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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

PLEIADES PUBLISHING, INC. and ALEXANDER SHUSTOROVICH,,

Plaintiffs,

-v-

JUNAID RUBBANI, SAMAN RUBBANI, MOHAMMAD J. RUBBANI, LEE'S ART SHOP, INC. d/b/a LEE'S STUDIO, ROSE ASSOCIATES, INC. and THE BOARD OF MANAGERS OF THE METROPOLITAN TOWER CONDOMINIUM,

Defendants.

Index No.: 116704/07

Motion Date: 04/26/11

Motion Seq. No.: 02

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2 - 4
Replying Affidavits - Exhibits	No(s).	5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

Plaintiffs move, pursuant to CPLR 3212, for summary judgment on the issue of liability as against defendants Junaid Rubbani (Junaid), Saman Rubbani (Saman) and Mohammad J. Rubbani (Mohammad) (collectively, Rubbani defendants) on their claims for property damage. Defendant Lee's Art Shop, Inc. d/b/a Lee's Studio (Lee) cross-moves, pursuant to CPLR 3212, to dismiss the complaint and any cross-claims asserted as against it.

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

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Defendants Rose Associates (Rose) and the Board of Managers of the Metropolitan Tower Condominium (Tower) cross-move, pursuant to CPLR 3212, for summary judgment on the cross-claims asserted as against them by the Rubbani defendants.

Plaintiffs are the owners of a combined condominium unit designated 73B and C at the premises known as 146 East 57th Street, New York, New York. The Rubbani defendants are the owners of the adjacent condominium unit, designated 73A. Defendants Rose and Tower are the operators and owners of the luxury condominium building, and Lee, allegedly, installed the electric track lighting in the Rubbani defendants' unit. Plaintiffs are seeking to recover $681,740.55 in property damage to their condominium unit allegedly caused by a fire that started in the closet of the Rubbani defendants' unit.

On March 21, 2007, a fire broke out in the walk-in closet of the Rubbani defendants' master bedroom, allegedly resulting in smoke and water damage in plaintiffs' adjacent apartment. The primary question presented by this motion is whether the cause of the fire was the light bulb that was installed in the closet (because the wattage exceeded the maximum wattage for the closet's wiring), whether the cause of the fire was incorrectly installed track lighting, or whether the cause was something else.

Saman was deposed in this matter on April 28,2010. At her examination before trial, Saman testified that she was unaware of the maximum wattage for the lightbulb in the walk-in closet, and that, at the time that the bulb was installed and at the time of the fire, she was not aware of the wattage of the lightbulb that was installed. Saman averred that the light fixture in the closet was in place when the Rubbani defendants purchased the apartment in 1999, and that the Rubbani defendants never had that fixture rewired. Subsequent to the fire, Saman was shown a photograph of the light bulb, which she then identified as a 100-watt bulb. The normal practice in the building was to call the building concierge when a lightbulb needed to be changed and the concierge would contact the handyman who would then come to the unit and change the bulb, and all light bulbs in the apartment were always changed by the building handyman. Saman estimated that the bulb had been installed in the closet about a week or two before the fire.

Saman testified that she became aware of a problem when she noticed a slight smokey haze in the living room and, after checking her son's room, she went to the master bedroom and saw flames emanating from the walk-in closet. Saman stated that, at the time of the fire, her husband's clothes were stored in the walk-in closet. Saman also testified that there was track

lighting in that closet had been installed by Lee, and that Lee ran that wiring to the light switch.

After the fire was extinguished, Saman said that the fire marshal who inspected the apartment told her that the track lighting wiring was substandard, below New York City code, and that she was fortunate that no fire had occurred sooner.

Junaid corroborated his wife's testimony at his deposition, stating that the light bulbs in the apartment were always changed by the building handyman, that he never purchased light bulbs for his apartment, and that he did not know what kind of bulb the handyman installed in the closet. Junaid also testified that Lee installed the track lighting in the bedrooms in the apartment. According to Junaid, his wife paid for the installation of the track lighting by credit card.

Alexander Milenkovic (Milenkovic), the building concierge, was also deposed in this matter. According to Milenkovic, when any resident in the building needed a light bulb to be changed, the resident would contact him, letting him know where in the apartment the bulb needed to be switched, and then he would pass the message on to the handyman who would then change the bulb. In addition, Milenkovic testified that it was up to the handyman to decide the appropriate wattage of the bulb that was being installed.

