

**Wood v Lefrak SBN L.P.**

2012 NY Slip Op 30102(U)

January 6, 2012

Sup Ct, NY County

Docket Number: 100598/09

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN  
Justice

PART 57

MICHAEL WOOD

INDEX NO.

100598/05

MOTION DATE

3

MOTION SEQ. NO.

MOTION CAL. NO.

-v-  
LEFRAK SUB Ltd Partnership

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for LeFrak Summary judgment

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

Answering Affidavits — Exhibits Notice of Cross-Motion

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

PAPERS NUMBERED

1, 1a, 1b  
2, 3, 4, 5  
6

Cross-Motion:  Yes  No

Memos of Law M1 - M3

Upon the foregoing papers, it is ordered that this motion and cross-motion are

determined in accordance with accompanying decision/order dated 1-6-12.

**FILED**

JAN 18 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1-6-12

Marcy S. Friedman  
**MARCY S. FRIEDMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDGMENT  SETTLE ORDER/JUDGMENT

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 57

-----X  
MICHAEL WOOD and  
HELEN MILLMAN-WOOD,

Plaintiffs,

Index No. 100598/09

-against-

LEFRAK SBN LIMITED PARTNERSHIP,  
and BENIHANA NATIONAL CORP.,

Defendants,

-----X  
LEFRAK SBN LIMITED PARTNERSHIP,

Third-Party Plaintiff,

Index No. 590335/09

-against-

56<sup>TH</sup> STREET SOUPS LLC d/b/a  
HALE & HEARTY SERVICES, LLC,

Third-Party Defendant.

**FILED**

**JAN 18 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
FRIEDMAN, J.:

In this personal injury action, defendant/third-party plaintiff Lefrak SBN Limited Partnership (Lefrak) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and all cross-claims, or, in the alternative, granting Lefrak summary judgment on its cross-claims against co-defendant Benihana National Corp. (Benihana), and on its third-party complaint against third-party defendant 56<sup>th</sup> Street Soups LLC d/b/a Hale & Hearty Services, LLC (Hale & Hearty) for contractual indemnification and breach of contract to procure insurance.

Third-party defendant Hale & Hearty cross-moves for an order, pursuant to CPLR 3025, to amend the third-party answer to include the affirmative defenses of Worker's Compensation Law § 11, comparative negligence/contribution, CPLR Article 16, and a cross-claim for common-law indemnification against Benihana.

Lefrak is the owner of a building located at 40 West 57<sup>th</sup> Street in New York City (the Premises). Benihana is a commercial tenant pursuant to a lease agreement (Benihana Lease) with Lefrak, and operates a Japanese restaurant on the mezzanine level of the Premises. Hale & Hearty is also a commercial tenant pursuant to a lease agreement (H&H Lease), and operates a restaurant on the ground floor of the mezzanine area and a portion of the basement below the mezzanine.

The underlying action involves a claim by plaintiff Michael Wood, a manager for Hale & Hearty, for personal injuries he allegedly sustained on October 23, 2007, when he slipped on liquid while descending the stairs between the first floor and the basement of the Premises. Plaintiff commenced this action based upon a theory of negligence, alleging that defendants failed to maintain the Premises in a reasonably safe condition, or permitted a dangerous or defective condition to exist on the staircase, causing plaintiff's injuries. Benihana asserted a cross-claim against Lefrak for common-law indemnification and contribution. Lefrak asserted cross-claims against Benihana for contractual indemnification and failure to procure liability insurance pursuant to the Lease. Lefrak commenced a third-party action against Hale & Hearty for contractual indemnification and breach of contract for failure to procure liability insurance.

Lefrak argues that it is entitled to summary judgment because: (1) it is an out-of-possession landlord who was not obligated to repair the condition that allegedly caused plaintiff's

injuries; (2) Lefrak did not create the hazardous condition; and (3) Lefrak did not have actual or constructive notice of the condition. Plaintiffs argue that Lefrak is not entitled to summary judgment because: (1) pursuant to NYC Administrative Code § 27-127 and § 27-128, Lefrak is statutorily required to maintain the Premises, including the stairs, in a safe manner; and (2) Lefrak had actual notice of and failed to correct the condition that caused plaintiff's injuries.

