

**Pelc v 20 Broad Co., LLC**

2011 NY Slip Op 30774(U)

April 3, 2011

Sup Ct, NY County

Docket Number: 101429/07

Judge: Paul G. Feinman

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

PRESENT: PAUL G. FEINMAN  
*Justice*

PART 12

Index Number : 101429/2007

PELC, BARBARA

vs.

20 BOARD

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3  
4, 5

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ABOVE DECISION AND ORDER.**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: April 3, 2011

P.G.F.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
BARBARA PELC,  
Plaintiff,  
  
-against-

Index No. 101429/07  
Mots. Seq. Nos. 005 & 006  
Submission Date 3/9/11

20 BROAD COMPANY, LLC, 20 BROAD STREET  
COMPANY, VORNADO REALTY TRUST,  
VORNADO REALTY, L.P., NEW YORK STOCK  
EXCHANGE, LLC, MENDIK REALTY COMPANY  
INC., and NEWEX CORPORATION,  
Defendants.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X  
NEW YORK STOCK EXCHANGE, LLC and  
NEWEX CORPORATION,  
Third-Party Plaintiffs,

-against-

TP Index No. 590962/09

L&K PARTNERS and JOE DOE CORP.,  
representing any successor or predecessor entity,  
Third-Party Defendants.

-----X  
Appearances:

Plaintiff

Bisogno & Meyerson, LLP  
By: George D. Silva, Esq.  
7018 Fort Hamilton Parkway  
Brooklyn NY 11228  
(718) 745-0880

Defendants NYSE, LLC and Newex Corp.

Law Offices of Edward Garfinkel  
By: William N. DeVito, Esq.  
12 Metrotech Center, 28<sup>th</sup> Fl.  
Brooklyn NY 11201  
(718) 250-1100

Defendants 20 Broad Company, LLC  
Vornado Realty Trust, Vornado Realty, L.P.,  
and Mendik Realty Company, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP  
By: Adam M. Kazanksy, Esq.  
150 East 42<sup>nd</sup> Street  
New York NY 10017-5639  
(212) 490-3000

L&K Partners, Inc. s/h/a L&K Partners

Law Office of James J. Toomey  
By: James J. Toomey, Jr., Esq.  
Stanley A. Diamond, Esq.  
485 Lexington Ave., 7<sup>th</sup> Fl.  
New York NY 10017  
(917) 778-6600

\_\_\_\_\_  
<sup>1</sup> Plaintiff took no position on these two motions at oral argument and did not submit papers.

**Papers considered on review of these motions for summary judgment:**

<u>PAPERS</u>	<u>NUMBERED</u>
<u>SEQ. 005</u> Notice of Motion by NYSE and Newex, Affs., Exhibits	1
20 Broad Company, Vornado, Aff. in Opp.	2
L& K Partners, Inc. Aff. in Opp.	3
NYSE and Newex Reply Affs.	4, 5
<u>SEQ. 006</u> L&K Partners, Inc. Notice of Motion, Aff., Exhibits	1
NYSE and Newex Aff. in Opp.	2
L&K Partners, Inc. Reply Aff.	3

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**PAUL G. FEINMAN, J.:**

Motion sequence numbers 005 and 006 are consolidated for disposition.

In motion sequence number 005, New York Stock Exchange, LLC and Newex Corporation (together, NYSE), move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against them. They also seek an order directing L&K Partners, Inc. to reimburse defense costs and to indemnify them.

In motion sequence number 006, third-party defendant L&K Partners, Inc. s/h/a L&K Partners (L&K) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims and counterclaims asserted as against it.

Since the instant motions were filed, the underlying action was settled on behalf of NYSE for \$350,000.00, rendering academic the portion of motion sequence number 005 seeking summary judgment dismissing the complaint. Therefore, the only issues remaining for the court's determination with respect to the instant motions concern the third-party action by NYSE against L&K for defense costs and indemnification.

