

<b>Rogers v Sermoneta</b>
2014 NY Slip Op 30161(U)
January 14, 2014
Supreme Court, New York County
Docket Number: 101000/2011
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN  
J.S.C. Justice

PART 36

Index Number : 101000/2011  
ROGERS, SUE IDA  
vs.  
SERMONETA, LLC.  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2, 3  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 4, 5, 6  
Replying Affidavits \_\_\_\_\_ | No(s). 7

Upon the foregoing papers, it is ordered that this motion ~~is~~ for summary judgment  
by third-party defendant Space 4 Architecture  
is granted, in accordance with the attached  
memorandum decision.

It is further ordered that counsel to speak  
regarding private mediation on or before  
2/6/14, 3pm, initiated by plaintiff counsel.

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

**FILED**

JAN 23 2014

Dated: 1/14/14 COUNTY CLERK'S OFFICE, NEW YORK  
DORIS LING-COHAN, J.S.C.

- 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

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

-----X  
SUE IDA ROGERS,

Plaintiff,

INDEX NO.  
101000/2011

-against-

SERMONETA, et al and ZURICH HOLDING CO., LLC,

Motion Seq. No.:  
003

Defendants.

-----X  
SHADAL LLC, ALDASH LLC, and GLOSER LTD d/b/a/  
SERMONETA GLOVES,

Defendants/Third-Party Plaintiff,

THIRD-PARTY  
INDEX NO.  
590223/2012

-against-

**FILED**

SPACE 4 ARCHITECTURE,

JAN 23 2014

DECISION/  
ORDER

Third -Party Defendant COUNTY CLERK'S OFFICE  
NEW YORK X

LING-COHAN, J.

Plaintiff commenced this action for personal injuries she allegedly sustained when she tripped and fell, in the interior of a retail store, operated by defendants Shadal, LLC and Gloser, LTD, doing business as Sermoneta Gloves ("Sermoneta"). Plaintiff alleges that she tripped on a block, which was a part of the configuration of the sales counter in the store. The Sermoneta defendants are tenants in the building, which is owned by defendant Zurich Holding Co., LLC ("Zurich").

Sermoneta commenced a third-party action against third-party defendant Space 4 Architecture ("Space 4") asserting causes of action for: (1) negligence; (2) common law and contractual indemnification; (3) contribution; and (4) breach of contract. It is undisputed that Space 4's involvement was pursuant to an agreement between Space 4 and Sermoneta. Exhibit D,

Affirmation of Gail Mota. Pursuant to such parties' agreement, Space 4 was hired to provide "Architectural Services" to Sermoneta, in conjunction with the renovation of Sermoneta's store. Sermoneta hired an Italian architectural firm, Eco Arredi P+R+V ("Eco"), to design the store's interior; Eco is not a party to this action. In accordance with the agreement, Space 4 was hired to assure that the design and execution thereof, were in compliance with "local laws and construction rules"; to prepare, stamp and seal all the plans necessary to obtain the required construction permits, and to assist and coordinate the completion of the project with non-party designer Eco.

The within motion for summary judgment by Space 4, seeks dismissal of the third-party complaint, on the ground that Space 4 has complied with its obligations as provided in the agreement with Sermoneta, and is free from any of the alleged negligence, as a matter of law. In particularizing the alleged negligence of Space 4, Sermoneta alleged in its Bill of Particulars only that Space 4 was negligent in the performance of its agreement, and that Space 4 failed to comply with its obligations under the written agreement between the parties. Sermoneta alleges in its supplemental bill of particulars various NYC Administrative Code violations. In seeking summary judgment of dismissal, Space 4 argues that it complied with all of the obligations under the agreement with Sermoneta and that there are no code violations.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Stillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). The proponent of a summary judgment motion must "make a prima face showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." *Zuckerman v. City of New York*, 49 NY2d 557 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 (1978).

Applying such principles, herein, Space 4 has established entitlement to summary judgment of dismissal of the third-party complaint, which has not been sufficiently refuted; thus, Space 4's motion for summary judgment is granted, as detailed below.

In support of its motion for summary judgment, Space 4 has supplied, *inter alia*, the deposition transcript of Guelfo Carpegna ("Carpegna"), owner of Space 4, in which he testified that Space 4 was not involved in the design of Semoneta's renovation project, but rather that Eco designed the interior of the store for Semoneta. Exhibit K, Notice of Motion, at 17, lines 2-12. He further testified that Space 4 was not involved in the construction of the store, but that a construction company was hired by Semoneta. *Id.* at 23, lines 23-25; at 24, lines 2-13. According to Carpegna, it was Space 4's responsibility to insure that the actual construction was according to the plans as designed by Eco and to file the plans with the New York City Department of Buildings, which were approved. *Id.* at 26, lines 4-18; at 35, lines 20-25; at 36, lines 2-4.

