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

PRESENT: Hon. KATHRYN E. FREED, Justice PART 10

INNER VIEW, INC., and TZELAN, LLC.,
Plaintiffs,

- V -

CIRCLE PRESS, INC., ONE 2 ONE ON VARICK, LLC., NEXT PRINTING & DESIGN, INC., 1 800 POSTCARDS INC., and PRESS ACCESS, LLC.,
Defendants

INDEX NO. 601152-2010

MOTION DATE

MOTION SEQ.NO. 004

TZELAN, LLC.,
Plaintiff

-V-

121 VARICK STREET CORP.,
Defendant.

INDEX NO. 105764-20 11

The following papers, numbered 1 to 10 were read on this motion to/for dismissal.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1,2, (3-12)
Answering Affidavits - Exhibits	13,(1419)
Replying Affidavits	20
Memo of Law	21

Cross-Motion: ☐ Yes X No

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

Motion of Defendant Press Access, LLC., to dismiss the instant complaint and all cross claims against it is granted. See attached Decision/Order attached, dated December 6, 2012

Dated: December 11, 2012

J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

Check One: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT

ThSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS 10

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INNER VIEW, INC. and TZELAN LLC,

Plaintiffs,

-against-

CIRCLE PRESS, INC. ONE 2 ONE ON VARICK, LLC, NEXT PRINTING & DESIGN, INC., 1 800 POSTCARDS, INC., and PRESS ACCESS, LLC,

Defendants.

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DECISION/ORDER
Index No.: 601152-2010
Seq. No.: 004

TZELAN, LLC,

Plaintiff,

-against-

121 VARICK STREET CORP.,

Defendant.

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FILED
DEC 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

Index No. 105764-2011

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

Recitation, as required by CPLR §2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIDAVITS AND EXHIBITS ANNEXED.....	.....1-3,4-6....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....7-8 .....
REPLYING AFFIDAVITS.....	.....10-11....
OTHER.....(Defendants' memo of law).....	.....9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

The above two index numbers were consolidated by Order of Justice Judith Gische on Apri 18, 2012, for the sole purpose of joint discovery.

Apri 18, 2012, for the sole purpose of joint discovery.

Defendant Press Access, LLC, under Index No. 601152/2010, moves for an Order pursuant to CPLR §3212 dismissing the complaint and all cross-claims against it. It further moves for an Order granting it contractual indemnification over and against defendant 1 800 Postcards, Inc. Both plaintiff and defendants' Circle Press, Inc., One 2 One On Varick, LLC, Next Printing & Design, Inc., and 1 800 Postcards, Inc., (hereinafter collectively referred to as "Circle Press Defendants"), oppose.

After a review of the papers presented, all relevant statutes and caselaw, the Court grants defendant Press Access's motion in its entirety.

Factual Background:

The building located at 121 Varick Street, New York, New York is a commercial cooperative owned by 121 Varick Street Corporation, which has been traditionally occupied by printing companies. Defendant One 2 One on Varick leases the sixth floor. Co-defendants' Circle Press, Inc., Next Printing & Design and 1-800 Postcards sublease the space from One 2 One. These companies are all in the printing business, and as such, own and operate printing presses. Mr. David Moyal is the President and owner of these various defendant companies.

Plaintiff Tzelan LLC holds the proprietary lease for the fifth floor, sharing it with plaintiff Inner View, which operates as a design company under the name "Tony Chi & Associates." Defendant Press Access is the business of selling and installing printing machines, one of which is at issue in the instant suit and motions.

Some time prior to October 21, 2008, David Moyal contacted Press Access inquiring about the prospective purchase of a printer. Upon deciding that the "Heidelberg SM XL 105-5 +L" model

printer, was the model which most accommodated his needs, on October 21, 2008, 1-800 Postcards and Press Access entered into a contract for the purchase of said printer. Press Access's sales contract contained several pertinent provisions. First, it obligated 1-800 Postcards to hire its own contractors to perform the necessary electrical and plumbing hookups. Additionally, it required 1-800 Postcards to procure an engineer to perform appropriate testing in an effort to determine if the floor slab designated to house the printer, was capable of handling its weight. This provision was of particular importance because this specific printer weighed 111,554 pounds without piles and 115,280 pounds with two piles.