Benihana argues that Lefrak is not entitled to summary judgment because: (1) under Article 19 and other provisions of the Benihana Lease, Lefrak is responsible for repairing and maintaining the plumbing lines or waste pipes; and (2) Lefrak's failure to maintain those lines led to leaks that resulted in the accumulation of water on which plaintiff fell; and (3) Lefrak was aware of the condition and failed to correct it.

It is well settled that an out of possession landlord is generally not liable for negligence with respect to a condition on its property after the transfer of possession to a tenant "unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." (Johnson v Urena Serv. Ctr., 227 AD2d 325, 326 [1<sup>st</sup> Dept 1996], lv denied 88 NY2d 814; accord Babich v R.G.T. Rest. Corp., 75 AD3d 439 [1<sup>st</sup> Dept 2010].)

Here, Lefrak claims that it was not contractually obligated to repair the water leak that caused plaintiff's accident. Relying on an inspection of the Premises made by its professional engineer on October 6, 2010, Lefrak takes the position that the water on the stairwell emanated from an overflowing drain in the kitchen of the second floor Benihana restaurant. (*Aff. of Jeffrey Schwalje, P.E.*, ¶ 11.) Citing section 15.01 of the Benihana Lease, which provides that the tenant

shall make "all non-structural repairs," Lefrak further claims that maintenance of the drain or waste water pipe was Benihana's responsibility.

While Benihana and plaintiff oppose Lefrak's motion, they do not submit any evidence to show that the water that accumulated on the stairwell did not emanate from Benihana's restaurant. Nor do they dispute that Lefrak notified Benihana, in March 2006 and July 2007, of leaks from the Benihana kitchen into Hale & Hearty's space, although the precise location of the leaks was not identified. (See Letters from Kevin Perdreaux, Lefrak's Property Manager, to Benihana [Exs. O & P to Lefrak Motion].) The undisputed evidence also shows that in 2006 and 2007 Benihana made several repairs to the drain and waste pipe in its space and, specifically, cleared grease from its "Floor drain Waste piping" and "Replaced leaking section of Waste line, at Grease Trap." (See Invoices to Benihana [Ex. Q to Lefrak Motion].)

Benihana argues that the Lease contemplated that Lefrak would be responsible for certain repairs to pipes. It cites section 15.01 of the Lease which provides, in pertinent part, that Tenant shall "make all non-structural repairs," but that "[n]otwithstanding the foregoing, . . . Tenant shall give Landlord prompt notice of any defective conditions in the plumbing, or electrical lines located in, servicing or passing through the demised premises and following such notice, Landlord shall remedy the condition with due diligence but at the expense of Tenant if repairs are necessitated by damage or injury attributable to Tenant. . . ." Benihana also cites section 19.02 of the Lease which provides that "Tenant shall permit Landlord to install, use and maintain pipes, ducts and conduits within the demising walls, bearing columns and ceilings of the Demised Premises."

Contrary to Benihana's contention, these lease provisions cannot serve, without more, to

raise a triable issue of fact as to whether Lefrak was obligated to repair the drain or waste pipe in question. Lefrak does not deny that it was responsible for the maintenance of building-wide pipes but, rather, submits uncontroverted evidence that Benihana was obligated to repair the specific drain or pipe that caused the leak. More particularly, Lefrak's property manager testified that Benihana was responsible for the maintenance of all of its mechanical systems, including its own plumbing. He differentiated Benihana's plumbing from the building plumbing, explaining: "All of the plumbing prior to a waste stack is theirs." (Perdreux Dep. at 31.) He further described the waste stack as "the main plumbing line." (Id.) Significantly, he testified, without contradiction, that the waste stack is located in the cellar level, and is not visible from the staircase of the Hale & Hearty space. (Id. at 33, 36.) Lefrak's engineer identified the waste water pipe that he claimed was the source of the water leak, onto the stairwell as a vertical pipe originating from the Benihana restaurant. (Schwalje Aff., ¶ 8.) Plaintiff himself testified that on the date of his accident, he saw water dripping from the pipe down the ledge above the stairwell. (See P.'s Dep. at 185.) In sum, there is no evidence in the record that the leak emanated from any other location than the Benihana restaurant or from any building-wide pipe for which Lefrak was responsible. The court accordingly holds that Benihana, not Lefrak, was obligated by section 15.01 of the Lease to repair the leak.<sup>1</sup>

