SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice PART 46

Index Number : 101056/2010
TUCHMAN, MAURICE
VS.
DEAM PROPERTIES, (U.S.) LLC
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

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

The court denies third party defendant's motion for summary judgment pursuant to the accompanying decision. C.P.L.R. § 3212(b).

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

FILED
MAY 13 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/25/14

Lucy Billings, J.S.C.
LUCY BILLINGS 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: PART 46

MAURICE TUCHMAN and ADLIN DE DOMINGO,

Plaintiffs

- against -

DEAM PROPERTIES (US), LLC, and EVEREST REALTY HOLDINGS, INC. d/b/a ERH CONTRACTING,

Defendants

Index No. 101056/2010

EVEREST REALTY HOLDINGS, INC. d/b/a ERH CONTRACTING,

Third Party Plaintiff

- against -

TRUMP PALACE CONDOMINIUMS,

Third Party Defendant

Index No. 590649/2011

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiffs sue to recover for property damage from two separate floods into their condominium unit 17B from the unit above, 18B, which defendant Deam Properties (US), LLC, owned, and in which defendant Everest Realty Holdings performed renovations, in a condominium building owned by third party defendant Trump Palace Condominiums, at 200 East 69th Street, New York County. In a third party action, Everest Realty seeks contribution and implied indemnification from Trump Palace.

Trump Palace moves for summary judgment dismissing the third party action and any cross-claims against Trump Palace or for summary judgment on Trump Palace's counterclaims against Everest Realty and on its cross-claim for contractual indemnification against Deam Properties. C.P.L.R. § 3212(b). Everest Realty separately moves for summary judgment dismissing the complaint and Deam Properties' cross-claims against Everest Realty or, at minimum, dismissing plaintiffs' claims for lost rental income and lost earnings. C.P.L.R. § 3212(b) and (e). Plaintiffs cross-move for summary judgment on defendants' liability based on plaintiffs' negligence and breach of contract claims. Id. Deam Properties separately moves for summary judgment dismissing the complaint against this defendant. C.P.L.R. § 3212(b). For the reasons explained below, the court grants Everest Realty's motion insofar as it seeks dismissal of plaintiffs' lost earnings claim, grants plaintiffs' cross-motion insofar as its seeks summary judgment on defendants' liability for the flood December 17, 2008, and denies the remainder of the parties' motions and cross-motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4

N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if the moving parties satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If the moving parties fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384; Romero v. Morrisania Towers Hous. Co. Ltd. Partnership, 91 A.D.3d 507, 508 (1st Dep't 2012); Ruth B. v. Whitehall Apt. Co., LLC, 56 A.D.3d 273, 274 (1st Dep't 2008); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007). In evaluating the evidence for purposes of the parties' motions and cross-motion, the court construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

III. THE MOTIONS IN THE MAIN ACTION

A. Everest Realty's Motion

As a contractor providing services to Deam Properties, Everest Realty is liable to plaintiffs for its negligence or other culpable conduct in performing the contract, when its breach of a contractual duty caused plaintiffs' injury, only under one of the following sets of circumstances. (1) Everest

Realty displaced Deam Properties' duty to maintain its premises in a safe condition. (2) Plaintiffs detrimentally relied on Everest Realty's performance of the contract. (3) Everest Realty launched the "instrument of harm" that caused plaintiffs' property damage. Church v. Callanan Indus., 99 N.Y.2d 104, 111-12 (2002); Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140 (2002); Rahim v. Sottile Sec. Co., 32 A.D.3d 77, 80-81 (1st Dep't 2006); Fernandez v. Otis El. Co., 4 A.D.3d 69, 73 (1st Dep't 2004). The record supports the third set of circumstances based on the undisputed evidence of water leaking into plaintiffs' unit December 17, 2008, that originated from a valve Everest Realty was working on to perform the contract to renovate unit 18B.