In support of their motion, plaintiffs have included a report of Mammone & Company, Inc., fire and arson consultants, retained by the Rubbani defendants' insurer to investigate the cause of the fire. According to this report, which is not authenticated, the cause of the fire was "most probably heat from the incandescent light bulb in the closet." Plaintiffs have also provided an addendum to this report, signed by a Terrence G. Jordan, opining that the 100-watt bulb was too high a wattage to be used in the closet, but this addendum is not sworn to or notarized.

In opposition to the instant motion, and in support of its cross-motion, Lee asserts that plaintiffs have failed to support their motion with evidence in admissible form, basing their request for summary judgment on the unauthenticated fire consultant's report and inadmissible hearsay offered by Saman. In addition, Lee does not admit that it installed the track lighting in the Rubbani defendants' apartment.

Lee points out that the testimony indicates that, whereas track lighting was installed in the bedrooms, there is no evidence that the track lighting was installed in the master bedroom closet, where all parties agree that the fire started. According to Lee, plaintiffs have failed to provide any evidence that conclusively establishes that it incorrectly installed track lighting that caused the fire in the Rubbani defendants'

apartment and, therefore, the complaint and any cross-claims asserted as against it should be dismissed.

In support of their cross-motion for summary judgment on their cross-claim for common-law indemnification asserted as against Rose and Tower, the Rubbani defendants argue that there is no evidence that they installed the light bulb that allegedly caused the fire, that all of the evidence indicates that the installation of the light bulbs was the obligation of the condominium, and that the Rubbani defendants never changed a light bulb in their apartment in the 14 years that they resided therein. Further, the Rubbani defendants assert that plaintiffs have failed to provide any evidence that they had actual or constructive notice of a dangerous condition, and sufficient time to remedy that condition that was allegedly the cause of damage to plaintiffs.

In opposition to the Rubbani defendants' cross-motion, Rose and Tower contend that there is no evidence in admissible form that establishes the cause of the fire and, hence, questions of fact exist precluding the grant of the Rubbani defendants' cross-motion seeking common-law indemnification from Rose and Tower. Rose and Tower have included the affidavit of Jonathan R. Lebow (Lebow), who opines that the cause of the fire was an "undetermined electrical failure of non-compliant zip cord installed by defendant Lee's Art Studio when installing track

lighting in the master bedroom of the subject apartment." This exhibit includes the expert's report, in which he indicates that he did not actually visit the premises, but that he relied on the report prepared by Mammone & Company, Inc.

In opposition to Rose and Tower's cross-motion, Lee states that Lebow's affidavit and report are conclusory and not based on personal inspection, and depend only on hearsay evidence. Therefore, Rose and Tower argue, Lebow's affidavit and report are insufficient to raise an issue of fact.

In reply, plaintiffs say that the Rubbani defendants do not challenge plaintiffs' assertion that the fire was caused by the light bulb in their master bedroom closet, but only maintain that the building was responsible for installing that bulb. Plaintiffs argue that the Rubbani defendants knew that the bulb was 100-watts, and that the bulb was in the closet for at least several weeks before the fire, so they should have known of the dangerous condition that it created. Though plaintiffs insist that Saman knew that the bulb was 100-watts, the court notes that Saman testified that she only became aware of the wattage after the fire when she was shown a photograph of the closet.

"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." Santiago v Filstein, 35 AD3d 184,

185-186 (1st Dept 2006) (internal quotation marks and citation omitted). 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 (1st 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 v Ceppos, 46 NY2d 223, 231 (1978).

On the basis of the above standard, plaintiffs' motion for summary judgment against the Rubbani defendants must be denied.

> 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 demonstrate the absence of any material issue of fact. Failure to make such showing requires denial of the motion regardless of the sufficiency of the opposing papers.

Stahl v Stralberg, 287 AD2d 613, 614 (2d Dept 2001) (internal citations omitted).

Neither the unauthenticated report of Mammone & Company, Inc., nor the unsworn addendum to that report is in admissible form so as to be permissibly considered by the court in deciding the motion. Id.; Rivera v GT Acquisition 1 Corp., 72 AD3d 525 (1st Dept 2010).