Space 4 has also submitted an affidavit by Thomas R. Turkel ("Turkel"), a certified and registered architect of the State of New York, in which he maintains that Space 4 has fully complied with its professional obligations under the agreement between Space 4 and Sermoneta. Specifically, Turkel states that, *inter alia*, "it is [his] professional opinion within a reasonable degree of architectural certainty that Space 4 fully met all of its obligations with respect to the aspects of its [agreement] to implement, draw, file and obtain permits for the [Eco] design..[as] evidenced by the fact that the store has been built as designed by [Eco], and does not violate any local law or construction standard". ¶14, Turkel Affidavit. Significantly, as stated above, in particularizing Sermoneta's claims against Space 4, Sermoneta alleges in its Bill of Particulars merely that Space 4 was negligent in the performance of its agreement, and that Space 4 failed to comply with its obligations under the written agreement between the parties, which is specifically refuted by Space 4's expert. Moreover, while Sermoneta alleges in its supplemental bill of particulars various code violations, no evidence of any code violations has been submitted in the record before this court and Space 4's expert, Turkel, explicitly states that it is his "professional opinion, within a reasonable degree of architectural certainty that the subject design does not violate any of [the

three] [NYC Administrative Code] provisions” that Sermoneta alleges were violated. Thus, based upon Space 4's submissions, Space 4 has established a *prima facie* entitlement to dismissal.

In opposition, no factual issues have been raised. While Sermoneta has submitted its own expert's affidavit by Professional Engineer Kristopher Seluga (“Seluga”), significantly, Seluga *concurrs with Space 4's expert*, that there were no code violations with respect to the subject renovation project. Exhibit F, Mota Affirmation. Sermoneta's expert's *speculative and conclusory* claim, without any supporting evidence, that “to the extent that other parties may claim the subject store design violated building code section 27-127 or any other portion of the building code, or to the extent that a court or jury might find such a violation, it was within the scope of Space 4's assignment to have identified and corrected any such code violations” (*id.* at 10), is insufficient to establish any liability on Space 4's part.

Further, while plaintiff has supplied opposition to Space 4's motion, it is noted that, plaintiff has failed to assert any direct causes of action against Space 4. Additionally, plaintiff's assertion that Space 4 committed architectural malpractice is without merit. Significantly, there are no claims asserted against Space 4 for malpractice. Nor are there any claims by Sermoneta that Space 4's negligent design led to the creation of a tripping hazard that resulted in plaintiff's injuries. Moreover, there is no *evidence* of malpractice by Space 4; no expert support has been supplied to indicate that Space 4 departed from accepted standards of architectural practice, in any way. Plaintiff's counsel's bare and speculative assertions as to such are insufficient. *See Grullon v. City of New York*, 297 AD2d 261, 263-64 (1<sup>st</sup> Dept 2002). Moreover, plaintiff's counsel's statement that “it is *arguable* that defendant violated various sections of the New York City Administrative Code” (¶46, Plaintiff's Affirmation in Opposition [emphasis supplied]), is a mere expression of hope and equally as speculative, as no evidence has been submitted in the record before this court, of any code violations. Thus, plaintiff's assertions are insufficient to defeat Space 4's motion for summary judgment. *See Corbett v. Russo*, 198 AD2d 46 (1<sup>st</sup> Dept 1993); *Zuckerman v. City of New York*, 49 NY2d at 562-63 (1980); *Romano v. Stanley*, 90 NY2d 444, 452 (1997). Moreover, while plaintiff's counsel asserts that “[t]here is an issue of fact as to whether the third-party defendant Space 4...was negligent in failing to recognize and speak up about the obvious tripping

hazard” (¶41, Plaintiff’s Affirmation in Opposition), third-party plaintiffs have not asserted such a claim against Space 4, but, rather, merely assert that Space 4’s negligence was its failure to comply with the terms of the parties’ agreement, which required that Space 4 confirm that Eco’s design plan was in compliance with “local laws and construction rules” and to obtain the necessary permits and approvals from the City, which were obtained. Thus, plaintiff’s affirmation in opposition fails to raise any factual issues to warrant a denial of Space 4’s motion for summary judgment.

Additionally, as to Sermoneta’s causes of action for contractual indemnification and breach of a contractual agreement to procure insurance on Sermoneta’s behalf, no evidence has been presented to demonstrate that such an agreement, requiring that Space 4 procure insurance on Sermoneta’s behalf or indemnify Sermoneta, exists.

Accordingly, based upon the above, it is

ORDERED, that Space 4 Architecture’s motion for summary judgment of dismissal of the third-party complaint is granted and the Clerk of the Court shall enter a judgment of dismissal of the third-party complaint, with costs and disbursements, upon proof of service of a copy of this order, with notice of entry, and it is further

ORDERED that, within 30 days of entry of this order, Space 4 Architecture shall serve a copy upon all parties, with notice of entry.

ORDERED that the remainder of the action shall continue.

Dated: 1/14/14



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Doris Ling-Cohan, J. S. CLERK COUNTY CLERK’S OFFICE  
NEW YORK

**FILED**

JAN 23 2014