To avoid liability for the leak due to Everest Realty's work, Everest Realty must demonstrate that its work did not cause the leak. Corprew v. City of New York, 106 A.D.3d 524 (1st Dep't 2013); Lopez v. New York Life Ins. Co., 90 A.D.3d 446, 447 (1st Dep't 2011); Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d 599, 600 (1st Dep't 2010); Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d 341, 342 (1st Dep't 2008). See Fernandez v. 707, Inc., 85 A.D.3d 539, 541 (1st Dep't 2011); Bajrushi v. Gomo Corp., 18 A.D.3d 240, 241 (1st Dep't 2005); Golden v. Manhasset Condominium, 2 A.D.3d 345, 347 (1st Dep't 2003). Although Everest Realty claims it satisfied its duty as a contractor when it informed Deam Properties of the leak, Everest Realty's evidence of its single report of the leak is its Chief Executive Officer Rivera's inadmissible email to Deam Properties'

managing agent. See Fernandez v. Otis El. Co., 4 A.D.3d at 71-72. Everest Realty further claims Trump Palace refused to shut off water to unit 18B until a $1,000.00 fee was paid, but again presents only Rivera's hearsay account of an Everest Realty employee's report to Rivera that the employee notified Trump Palace of the leak and the need to shut off the water, but Trump Palace's resident manager refused. In fact the resident manager in his deposition testimony denied that he received any request to shut off water before or after the December 2008 flood. Everest Realty's own account of its measures to prevent the valve from leaking, moreover, that its employee attached one end of a hose to the valve, taped the other end into a sink, and kinked the hose to stop the water flow, falls far short of demonstrating Everest Realty's non-negligent performance of its contract in December 2008. See Rivera v. City of New York, 42 A.D.3d 361, 362 (1st Dep't 2007); Fernandez v. Otis El. Co., 4 A.D.3d at 73.

Regarding the water leak into plaintiffs' unit October 30, 2009, the observation by Trump Palace's security guard Greger Moreau of water surrounding the base of the washing machine that Everest Realty installed demonstrates its potential negligence. By pointing merely to its completion of its work and Deam Properties' acceptance of that work months before the leak, without evidence of the leak's cause, Everest Realty fails to satisfy its burden to demonstrate that it did not cause the leak. Corprew v. City of New York, 106 A.D.3d 524; Lopez v. New York Life Ins. Co., 90 A.D.3d at 448. At minimum, factual issues

remain regarding whether Everest Realty created the conditions causing the October 2009 leak. Kramer v. Cury, 92 A.D.3d 484, 485 (1st Dep't 2012); Lopez v. New York Life Ins. Co., 90 A.D.3d at 447-48; Singh v. United Cerebral Palsy of N.Y. City, Inc., 72 A.D.3d 272, 278 (1st Dep't 2010); Grant v. Caprice Mgt. Corp., 43 A.D.3d 708, 709 (1st Dep't 2007). See Eliasberg v. Memorial Sloan-Kettering Cancer Ctr., 79 A.D.3d 628 (1st Dep't 2010); Corrales v. Reckson Assoc. Realty Corp., 55 A.D.3d 469. 470 (1st Dep't 2008).

Short of summary judgment dismissing the complaint against Everest Realty, it seeks summary judgment dismissing plaintiffs' claims for lost rental income and lost earnings. In their bill of particulars, plaintiffs claim damages of $18,500.00 per month, the rental value of their home in California where they resided while their condominium unit in New York was uninhabitable from the water leaks' damage. Thus plaintiffs' claimed lost rental income is their claimed damages from being deprived of the use and enjoyment of their condominium unit. As long as evidence shows that defendants' wrongful conduct, in depriving plaintiffs of their unit in New York, prevented plaintiffs from renting their California home, their claim for lost rental income is viable even though the unrented premises were not damaged by defendants. Rott v. Negev, LLC, 102 A.D.3d 522 (1st Dep't 2013); Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d 473, 474 (1st Dep't 2012); Pope v. Saget, 29 A.D.3d 437, 442 (1st Dep't 2006); Cambridge Assoc. v. Town of N. Salem,