The contract further required1-800 Postcards to become acquainted with, and also comply with any, existing state, municipal or local rules, etc., concerning the use or operation of such a device, and to comply with all construction and building regulations related to its use and maintenance. Said contract also contained an indemnity clause, wherein 1-800 Postcards agreed to indemnify Press Access for damages caused by the printer. Subsequently, Mr. Moyal procured the services of Rajnikant Doshi, PE, of Consulting Engineers Collaborative, Inc. Appended as Exhibit "J" in Press Access's moving papers, is a letter from Mr. Doshi, dated April 1, 2011 and addressed to the Department of Buildings (DOB). It states that "[r]egarding a question raised for the sixth floor slab for the referenced building (121 Varick Street, Sixth Floor Loading), based on the structural drawings prepared by Victor Mayper Architect/Engineer dated February 7, 1928, the existing second floor through eleventh floor are designed for 200 psf super-imposed live load, hence, in our opinion the existing 8-inch concrete slab is sound and capable of supporting the static load of 180 psf."

Press Access and Mr. Moyal also entered into a service agreement, wherein it was agreed that 1-800 Postcards would perform daily and planned maintenance on the subject printer. It would also

take all "reasonable steps to safeguard the Covered Equipment," and refrain from using it if it appeared damaged in any way. Once Press Access was assured by 1-800 Postcards that the sixth floor slab could support the static-floor load for said printer, Press Access proceeded with its installation. 1-800 Postcards subsequently inspected and approved the installation, and never made any complaints regarding the printer's performance. Additionally, subsequent visits by Press Access technicians involved only routine maintenance, and not any significant repair work.

In his affidavit, Mr. Moyal avers that the intention of the parties in entering into the indemnification clause was "solely to protect Press Access if Postcards negligently operated the Subject Press and caused harm to third-parties.....There was no intention between the parties for 1-800 Postcards, Inc. to indemnify Press Access for improper installation or for damage to the building if Press Access misrepresented the suitability of the Subject Press for the space." Moyal Aff. ¶ 29.

The DOB subsequently issued two violations to the building owner, with regard to the printing press. While it is not clear what event(s) transpired leading up to these complaints, the DOB ultimately dismissed the complaints. On May 10, 2011, plaintiffs sued Circle Press, One 2 One on Varick, Next Printing & Design and 1-800 Postcards and Press Access, claiming that Press Access's improper installation of the printer caused electrical fires, cracks, falling concrete, toxic chemical leaks and vibrations which jeopardized the safety of the entire building.

Plaintiff Inner View requested injunctive relief seeking to enjoin 1-800 Postcards from operating its printers and to order their removal from the sixth floor, claiming that the installation, operation and maintenance of the presses constituted a nuisance. Press Access served its Answer denying these allegations and asserting a cross-claim against 1-800 Postcards for indemnification. However, it responded to discovery demands, producing all documents relevant to the sale,

installation and maintenance of the subject printer.

Plaintiff Tzelan commenced a separate action against 121 Varick Street Corp. Circle Press, One 2 One, Next Printing, and 1-800 Postcards moved to consolidate the actions because Mr. Moyal was the president of all of these respective entities. Said motion was granted to the extent that the actions were joined for discovery. Subsequently, the parties entered into a stipulation wherein once Press Access moved for summary judgment, all discovery relative to it would be stayed as to the other parties.

Positions of the parties:

Press Access argues that no negligence can be attributed to it because it owes no duty of care to any of the parties, in that it did not own, control, maintain or possess any portion of the building, nor did it create any dangerous condition therein. Press Access also argues that the indemnification clause clearly requires 1-800 Postcards to defend and indemnify it for damages akin to the complaints alleged by plaintiff.