**BACKGROUND**

The underlying action stemmed from a slip and fall accident on a wire during the time that a construction project was ongoing at 20 Broad Street, New York, New York. The incident occurred on February 10, 2005. Initially, plaintiff, a maintenance worker at the building, stated that the accident occurred on the 20<sup>th</sup> floor of the building, but later she restated her claim, alleging that the accident occurred at the 12<sup>th</sup> floor conference room. NYSE was leasing the space where the accident took place, and L&K was the contractor for the project.

Pursuant to the contract between NYSE and L&K:

“The contractor shall indemnify and hold harmless, the owner, architect, architect’s consultants and agents and employees or any of them from and against, claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the work, provided that such claim, damage, loss or expenses attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property, but only to the extent caused by the negligent acts or omissions of the contractor, a subcontractor, or anyone directly or indirectly employed by them or for anyone whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused by a party indemnified hereunder. . . .”

Notice to Admit, Ex. F. In addition, L&K was required to obtain commercial general liability insurance, naming NYSE as additional insured under that policy, which L&K states that it did.

In its opposition to NYSE’s motion, L&K states that, although it was the contractor for the project, there is no credible evidence that it was performing any work on the 12<sup>th</sup> floor of the building at the time of plaintiff’s accident. According to L&K, the work performed by L&K on the 12<sup>th</sup> floor was completed as of January 2005, several weeks prior to plaintiff’s accident. EBT of Timothy Masset (Masset), L&K’s project manager, at 70 and 74. NYSE alleges that L&K sectioned off construction areas where they were working with plastic, and that the area in which

the accident took place was not so sectioned off. L&K agrees with this statement, but argues that the reason why that area of the 12<sup>th</sup> floor was not sectioned off with plastic was because all construction in that area was complete. *Id.* at 74 and 122; EBT of James Katsarelis (Katsarelis), director of project management for NYSE, at 36 and 50.

L&K contends that NYSE was using the 12<sup>th</sup> floor conference room as of the date of the accident as swing space, and that the only work being performed by L&K in February of 2005 in the conference room was punch list work, limited to painting, installing glass on the doors and mill work. Moreover, L&K asserts that, according to plaintiff's own testimony, the cord that she fell over "was the kind of extension you use for the computer to the printer." Plaintiff's EBT, at 78. L&K avers that NYSE has failed to produce any credible evidence that such a cord may be attributable to L&K. Furthermore, according to Katsarelis, it was NYSE that set up the conference room during the applicable period, and he was the individual who decided where all of the furniture and equipment, including computers, was to be placed. Katsarelis EBT, at 30-32 and 36. Katsarelis also testified that porters from NYSE placed the computers on the desks in the conference room, but that he was the one who directed where the desks and computers were to go. *Id.* at 50.

L&K avers that, other than speculation, there is no evidence that the cord over which plaintiff tripped belonged to, or was placed in the conference room, by L&K. Therefore, according to L&K, it does not owe NYSE defense costs or indemnification, because there is no evidence that the injury resulted from L&K's work.

In reply, NYSE asserts, which is also part of its opposition to L&K's summary judgment motion (motion sequence number 006), that there are questions of fact precluding granting

summary judgment to L&K on the issue of indemnification because, in her deposition testimony, plaintiff stated that the conference room was still under construction and was crowded with boxes, wires and construction company equipment. Plaintiff's EBT, at 15.

The arguments of motion sequence number 006 mirror the arguments proffered with respect to motion sequence number 005.

The court notes that in the verified complaints filed by plaintiff, the first against Vornado Realty Trust and New York Stock Exchange, Inc., and the second against all of the parties named in the above caption, plaintiff alleges that the accident occurred at 20 Broad Street, New York, New York, and does not specify any particular floor or location within the premises.

#### DISCUSSION

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted].” *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

It is well-settled law that a contractual duty to defend is broader than a contractual duty to indemnify, and that the duty to defend is triggered whenever the allegations in the complaint even suggest the possibility of liability. As stated in *BP Air Conditioning Corp. v One Beacon*

*Insurance Group* (8 NY3d 708, 714 [2007]),

“A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured . . . .”