282 A.D.2d 702 (2d Dep't 2001); Soule v. Soule, 252 A.D.2d 768, 770-71 (3d Dep't 1998). See 30-40 E. Main St. Bayshore, Inc. v. Republic Franklin Ins. Co., 74 A.D.3d 1330, 1333 (2d Dep't 2010); Gettner v. Getty Oil Co., 266 A.D.2d 342, 343 (2d Dep't 1999). There must be a comparison between the value of the premises defendants' conduct caused plaintiffs to vacate and the value of the substitute premises in which plaintiffs resided, preventing them from renting those alternate premises.

Plaintiffs' testimony at their depositions establishes only the rent paid by prior tenants at their California home and the duration of plaintiffs' stay there. See Rott v. Negev, LLC, 102 A.D.3d 522; Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d at 476; LaSalle Bank N.A. v. Nomura Asset Capital Corp., 47 A.D.3d 103, 107 (1st Dep't 2007); Cambridge Assoc. v. Town of N. Salem, 282 A.D.2d 702. This testimony does not show that their condominium unit in New York was of equivalent value or that a rental unit comparable to their unit was unavailable at less cost than the rental value of their California home. Nor does their testimony show that the condition of their condominium unit required their relocation for the period plaintiffs stayed in their California home or that the condition even required their relocation. Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d at 475. Plaintiffs will bear the burden to show the causal connection and the comparable values at trial. Id. at 474.

The absence of this evidence at this stage does not negate

plaintiffs' entitlement to recover all or part of their lost rental income, but bears only on the amount of their recovery. Id. at 475; LaSalle Bank N.A. v. Nomura Asset Capital Corp., 47 A.D.3d at 108-109. Evidence that a rental unit comparable to plaintiffs' unit was available at less cost than $18,500.00 per month or that their unit's condition did not require their relocation for as long as plaintiffs stayed in California, however, is evidence regarding mitigation of plaintiffs' damages from being deprived of the use and enjoyment of their unit. Jenkins v. Ettinger, 55 N.Y.2d 35, 39 (1982); Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d at 474; LaSalle Bank N.A. v. Nomura Asset Capital Corp., 47 A.D.3d at 107, 109. It is not plaintiffs' burden, especially in the context of Everest Realty's motion seeking dismissal of this claim, to present evidence of mitigation. Jenkins v. Ettinger, 55 N.Y.2d at 39; Assouline Ritz1 LLC v. Edward I. Mills & Assoc., Architects, PC, 91 A.D.3d at 474; LaSalle Bank N.A. v. Nomura Asset Capital Corp., 47 A.D.3d at 107. See American Capital Access Serv. Corp. v. Muessel, 28 A.D.3d 395, 396 (1st Dep't 2006). Everest Realty and its co-defendant may present evidence of plaintiffs' failure to mitigate their claimed damages of $18,500.00 per month at trial. See Gettner v. Getty Oil Co., 266 A.D.2d at 343-44.

Finally, plaintiffs do not allege any claim for lost earnings or lost profits in their complaint or bill of particulars. Any claim that plaintiffs now allege, that they

lost earnings because their condominium unit's condition prevented them from using their unit to show artwork, or for any other lost earnings or profits aside from the rental income discussed above, is unpleaded and therefore dismissed. Paris v. Waterman S.S. Corp., 218 A.D.2d 561, 565 (1st Dep't 1995). See Cross v. Colen, 6 A.D.3d 306, 307 (1st Dep't 2004).

B. Deam Properties' Motion

Premises owners owe a duty to maintain their premises in a condition that will not foreseeably cause injury to persons or other property. 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d 280, 290 (2001); 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667 (1st Dep't 2011). See Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Hasley v. Abels, 84 A.D.3d 480, 482 (1st Dep't 2011); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006). To hold Deam Properties liable for a condition in Deam Properties' premises due to its negligence, plaintiffs must demonstrate that Deam Properties created the condition or received actual or constructive notice of the condition. Hasley v. Abels, 84 A.D.3d at 482; Alexander v. New York City Tr., 34 A.D.3d at 313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006).