Plaintiffs, via the affidavit of Tammy Chou, an "officer and member of plaintiff Tzelan," argue that once defendants provide discovery, the static load of the printer will be "identified to be greater than 178.6 per square foot." She argues that summary judgment should be denied because there exists a genuine issue of material fact as to the "live load" exerted by the subject printing press. She asserts that this is so because "in that the Heidelberg printing press is an electrically-powered machine, its 'static load' is irrelevant." Chou goes on to explain the differences between a static load and a live load. She also asserts that "the floor weight exerted by a machine with moving parts constituted a live load,.....thus, because "the building's Certificate of Occupancy fixes the live load for the entire building, the static load of machinery on the sixth floor, whatever it may be, is not

relevant to this action or this motion."

While plaintiff's papers contain convoluted percentages and poundage per square foot, Chou argues that the press exceeds the weight limit by "either 12% or 33%. Therefore, the "installation of the Heidelberg Press could lead to catastrophic collapse of the sixth floor into the fifth floor...and possibly... "the entire building," and excusing Press Access from the action "will insulate it from the horrific risk it created." It is important to note that Chou does not explain where she obtained these percentages and poundages.

Circle Press Defendants allege that plaintiffs have "chronically refused to inspect" the 6th Floor, which is the "main reason why they have not yet filed their own motion for summary judgment." They accuse plaintiffs of consistently failing to inspect the sixth floor in willful disregard of previous preliminary conference orders, So-Ordered by Hon. Judith Gische on February 24, 2011. To date, since no inspection has ever been conducted by plaintiffs, defendants now urge this Court to"throw out plaintiffs' frivolous claims."

Additionally, Circle Press defendants argue that plaintiffs have failed to proffer any offer of proof concerning the alleged hazardous conditions caused by the printer, and also how these conditions amount to a nuisance under the law. Circle Press defendants also argue that Press Access "cites no Alabama law, whatsoever, for its position that it is entitled to contractual indemnification, They refer to and rely on a particular statement contained in the contract which provides "THIS CONTRACT SHALL BE GOVERNED AND ENFORCED BY THE LAWS OF THE STATE OF ALABAMA."

The subject indemnity clause states:

"Buyer is responsible to provide a safe workplace and facility for employees and third parties. To the extent that personal injury or property damage occurs as a result of the Buyer's failure to operate or maintain the workplace or the equipment in accordance with all applicable safety laws, rules, and regulations, industry standards, Seller's instructions and recommended methods and procedures or as a result of the change, removal or defeat of guards, safety devices or software provided by the Seller, Buyer will defend and indemnify Seller from all liability, claims, costs or damages arising there from. Seller claims any right of indemnification for losses caused by abuse or misuse of the equipment established by applicable law."

Conclusions of law:

The drastic remedy of summary judgment should be granted only where there are no triable issues of fact (Chemical Bank v. West 195th Street Development Corp., 161 A.D.2d 218 [1st Dept. 1990]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2d Dept. 2009]), or where the issue is arguable or debatable (Stone v. Goodson, 8 N.Y.2d 8 [1960]). In order to prevail on a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]). Once the movant demonstrates entitlement to judgment, the burden then shifts to the opponent to rebut the prima facie showing (Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870, 872 [1989]).

In the instant case, the Court finds neither plaintiff nor the Circle Press Defendants have submitted any evidentiary proof in admissible form that unequivocally establishes a prima facie case of negligence against Press Access. The cause of action of negligence requires a party to demonstrate a duty owed to it by defendant; a breach thereof; and injury or damage proximately resulting therefrom (*see* Derdiarian v. Felix Constr.Corp., 51 N.Y.2d 308 [1980]; Murray v. New York City Housing Auth.,269 A.D.2d 288 [1st Dept. 2000]).