Further, this court disagrees with plaintiffs that the deposition testimony of Saman constitutes an admission of

liability. Nor may the Mammone & Company, Inc. report, prepared by the Rubbani defendants' insurer, be deemed an adoptive admission.

Saman did not admit that the fire was caused by the light bulb in the closet, but says that she was told by an unidentified fire marshal that the cause was the incorrectly wired track lighting. Such testimony is not only hearsay, but does not constitute an admission on her part. The case of Sanders v Bass (235 AD2d 255 [1st Dept 1997]), cited by the plaintiffs is distinguishable. In Sanders, the defendant specifically admitted that the fire was caused by the box fans left running and unattended by the defendant's employees. Likewise, there is no evidence that the Rubbani defendants adopted the conclusions in the report made by Mammone & Company, Inc., the investigators hired by their carrier.

The court is also unpersuaded by plaintiffs' argument that the Rubbani defendants had actual or constructive notice of a dangerous condition that they failed to remedy. In each of the cases cited by plaintiffs, the owners had actual notice of a dangerous condition: Golden v Manhasset Condominium (2 AD3d 345 [1st Dept 2003]) (owners had actual notice of a problem with an exhaust system); Sarfowaa v Claflin Apts. LLC (284 AD2d 228 [1st Dept 2001]) (owners informed of suspected gas leaks on at least two occasions); Acosta v Zito (114 AD2d 757 [1st Dept 1985])

(many complaints made about a faulty stove). This is not the situation in the case at bar, where the Rubbani defendants resided in the apartment for fourteen years prior to the fire without any problem with the closet light, and with the track lighting for five years without incident.

Moreover, as discussed below, because a question of fact has been raised as to the actual cause of the fire, any issue regarding notice must await a determination of causation.

The Rubbani defendants' cross-motion for summary judgment on their cross-claim asserted as against Rose and Tower for common-law contractual indemnification must be denied.

> Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence.

Martins v Little 40 Worth Associates, Inc., 72 AD3d 483, 484 (1st Dept 2010). In the case at bar, an issue is whether the fire was caused by the light bulb or the track light wiring and, consequently, it cannot be determined whether any negligence on the part of Rose and Tower contributed to the causation of the fire.

Rose and Tower's cross-motion for summary judgment shall also be denied. The affidavit and report of Lebow, opining that the cause of the fire was faulty zip wiring installed by Lee, not the light bulb installed by their staff, is insufficient to establish prima facie liability on the part of Lee and absolution

for Rose and Tower, as a matter of law. As stated in Zvinys v Richfield Investment Company (25 AD3d 358, 359-360 [1st Dept 2006]), in which the Court denied a summary judgment motion based on a similar affidavit-

> [t]he expert never visited the premises or inspected the [zip wiring] that he alleged were deficient or defective. There was no deposition testimony or Fire Department report addressing the [zip wiring]'s condition or suitability, and the expert did not cite any statutes, codes or industry standards allegedly violated with respect to the [zip wiring]. Nor did the expert inspect the [wiring or light bulb fixture] or cite any specific code sections regarding [the zip wiring] that were violated.

Robertson v New York City Housing Authority, 58 AD3d 535 (1st Dept 2009); Vasquez v The Rector, 40 AD3d 265 (1st Dept 2007).

In any event, even aside from the inadmissible reports and affidavits, the conflicting testimony as to the cause alone precludes granting any party summary judgment. See Harriott v Pender, 4 AD3d 395, 397 (2d Dept 2004) ("conflicting testimony . . . was presented and therefore, an issue of fact remains").

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the cross-motion of defendants Junaid Rubbani, Saman Rubbani and Mohammad J. Rubbani, seeking summary judgment as against co-defendants Rose Associates, Inc. and the Board of Managers of the Metropolitan Tower Condominium and dismissal of

all cross-claims asserted as against them is denied; and it is further

ORDERED that the cross-motion of defendants Rose Associates, Inc. and the Board of Managers of the Metropolitan Tower Condominium seeking to dismiss the complaint and all cross-claims asserted as against them is denied.

This is the decision and order of the court.

Dated: July 1, 2011

ENTER:

J.S.C.

DEBRA A. JAMES