While Deam Properties, as the owner of the unit above plaintiffs' unit, would be liable for damages caused by Deam Properties negligently allowing water to infiltrate plaintiffs' unit, Liberman v. Cayre Synergy 73rd LLC, 108 A.D.3d 426, 427

(1st Dep't 2013), Deam Properties contends that its independent contractor Everest Realty's negligence allowed the infiltration, for which Deam Properties is not liable. An employer of an independent contractor is ordinarily not liable for the contractor's negligence. Chainani v. Board of Educ. of City of N.Y., 87 N.Y.2d 370, 380-81 (1995); Rosenberg v. Equitable Life Assur. Socy. of U.S., 79 N.Y.2d 663, 668 (1992); 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667; Emmons v. City of New York, 283 A.D.2d 244, 245 (1st Dep't 2001). If the employer's duty to injured parties is non-delegable, however, the employer is liable for the independent contractor's negligence even if the employer committed no negligent acts or omissions itself. Rosenberg v. Equitable Life Assur. Socy. of U.S., 79 N.Y.2d at 668; 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667; Daitch v. Naman, 25 A.D.3d 458, 459 (1st Dep't 2006); Dowling v. 257 Assoc., 235 A.D.2d 293 (1st Dep't 1997). See Jacobson v. 142 E. 16 Coop. Owners, 295 A.D.2d 211 (1st Dep't 2002).

Deam Properties' duty as the owner to maintain its unit to avoid damage to adjoining owners' premises is non-delegable. N.Y. Mult. Dwell. Law § 78(1); 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667; Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d 364, 367 (1st Dep't 2006). See McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 375 (2011); 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d at 290; Hughey v. RHM-88, LLC, 77 A.D.3d 520, 521-22 (1st Dep't 2010); Emmons v. City of New York, 283 A.D.2d at 245. Since Deam Properties' maintenance of its

unit caused damage to adjoining owners' premises, Deam Properties is vicariously liable for Everest Realty's negligence in performing that work under their contract, causing plaintiffs' property damage. Rosenberg v. Equitable Life Assur. Socy. of U.S., 79 N.Y.2d at 668; 905 5th Assoc., Inc. v. Weintraub, 85 A.D.3d 667; Daitch v. Naman, 25 A.D.3d at 459; Dowling v. 257 Assoc., 235 A.D.2d 293. See Chainani v. Board of Educ. of City of N.Y., 87 N.Y.2d at 380. While Deam Properties contends its lack of control over Everest Realty's work insulates Deam Properties from liability, that lack of control is merely a factor in determining a contractor's status as an independent contractor or employee and does not affect Deam Properties' vicarious liability. Concord Vil. Owners, Inc. v. Trinity Communications Corp., 61 A.D.3d 410, 411 (1st Dep't 2009); Goodwin v. Comcast Corp., 42 A.D.3d 322 (1st Dep't 2007).

C. Plaintiffs' Cross-Motion

Plaintiffs cross-move for summary judgment on both defendants' liability for negligence and on Deam Properties' liability for its breach of the condominium bylaws and an alteration agreement between Deam Properties and Trump Palace. Plaintiffs claim they are additional insureds under the alteration agreement. No evidence in the record indicates that the valve on which Everest Realty was working malfunctioned due to any cause other than Everest Realty's work. Nor does any evidence indicate that the cause of the leak December 17, 2008, was anything other than that malfunctioning valve and Everest

Realty's ineffective measures to stop water flow from the valve onto the floor in unit 18B. Thus plaintiffs are entitled summary judgment on Everest Realty's direct liability and Deam Properties' vicarious liability for the December 2008 flood.