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<sup>1</sup>In so holding, the court rejects Benihana's contention that the affidavit of Herbert Heller, its professional engineer, raises a triable issue of fact as to whether the waste water pipe above the stairwell originated from the floor drains in the Benihana restaurant. Heller disputes the finding of Lefrak's engineer, Schwalje, to that effect. (See Heller Aff., ¶ 5; Schwalje Aff., ¶ 8.) The court is not persuaded by Lefrak's contention that Heller's affidavit may not be considered, as Lefrak fails to show that it made a demand for a CPLR 3101(d) exchange to which Benihana failed to respond. However, the court finds that the exact location of the waste water pipe is irrelevant, as there is no evidence in the record that the leak emanated from any location other than the Benihana restaurant, and the undisputed evidence is that the waste stack for which Lefrak was responsible was in the cellar not above the stairwell.

Although Lefrak was an out of possession owner that was not contractually obligated to repair the leak in question, it may nevertheless be found liable for negligence if it had actual or constructive notice of a dangerous condition. (See Penn v Jaros, Baum & Bolles, 12 AD3d 255 [1<sup>st</sup> Dept 2004]; see Lefrak Memo. Of Law In Support at 5 [acknowledging that “out of possession landlord will not be insulated from liability if they had actual or constructive notice of the dangerous condition.”].) Plaintiff testified that he complained on repeated occasions, both a few days and months before the accident, to Lefrak’s building manager, Frank Lentini, about leaks into Hale & Hearty’s kitchen and on the stairwell. (P.’s Dep. at 171-175.) As noted above, Lefrak’s property manager, Kevin Perdreaux, also sent letters to Benihana in March 2006 and July 2007 about leaks from Benihana’s space into Hale & Hearty’s space. This evidence is sufficient to raise a triable issue of fact as to whether Lefrak had notice of the leak that caused plaintiff’s accident. While Lefrak denies that it was ever informed of a leak on the Hale & Hearty stairwell (Lentini Dep. at 70), this denial raises an issue of credibility which should not be determined on a motion for summary judgment.

The branch of Lefrak’s motion for summary judgment dismissing the complaint will accordingly be denied. As to Lefrak’s claim for indemnification from Benihana, section 21.02 of the Benihana Lease requires Benihana to indemnify Lefrak for any claims arising from “the conduct or management of the Demised Premises. . . ,” or “arising from any act or omission of Tenant. . . .” Section 21.01 clarifies that the Landlord shall not be liable to the Tenant or any other person for injury “unless caused by or due to the negligence of Landlord.” Under these provisions, Lefrak is entitled to a grant of conditional contractual indemnification against Benihana to the extent of directing Benihana to indemnify Lefrak for any liability arising out of

the accident that was not the result of Lefrak’s own negligence. (See Lennard v Mendik Realty Corp., 43 AD3d 279 [1<sup>st</sup> Dept 2007].)

As to Lefrak’s claim against Benihana for failure to procure insurance, section 11.04 of the Benihana Lease requires Benihana to provide a comprehensive liability policy in the name of Lefrak for injury to persons and/or property “occurring in, on or about the Premises, or any appurtenances thereto.” Section 1.02 defines the premises as “the commercial space located on the mezzanine of the Building, as shown on the floor plan identified as Exhibit A,” as well as use of the elevator and entrance space on the first floor of the building. Lefrak’s sole authority (Queens Office Tower Assocs. v General Mills Restaurant, 269 AD2d 223 [1<sup>st</sup> Dept 2000]) does not support its contention that the stairwell below the demised premises falls within the area contemplated by the insurance procurement provision, and the court holds otherwise.

As to Lefrak’s third-party claim for indemnification against Hale & Hearty, Article 46 of the H&H Lease provides in pertinent part:

“Tenant agrees to indemnify and save harmless Landlord from and against any and all claims of whatever nature against Landlord arising from (A) any act, omission or negligence of Tenant . . . , (B) any accident, injury or damage whatsoever caused to any person . . . and occurring during the term of this Lease in or about the demised premises, and ( C) any breach, violation or non-performance of any term . . . in this Lease set forth on the part of Tenant to be fulfilled . . . excluding, however claims arising out of any negligence or other misconduct of the Landlord or its agents, contractors, servants or employees.”

