's deposition testimony, in which he stated that Pavarini would hire and retain all subcontractors needed to complete the project. Olevic testified that Pavarini was responsible for overseeing, inspecting and monitoring the work performed by subcontractors, and was responsible to coordinate when certain work was performed in conjunction with other work being completed at the job site between the different subcontractors.

Plaintiff refers to Kelm's testimony, in which he states that Pavarini directed Eastern to store the doors in the hallway on the eighth floor. He testifies that Pavarini directed Eastern to store the doors in the same manner as they were kept in the upper floors, "leaning against the wall, on edge leaning against the wall." Plaintiff argues that Eastern received instructions directly from Pavarini as to when and where to store and install the doors.

Plaintiff contends that Barbizon, as owner of the premises, has a non-delegable duty to maintain the premises in a reasonably safe condition and to prevent obstructions in common areas (hallways) where tenants frequent. Plaintiff cites Section 78 of the Multiple Dwelling Law. Plaintiff provides deposition testimony from Alfonso Gomez, a concierge employed by Barbizon, who stated that, on behalf of Barbizon, he made regular inspections of the hallways, including the eighth floor. Gomez stated that he would inspect the hallways to make certain that the occupants on the floors had safe access to the elevators, as well as the staircase and their apartments.

Plaintiff also contends that both defendants had notice of a dangerous condition on the site of the accident, mainly the doors being stored unsecured in an active hallway. Plaintiff states that defendants have disregarded their own testimony, in which they said that during walk-throughs on the eighth floor, they saw the doors stored in an unsecured manner in the hallway prior to the accident. Plaintiff also refers to the photos of the doors, which indicated a

dangerous condition. Plaintiff argues that Barbizon and Pavarini had notice of the doors and had enough time to remedy the situation before the accident.

Eastern opposes the alternative motion brought by Barizon and Pavarini, arguing that Pavarini had ordered Eastern to bring the doors to the eighth floor and told Eastern where to store the doors. Eastern states that the indemnification provision is enforceable to the extent that it does not indemnify Pavarini for its own negligence. Eastern contends that there is an issue as to whether Pavarini was negligent in this case and this, therefore, would limit Eastern's liability for indemnification.

Eastern states that claims for failure to procure insurance are unsupported since Eastern did obtain insurance with Pennsylvania Lumbermens, and named Barbizon and Pavarini as additional insureds under the policy. Pertinent provisions of the policy are annexed with the opposition papers.

In their reply papers, Barbizon and Pavarini assert that it is clear that Eastern had complete control of the doors and they had no duty to plaintiff. Pavarini denies that it controlled the means and method of Eastern's work, including the stacking of the doors. Defendants also assert that testimony from the evidence submitted indicates that the placement of the doors in the hallway was a normal procedure in the construction industry to allow the doors to get acclimated to an area to which they were to be installed.

Barbizon and Pavarini contend that plaintiff did not present any proof that Barbizon had notice of a negligent condition. They claim that their agents did not see the doors standing straight up, as plaintiff testified.

With respect to Eastern's opposition, the moving defendants aver that they were not negligent, that Eastern is bound by the terms of the indemnification provision in the contract, and that Eastern did not serve admissible evidence to oppose their motion. They claim that Eastern has not opposed that portion of the motion relating to failure to procure insurance.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303,306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

Plaintiff must establish three elements against defendants to hold them liable for negligence: (1) that defendants owed a duty to plaintiff; (2) that defendants breached that duty; and (3) that the breach is the proximate cause of plaintiff's injuries. See *Pina v New York Paving, Inc.*, 266 AD2d 120 (1st Dept 1999). With respect to a dangerous or defective condition on the premises, plaintiff must submit evidence tending to show the existence of a dangerous or defective condition, and that defendants either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time. See *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

The first issue under consideration is the condition of the door panels. There is a dispute as to the way the panels were stored in the hallway. Plaintiff claims that they were standing straight up prior to the accident. Defendants claim that the doors were leaning against the wall, and that this was a standard procedure. There is a question of fact as to whether the panels created in a dangerous condition. There seems to be no dispute that the doors were not secured at the time.

The next issue concerns liability. Barbizon claims that it owes no duty of due care

toward plaintiff. But as plaintiff declared, the owner of a multiple dwelling owes a duty to persons on the premises to maintain them in a reasonably safe condition. See Multiple Dwelling Law 78. This duty is non-delegable, and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. *Mas v Two Bridges Assocs.*, 75 NY2d 680, 687 (1990). This duty exists even in the case of liability by an independent contractor. See *Joyce v Manhattan College*, 1 AD3d 202 (1st Dept 2003).

Although Barbizon was not directly involved in the actual construction of the premises, including the eighth floor hallway, it maintained a duty of due care toward plaintiff. According to Monarco's deposition testimony, prior to the accident, Barbizon conducted and attended site meetings with Pavarini that related to tenant safety, including the storage of certain materials in the common areas of the premises. Gomez testified as to inspecting the hallways and that he had been on the eighth floor prior to the accident. There is an issue of fact as to whether Barbizon had notice of the stored panels prior to the accident, and whether it had time to remedy the situation.