The record does not, however, support a finding of liability on either defendant's part for the October 2009 leak. Everest Realty's installation of a washing machine in Deam Properties' unit where water had accumulated around the machine's base shortly after plaintiffs' complaint of a leak into their unit below raises factual questions regarding defendants' liability, to be sure. Absent evidence of the leak's cause, however, plaintiffs do not establish defendants' liability for the leak based on negligence as a matter of law. Espinosa v. Azure Holdings II, LP, 58 A.D.3d 287, 289 (1st Dep't 2008); Fravezzi v. Koritz, 295 A.D.2d 290 (1st Dep't 2002). See Zimbardi v. City of New York, 94 A.D.3d 454, 455 (1st Dep't 2012); Sacco v. City of New York, 92 A.D.3d 529, 530 (1st Dep't 2012).

The court also denies plaintiffs' motion for summary judgment on their contractual claims against Deam Properties. Plaintiffs rely on the condominium bylaws to establish Deam Properties' liability for failing to maintain its unit and to indemnify other unit owners for damages caused by its renovation, but fail to authenticate the bylaws through an affidavit or deposition testimony on personal knowledge. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 638 (1st Dep't 2011); Murray v. City of New York, 74 A.D.3d 550 (1st Dep't

2010); Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 (1st Dep't 2010); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009). See IRB-Brasil Resseguros S.A. v. Eldorado Trading Corp., 68 A.D.3d 576, 577 (1st Dep't 2009); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); People v. Bryant, 12 A.D.3d 1077, 1079 (4th Dep't 2004). Although plaintiffs also claim to be additional insureds under the alteration agreement, they fail to present the agreement. Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d at 342; Giordano v. Berisha, 45 A.D.3d 416, 417 (1st Dep't 2007); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007); Washington v. Montefiore Medical Ctr., 9 A.D.3d 271, 272 (1st Dep't 2004). Plaintiffs present an insurance certificate, but it likewise is not authenticated on personal knowledge, and, in any event, does not list them as additional insureds.

IV. TRUMP PALACE'S MOTION IN THE THIRD PARTY ACTION

A. Motion for Summary Judgment Dismissing Claims Against Trump Palace

To support third party defendant Trump Palace's contention that Trump Palace owed no duty regarding the condominium units' interior, see Fayolle v. East W. Manhattan Portfolio L.P., 108 A.D.3d 476 (1st Dep't 2013); Araujo v. Mercer Sq. Owners Corp., 95 A.D.3d 624 (1st Dep't 2012); Agosto v. 30th Place Holding, LLC, 73 A.D.3d 492 (1st Dep't 2010); Rothstein v. 400 E. 54th St. Co., 51 A.D.3d 431 (1st Dep't 2008), Trump Palace also relies the

condominium bylaws, but fails to present them in admissible form as required to demonstrate entitlement to summary judgment. See Miller-Francis v. Smith-Jackson, 113 A.D.3d 28, 34-35 (1st Dep't 2013); Murray v. City of New York, 74 A.D.3d 550; Tortorello v. Carlin, 260 A.D.2d 201, 204 (1st Dep't 1999). While Meghan Kane, Trump Palace's Property Manager, attests that the condominium bylaws and declaration that Trump Palace presents are accurate to the best of her knowledge, no witness authenticates these documents by attesting to familiarity with the signature on the declaration, to which the bylaws are an exhibit, or personal knowledge of the declaration's execution. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d at 638; Rivera v. GT Acquisition 1 Corp., 72 A.D.3d at 526; Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471; Bermudez v. Ruiz, 185 A.D.2d 212, 214 (1st Dep't 1992). See Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d at 357-58; Acevedo v. Audubon Mgt., 280 A.D.2d at 95; People v. Bryant, 12 A.D.3d at 1079; Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003).

Trump Palace's failure to present admissible evidence that Trump Palace owed no duty to plaintiffs requires denial of its motion for summary judgment dismissing the third party complaint. Lopez v. New York Life Ins. Co., 90 A.D.3d at 448; Singh v. United Cerebral Palsy of N.Y. City, Inc., 72 A.D.3d at 278; Corrales v. Reckson Assoc. Realty Corp., 55 A.D.3d at 470. Since no other parties claim against Trump Palace, its motion's request for summary judgment dismissing cross-claims is moot and

therefore denied.