L&K has admitted that, pursuant to its agreement with NYSE, and to protect itself, it purchased general commercial liability insurance in which it named NYSE and Newex as additional insureds. As additional insureds, NYSE and Newex would be entitled to defense costs, provided that the allegations in the complaint possibly engender liability on the part of one of them. *Regal Construction Corp. v National Union Fire Insurance Company of Pittsburgh, Pa.*, 15 NY3d 34 (2010).

In the case at bar, the complaints filed by plaintiff present the possibility that NYSE or Newex could be liable to her for her injuries under circumstances in which L&K might be responsible. Hence, they are entitled to be defended in the underlying action by L&K.

“[T]he fact that the parties settled the underlying action without any judicial determination as to who was at fault does not preclude [NYSE] from pursuing such a cause of action. Moreover, . . . the duty to defend is not dependent on the merits of the underlying complaint but, rather, is triggered by the allegations contained in the underlying complaint [internal quotation marks and citation omitted].”

*Yeshiva Ohr Torah Community School, Inc. v Zurich American Insurance Company*, 78 AD3d 686, 690 (2d Dept 2010).

As a consequence of the foregoing, that portion of NYSE’s motion seeking a declaration that L&K is obligated to reimburse them for their defense costs in the underlying personal injury action is granted, and that portion of L&K’s motion seeking a declaration that it is not obligated to provide defense costs to NYSE for the underlying personal injury action is denied.

That portion of NYSE's motion seeking a declaration that L&K is obligated to indemnify them in the underlying personal injury action and that portion of L&K's motion seeking a declaration that it is not obligated to indemnify NYSE in the underlying personal injury action are each denied.

In their response to L&K's motion, NYSE argued that there are questions of fact precluding a grant of summary judgment in L&K's favor. According to the testimony presented with these motions, the court agrees that there are questions of fact as to whom the wire over which plaintiff fell belonged.

Even though L&K states that it finished the construction work in the conference room several weeks prior to plaintiff's accident, it admits that it was still performing punch work in that area. L&K was unable to provide any minutes for January, February or March of 2005 to substantiate exactly when the project on the 12<sup>th</sup> floor conference room was finished or when the punch list items were completed. *Masset EBT*, at 40.

Further, in her deposition, plaintiff testified that there was still equipment in the conference room that belonged to the construction contractors, as well as NYSE furniture and equipment, making the room extremely crowded. *Plaintiff's EBT*, at 15.

“The burden of a court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.”

*Dyckman v Barrett*, 187 AD2d 553, 554 (2d Dept 1992).

Based on the foregoing, the court cannot conclusively determine the party who was responsible for the cord that caused plaintiff to trip.

## CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of New York Stock Exchange, LLC and Newex Corporation's motion (motion sequence number 005) seeking a declaration that L&K Partners, Inc. s/h/a L&K Partners is obligated to reimburse them for their defense costs in the primary action is granted; and it is further

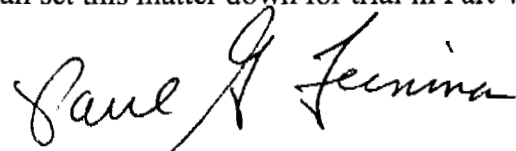
ADJUDGED and DECLARED that L&K Partners, Inc. s/h/a L&K Partners is obligated to reimburse New York Stock Exchange, LLC and Newex Corporation for their defense costs in the primary action; and it is further

ORDERED that the remainder of New York Stock Exchange, LLC and Newex Corporation's motion (motion sequence number 005) is denied; and it is further

ORDERED that L&K Partners, Inc. s/h/a L&K Partners' motion for summary judgment (motion sequence 006) is denied; and it is further

ORDERED that the Clerk of Trial Support shall set this matter down for trial in Part 40 forthwith as to the Third-Party Action.

Dated: April 3, 2011  
New York, New York



J.S.C.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

(2011 Pt 12 D&O\_101429\_2007\_005\_006\_LD\_JH)