There is also an issue of liability with respect to Pavarini. Apparently, Pavarini has a supervisory capacity over the construction of the premises. It hired and contracted with Eastern, the subcontractor whose responsibility was to install the door panels. Kelm testified that an agent of Pavarini directed his foreman to store the door panels on the eighth floor hallway. This indicates that Eastern was receiving instructions from Pavarini as to the delivery and storage of the panels.

One who hires an independent contractor to do work may be responsible for a dangerous condition negligently created by the independent contractor, if the hirer had actual or constructive notice of the condition. *Kojic v City of New York*, 76 AD2d 828, 830 (2d Dept 1980). Here, there is a dispute as to the way the panels were stored. Whether the panels

were upright or leaning against the wall prior to the accident is at issue. The concept that either position was unsecured and potentially dangerous to anyone frequenting the hallways must also be considered. Therefore, the issue of notice applies to Pavarini.

Defendants' motion for summary judgment is denied and they are not dismissed from this action, whereas issues of fact exist as to the nature of the condition of the door panels and whether defendants had proper notice of the condition.

The next issue concerns indemnification as applied against Eastern. The answer of Barbizon and Pavarini contains two cross claims against Eastern based upon Eastern's alleged negligence in this action. Barbizon and Pavarini move for judgment on these cross claims. Their cross claims are based on the terms of the indemnification provision in the contract between Pavarini and Eastern, which indemnifies and holds harmless both Barbizon and Pavarini in the event that an action or claim occurs based upon activities performed by Eastern.

Defense and indemnification agreements are enforceable where the parties' unmistakable intent is evidenced by the contract's language. See *Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774 (1987). "An indemnification agreement will be deemed void and unenforceable if the party seeking indemnification is itself negligent [internal quotations and citations omitted]." *Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 369 (1st Dept 2006). However, "when the intent is clear, an indemnification agreement will be enforced, even if it provides indemnity for one's own or a third party's negligence." *Bradley v Earl B. Felder, Inc.*, 8 NY3d 265, 275 (2007).

The indemnification clause is under the General Conditions section of the contract, under Article 9, page 13. It provides, in pertinent part, as follows:

(a) To the fullest extent permitted by law, the trade contractor (Eastern) shall indemnify, defend, save and hold harmless the owner (Barbizon), owner lenders, the construction manager (Pavarini) and all parties listed as additional insureds in this trade contract ... their respective partners ... harmless and against any and all liability, damages, loss, claims, demands and actions of any

nature whatsoever which arise out of or connected with or are claimed to arise out of or be connected with: (1) the performance of the work by the trade contractor or any act or omission of trade contractor; (2) any accident or occurrence which happens, or is alleged to have happened, in or about the place where such work is being performed in the vicinity thereof (a) while trade contractor is performing the work either directly or indirectly through a subcontractor ... or (b) while any of the trade contractors, property, equipment or personnel are in or about such a place or vicinity thereof by reason of or as a result of the performance of the work ...

This court finds that the clause does not provide in unambiguous and unequivocal language that Eastern would indemnify the moving defendants for their own negligence. Since there remain issues of fact as to the negligence of Barbizon and Pavarini, Eastern is not liable to indemnify them until it is shown that they are free of negligence.

The moving defendants contend that Eastern has not responded to their claim that it did not procure insurance for them, but, contrary to their claim, Eastern has provided proof that insurance was procured.

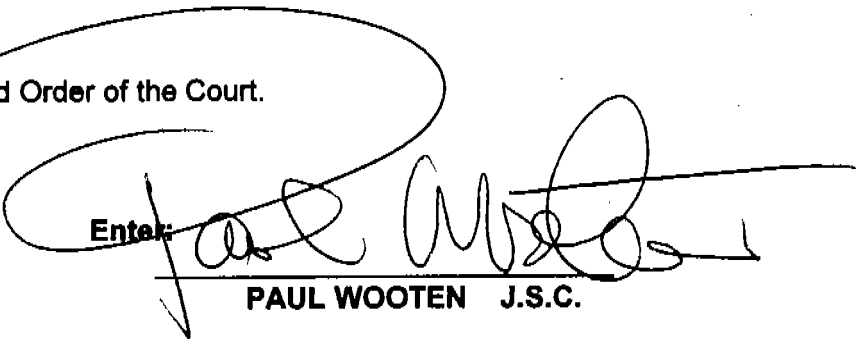
Accordingly, it is

ORDERED that Barbizon's and Pavarini's motion for summary judgment dismissing the complaint is denied; and it is also

ORDERED that Barbizon and Pavarini's alternative motion for summary judgment on their cross claims is denied.

This constitutes the Decision and Order of the Court.

Dated: 9-15-10

Enter: 
PAUL WOOTEN J.S.C.

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

FILED
SEP. 21 2010
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