B. Motion for Summary Judgment on Trump Palace's Claims Against Defendants

Since Trump Palace bases its claim for contractual indemnification against Deam Properties on the inadmissible condominium bylaws, Trump Palace is not entitled to summary judgment on contractual indemnification against Deam Properties. Siegel v. RRG Fort Greene, Inc., 68 A.D.3d 675, 676 (1st Dep't 2009). Trump Palace also relies on the bylaws to establish that it was not negligent in failing to address the flooding inside unit 18B or 17B, because the bylaws imposed no duty of care regarding the conditions inside the condominium units. Thus, absent admissible bylaws to rely on, Trump Palace has not demonstrated entitlement to summary judgment on implied indemnification against Deam Properties or Everest Realty. Martins v. Little 40 Worth Assoc., Inc., 72 A.D.3d 483, 484 (1st Dep't 2010); Esteva v. Nash, 55 A.D.3d 474, 475 (1st Dep't 2008); Corrales v. Reckson Assoc. Realty Corp., 55 A.D.3d at 470; Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d 209, 212 (1st Dep't 2006). See Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d 234, 247 (1st Dep't 2013); Structure Tone, Inc. v. Universal Servs. Group, Ltd., 87 A.D.3d 909, 912 (1st Dep't 2011); Edge Mgt. Consulting, Inc. v. Blank, 25 A.D.3d at 366-67.

Trump Palace also seeks summary judgment on counterclaims against Everest Realty for contractual indemnification and insurance coverage. Trump Palace is not entitled to summary judgment on the duplicative counterclaims for contractual

indemnification, given the undisputed absence of a contract between Trump Palace and Everest Realty. Edwards v. BP/CG Ctr. I, Inc., 102 A.D.3d 413, 414 (1st Dep't 2013). While Trump Palace also bases these counterclaims on the condominium bylaws, which are not in admissible form, they do not apply to Everest Realty in any event. The record discloses no other source of a contractual obligation between these two parties. To support the counterclaim for insurance coverage, Trump Palace presents an insurance certificate as well as the bylaws, but this document, too, is not authenticated on personal knowledge and, in any event, demonstrates that Everest Realty obtained insurance coverage for Trump Palace as an additional insured under Everest Realty's insurance policy. Edwards v. BP/CG Ctr. I, Inc., 102 A.D.3d at 414.

Finally, although Trump Palace also seeks summary judgment on counterclaims against Everest Realty for contribution and breach of warranty, Trump Palace fails to present any support for these counterclaims. Therefore the court denies Trump Palace's motion insofar as it seeks summary judgment on them. C.P.L.R. § 3212(b); Ruiz v. RHQ Assoc., LLC, 92 A.D.3d 410 (1st Dep't 2012); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609 (1st Dep't 2011); Ruth B. v. Whitehall Apt. Co., LLC, 56 A.D.3d at 274; Perez v. Hilarion, 36 A.D.3d 536, 537 (1st Dep't 2007).

V. CONCLUSION

For the reasons explained above, the court grants the motion by defendant Everest Realty Holdings, Inc., for summary judgment

only to the extent of dismissing plaintiffs' claim for lost earnings. C.P.L.R. § 3212(b) and (e). The court also grants plaintiffs' cross-motion for summary judgment on the liability of defendants Everest Realty and Deam Properties (US), LLC, for the flooding in plaintiffs' condominium unit December 17, 2008. Id. The court denies the remainder of Everest Realty's motion and plaintiffs' cross-motion and denies the motions for summary judgment by defendant Deam Properties and third-party defendant Trump Palace Condominiums. C.P.L.R. § 3212(b).

All parties shall appear for a pretrial conference June 19, 2014, at 3:30 p.m. in Part 46. This decision constitutes the court's order.

DATED: April 25, 2014

LUCY BILLINGS, J.S.C.