

**Harrison v Kaufman 8th Ave. Assoc.**

2012 NY Slip Op 32369(U)

September 12, 2012

Sup Ct, NY County

Docket Number: 102836/2008

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

DELORES HARRISON,

Plaintiff,

- v -

KAUFMAN 8<sup>th</sup> AVENUE ASSOC., KAUFMAN  
MANAGEMENT COMPANY, LLC, IN HOUSE  
CONSTRUCTION SERVICE, INC., and SYLVAN  
SHEMITZ DESIGNS,

Defendants.

Index No.: 102836/2008

Motion Date: 07/27/2012

Motion Seq. No.: 003/004

Motion Cal. No.: \_\_\_\_\_

**FILED**

The following papers, numbered 1 to 8 were read on this motions and cross motion for summary judgment

SEP. 13 2012

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Notices of Motion/-Affidavits -Exhibits \_\_\_\_\_  
Notice of Cross Motion/Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_  
Sur Replying Affirmation \_\_\_\_\_

PAPERS NUMBERED	
1, 2	_____
3, 4, 5	_____
6, 7	_____
8	_____

Cross-Motion:  Yes  No

Motion Sequence Numbers 003 and 004 are consolidated for disposition. Upon the foregoing papers, the motion of defendant Sylvan Shemitz Designs, Inc. s/h/a Sylvan Shemitz Designs, for summary judgment dismissing the complaint against it and entering judgment on the third party complaint for contribution and indemnification (Motion Sequence Number 003) and the motion of defendants Kaufman 8<sup>th</sup> Avenue Associates and Kaufman Management Company, LLC and the cross motion of third party Woodland Electrical Contracting Corp. (Motion Sequence Number 004) shall be denied.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

Defendant Sylvan Shemitz Designs, Inc. ("Shemitz Designs") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against it and for summary judgment on its third party claim asserted against third party defendant Woodland Electrical Contracting Corp. ("Woodland Electrical"). Defendants Kaufman 8<sup>th</sup> Avenue Assoc. and Kaufman Management Company ("the Kaufman defendants") likewise move for summary judgment dismissing the complaint and cross claims against them; and alternatively for summary judgment on their cross claims of common law indemnification against third party defendant Woodland Electrical. Third party defendant Woodland Electrical cross moves for summary judgment on the Kaufman defendants' common law indemnification claims as there was no written executed agreement between them. Woodland Electrical also contends that as there was no active negligence on its part, it has no obligation to indemnify the Kaufman defendants, and that any dangerous condition of the light fixture arose from the defective design of Shemitz.

This action arises out of an accident that occurred on April 7, 2005. Plaintiff alleges that, as she walked on the sidewalk adjoining 519 Eighth Avenue, New York, New York ("the building"), she was struck and injured by a piece of a light fixture that fell from a height. Moving Kaufman defendants are the owner and managing agent of the building. Defendant In House Construction Service, Inc. ("In House") was the general contractor, retained by the Kaufman defendants to perform the interior lobby and exterior electrical lighting work, which was taking place at the building at the time of the accident. Defendant In House subcontracted the exterior electrical lighting work to third party defendant Woodland Electrical, who was engaged in installing the fixture in

question. Moving defendant Shemitz, the subcontractor of Woodland Electrical, designed and manufactured the fixture.

Moving defendant Shemitz argues that the complaint should be dismissed as against it because (1) plaintiff does not allege any products liability claim against it, (2) it owed no duty to plaintiff to inspect, construct or repair the lighting fixture in question, and (3), in any event, it had no actual or constructive notice of any dangerous condition.

The Kaufman defendants also move for summary judgment dismissing the complaint arguing that they are not liable, as a matter of law, as they were not the entity that installed the fixture, they were neither supervising nor performing any of the renovations, and as none of their employees were present outside the building when the fixture fell, they are not responsible for any negligence on the part of either independent contractor.

The court shall deny the motions of Shemitz, the Kaufman defendants and the cross motion of the third party defendant Woodland Electrical.

This court concurs with plaintiff that as for the Kaufman defendants, the law is clear that the duty imposed on them, as owner/managers of premises, is to maintain the building in a condition that is not dangerous to the traveling public, and such duty may not be shifted to an independent contractor as far as a pedestrian is concerned. Rohlf v Wejl, 244 AD 467 (2d Dept 1935) aff'd 271 NY 444 (1936). Plaintiff alleges in her complaint that the Kaufman defendants were negligent inter alia, in allowing the building to become dangerous and failing to use reasonable care in installing the fixture and "failing to warn plaintiff" of the dangerous condition. According to the plaintiff's testimony at her deposition, there was no scaffold protecting pedestrians from the

lighting installation work but only a construction sign that contained contact information. On the other hand, one of the workers for Woodland Electrical who was installing the fixture that broke apart and fell, testified that he and others were using a motorized scissor type scaffold at the time of the accident. There is clearly a question of fact as to whether any scaffold was being used and whether the installation was carried out with reasonable care at the time of plaintiff's accident.

As for third party defendant Woodland Electrical, the subcontractor of defendant In House, this court finds that third party defendant Woodland Electrical owed a duty of care to plaintiff pedestrian based upon evidence in the record that in carelessly installing the fixture which fell and struck plaintiff, Woodland "launched a force or instrument of harm". Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 140 (2002). Evidence of Woodland's negligence in doing so consists of the testimony the vice president of defendant Shemitz, which designed the fixture, who stated that Woodland improperly installed the set screws designed to hold the fixture to the hub. Such evidence precludes this court from granting third party defendant Woodland Electrical summary judgment dismissing Shemitz Designs' third party complaint for common law indemnification. Tipaldi v Riverside Memorial Chapel, Inc., 473 AD 414, aff'd 298 NY 686 (1948).

Nor is defendant Shemitz Designs entitled to summary judgment dismissing the first party complaint against it. The opinion of the representative of In House, the general contractor hired by the Kaufman defendants, that the angles of the light fixture were designed so as to be not of sufficient strength and therefore flexible, causing movement of the arm, raises an issue of fact on the products liability theory alleged in