(Exhibit I to Lefrak Motion.) Although Hale & Hearty argues that General Obligations Law § 5-322.1 renders this provision unenforceable, General Obligations Law § 5-321 is apposite. General Obligations Law § 5-321 provides:

“Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for

damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.”

General Obligations Law § 5-321 does not bar a landlord’s claim for indemnification where, as here, the lease is negotiated by sophisticated business entities, and contains a broad indemnification provision coupled with an insurance procurement requirement, and thus is tantamount to an agreement to “use insurance to allocate the risk of liability to third parties between themselves.” (Great N. Ins. Co. v Interior Const. Corp., 7 NY3d 412, 419 [2006].) Moreover, section 5-321 does not bar indemnification where, as here, the tenant is obligated to indemnify the landlord only to the extent the landlord was not itself negligent. (See Hughey v RHM-88, LLC, 77 AD3d 520, 522-523 [1<sup>st</sup> Dept 2010]; Lennard, 43 AD3d at 279.) Lefrak is accordingly entitled to a grant of conditional contractual indemnification against Hale & Hearty.

Lefrak has further demonstrated entitlement to summary judgment on its third-party cause of action against Hale & Hearty for failure to procure insurance. Pursuant to Article 47(A)(1) of the H&H Lease, Hale & Hearty was required to procure liability insurance covering the landlord for claims for personal injury “occurring in or about the demised premises.” This provision clearly obligated Hale & Hearty to procure insurance that would have covered plaintiff’s accident. As Hale & Hearty fails to submit any evidence that it procured the required insurance, Lefrak is entitled to summary judgment on this claim.

Finally, Hale & Hearty’s cross-motion to amend its third-party answer is unopposed. However, to the extent that the motion seeks leave to assert defenses under Workers’ Compensation Law § 11, the motion should be denied as unnecessary, as the third-party complaint

pleads causes of action for contractual indemnification and failure to procure insurance, but does not plead a cause of action for common law indemnification. The motion will be granted to the extent that it seeks leave to amend the answer to assert a cross-claim against Benihana for contribution. Such amendment is supported by the evidence on the record of these motions that the leak in question emanated from Benihana's premises.

Accordingly, it is hereby

ORDERED that the branch of the motion of defendant/third-party plaintiff Lefrak SBN Limited Partnership (Lefrak) for an order granting summary judgment dismissing the complaint and all cross-claims is denied; and it is further

ORDERED that the branch of Lefrak's motion for summary judgment on its second cross-claim against co-defendant Benihana National Corp. (Benihana) is granted as to liability to the extent of awarding Lefrak conditional contractual indemnification against Benihana, directing Benihana to indemnify Lefrak for any liability arising out of the accident that was not the result of Lefrak's own negligence; and it is further

ORDERED that the branch of Lefrak's motion for summary judgment on its third cross-claim against Benihana for failure to procure insurance is denied; and it is further

ORDERED that the branch of Lefrak's motion for summary judgment on the first cause of action in its third-party complaint against third-party defendant 56<sup>th</sup> Street Soups LLC d/b/a Hale & Hearty Services, LLC (Hale & Hearty) is granted as to liability to the extent of awarding Lefrak conditional contractual indemnification against Hale & Hearty, directing Hale & Hearty to indemnify Lefrak for any liability arising out of the accident that was not the result of Lefrak's own negligence; and it is further

ORDERED that the branch of Lefrak's motion for summary judgment on the second cause of action in its third-party complaint for failure to procure insurance is granted as to liability against third-party defendant Hale & Hearty; and it is further


ORDERED that an assessment of damages in Lefrak's favor shall be held at the time of trial or other resolution of the main action; and it is further

ORDERED that Hale & Hearty's cross-motion for leave to amend its answer is granted to the extent of granting leave to Hale & Hearty to serve an amended answer asserting a cross-claim against Benihana for contribution, provided that such amended answer shall be served within 30 days of the date of entry of this order.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 6, 2012

ENTER:

  
J.S.C.

**FILED**

**JAN 18 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**