In consideration of this, it is clear that plaintiffs have failed to present even a scintilla of evidence which proves that the alleged "dangerous" conditions even exist, let alone that they are the direct result of Press Access's alleged improper installation of the printer. While Press Access supported its motion with physical documentation, plaintiff failed to specifically address this evidentiary record. In opposing a summary judgment motion, the party must lay bare its evidentiary proof. "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation" (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, 49 N.Y.557, 562 [1980]).

Indeed, in her affidavit, Tammy Chou confusingly addresses the alleged difference between "live and static loads." However, she fails to indicate with any semblance of certainty, how she arrived at her calculation/conclusions, and if she even possesses the requisite expertise to render them. Moreover, statements emanating from both plaintiffs and Circle Press Defendants' have succeeded in undermining their respective positions, ie, "[p]ress Access's installation *could* cause collapse of the entire building incidents (see Banker aff.¶ 5); "[t]o be clear, Circle Press Defendants believe the facts irrefutably demonstrate that there is no problem with the Subject Press installation or load in the building" (see Circle Press Defendants' Memo of Law ¶¶ 9).

Press Access has submitted admissible evidence of its *lack* of negligence in the form of the Consulting Engineers Collaborative and the DOB. The DOB investigated the complaints and found that the printing press posed no danger and "fit in with the manufacturing allowability. The disposition of the DOB, clearly states "ENGINEERS REPORT SUBMITTED & PRINTING PRESS DOES NOT EXCEED LIVE LOADS FOR FLOOR, INSPECTED WITH FEU TIM LYNCH." It appears that plaintiffs never contested or appealed the DOB's decision. As such, they are no longer

able to do so because as a general rule, the doctrines of res judicata and collateral estoppel apply to quasi-judicial determinations of administrative agencies (*see* Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499 [1984]).

Plaintiffs' further argument that Press Access's motion should be denied because outstanding discovery exists, is belied by Exhibit "D," which is appended to Press Access's motion. Exhibit "D" is a "So-Ordered" stipulation wherein it is agreed that "all parties will serve responses to outstanding discovery requests within 45 days." The parties further agreed to "complete all depositions within 60 days" of February 16, 2012. Finally, the parties agreed that once Press Access moved for summary judgment, all discovery relative to it would be stayed as to all other parties.

The Court also finds Circle Press Defendants' argument against the application of the indemnity clause, to be unavailing, and contradictory. They argue that "the intention of the parties in entering into the indemnification clause was to protect Press Access from Circle Press Defendants' negligence (Moyal Affidavit ¶ 29), not to protect Press Access from damages arising out of a shoddy or otherwise incorrect installation or Press Access' own misrepresentations." This statement is disingenuous and patently ridiculous, in light of Circle Press Defendants' previous statement that they believe that there was nothing wrong with the printer or the method and procedures Press Access utilized in its installation.

Additionally, the Court finds Circle Press Defendants' argument that the application of Alabama law invalidates the instant indemnity clause to also be unavailing. They cite several cases emanating from the Alabama Supreme Court, which ubiquitously stand for the general, common law proposition that when determining the validity of an indemnity clause, the requisite intent of the parties must be clear and unambiguous. "Contracts will not be construed to indemnify a person

against his [or her] own negligence unless such intention is expressed in unequivocal terms" (Kurek v. Port Chester Hous. Auth., 18 N.Y.2d450, 456 [1966]; Sherry v. Wal-Mart Stores, E., L.P., 67 A.D.3d 992 [2d Dept. 2009]). "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. Feiden, Inc., 8 N.Y.3d 265, 275 [2007]). 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 (*see* Correia v. Professional Data Mgt., 259 A.D.2d 60, 65 [1st Dept. 1999]; Martins v. Little 40 Worth Assoc. Inc., 72 A.D.3d 483 [1st Dept. 2010]).

Therefore, the Court finds that Press Access's request for contractual indemnification is rendered moot in that it is hereby

ORDERED that defendant Press Access's motion is granted in that the instant complaint and all cross-claims against it are dismissed and it is further

ORDERED that the Clerk of the Court enter judgment accordingly and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: December 6, 2012

Hon. Kathryn E. Freed
J.S.C.