Anderson v Marriott Intl., Inc.
2015 NY Slip Op 31659(U)
August 26, 2015
Supreme Court, Suffolk County
Docket Number: 11-24326
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11-24326
CAL No. 14-01917OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 3-12-15
ADJ. DATE 3-13-15
Mot. Seq. # 004 - MD
005 - MG

---X

STEVEN ANDERSON,

Plaintiff,

- against -

MARRIOTT INTERNATIONAL, INC., COLUMBIA SUSSEX CORPORATION, COLUMBIA PROPERTIES MELVILLE, LLC and HERBER PLUMBING & HEATING CORP.,

Defendants.

---X

KRAMER, DILLOF, LIVINGSTON & MOORE
Attorney for Plaintiff
217 Broadway
New York, New York 10007

SPECTOR GADON & ROSEN, P.C.
Attorney for Defendants Marriott & Columbias
1635 Market Street, 7th Floor
Philadelphia, PA 19103

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Defendant Herber Plumbing
99 North Broadway
Hicksville, New York 11801

Upon the following papers numbered 1 to 54 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9, 30 - 45 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 27, 46 - 49 ; Replying Affidavits and supporting papers 52 - 53 ; Other memorandum of law 10 - 11, 28 - 29, 33, 50 - 51 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by the defendant Marriott International, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion by the defendant Herber Plumbing & Heating Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted.

This is an action sounding in negligence and premises liability to recover damages for personal injury allegedly suffered by the plaintiff on the night of June 28 to June 29, 2010 when, while registered

RST

as a guest at the Melville Marriott hotel located at 1350 Old Walt Whitman Road, Melville, NY 111747 (the Hotel), he was exposed to excessive levels of carbon monoxide. In his amended bill of particulars, the plaintiff alleges, among other things, that a hot water heater (the unit) in the boiler room located beneath his room was not properly maintained causing him and other guests of the Hotel to be injured by prolonged exposure to carbon monoxide.

It is undisputed that the defendant Columbia Properties Melville, LLC (Owner) owns the Hotel, that the defendant Columbia Sussex Corporation (CSC or Franchisee) manages the Hotel pursuant to a written agreement with the Owner (collectively, also the Hotel), and that the Hotel operates under the name Melville Marriot pursuant to a franchise agreement between CSC and the defendant Marriott International, Inc. (Marriott) dated July 22, 1994 (Franchise Agreement). The defendant Herber Plumbing & Heating Corp. (Herber) performed certain work on the heating and ventilation system at the Hotel prior to this incident. It is further undisputed that the plaintiff was registered as a guest in room No. 1089 at the Hotel on the evening in question, that said room is directly above the boiler room where the unit was located, and that the unit malfunctioned that evening giving off high levels of carbon monoxide. The next afternoon the Hotel received a telephone call from a local hospital indicating that two other guests at the Hotel were being treated for carbon monoxide poisoning. Thereafter, the Hotel called Herber and the local fire department, both of which tested for and found elevated levels of ambient carbon monoxide in the guest rooms above the boiler room, and the plaintiff was transported by ambulance to the local hospital.

Marriott now moves for summary judgment dismissing the complaint and all claims against it on the ground that, because it "neither operates nor exercises control over the daily operations of the Hotel, under New York law, Marriott cannot be liable to Plaintiff." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Carbon monoxide.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, Marriott submits, among other things, the affidavit of one of its officers, the Franchise Agreement, and the management contract between the Owner and CSC. In his affidavit, Kip Vreeland swears that he is the chief operating officer of full service franchising for Marriott, that the relationship of Marriott to the Hotel is based on the Franchise Agreement, and that Marriott did not "own, operate, or manage the Hotel or any part of it" at the time of this incident. He further swears that, at that time, Marriott did not exercise any control over the daily operations of the Hotel, and did not hire, employ, compensate, or otherwise direct or control the actions of the Hotel's employees, and that CSC had the sole responsibility for the day-to-day management of the Hotel.

The management agreement between the Owner and CSC dated December 27, 2005 provides in Article V, entitled "Operational Services," at Section 5.1, that "Owner hereby engages [CSC] as the exclusive operator of the Hotel," and pursuant to Section 5.2, that CSC shall hire, employ train, pay, supervise, direct, discharge, and determine the compensation of all employees necessary for the operation of the Hotel, and that CSC shall enter into service contracts necessary or desirable for the cleaning and maintenance of the Hotel. Section 5.2 (O) provides that CSC shall "[k]eep the Hotel and the respective Furnishings and Equipment in good order, repair, and condition ..."

The provisions of the Franchise Agreement relied upon by Marriott include paragraph 5.7(1) which provides that "[CSC] shall have the exclusive authority and responsibility for the day-to-day management of [the Hotel]," and paragraph 5.4 (c) which provides that "Marriott does not exercise any direction or control over the employment policies or employment decisions of Franchisee. All employees of Franchisee are solely employees of Franchisee, not Marriott. Franchisee is not Marriott's agent for any purpose in regard to Franchisee's employees or otherwise."

The Franchise Agreement further provides in paragraph 8.2(A) that "[CSC] shall maintain [the Hotel] in good repair and condition and in conformity with applicable laws and regulations, and shall make or cause to be made such routine maintenance, repairs and minor alterations, as [CSC] or Marriott, from time to time, deems necessary," and in paragraph 17.2 that "It is the expressed intention of the parties hereto that [CSC] is and shall be an independent contractor and no partnership shall exist between [CSC] and Marriott. This Agreement does not constitute [CSC] or Marriott the agent, legal representative, or employee of the other for any purpose whatsoever, and neither party is granted any right or authority to assume or create any obligation for or on behalf of, or in the name of, or in any way bind the other party." Finally, the Franchise Agreement provides in paragraph 3.5(c) that "Marriott shall not be responsible for architecture or engineering, for code, zoning, or other requirements or laws, ordinances or regulations of any state, local or federal governmental body ..." regarding the renovation or refurbishment of the Hotel.

Generally, a franchiser will not be held liable for the injuries suffered by a third-party in his or her dealings with its franchisee (***Khanimov v McDonald's Corp.***, 121 AD3d 1050, 995 NYS2d 202 [2d Dept 2014]; ***Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.***, 111 AD3d 1374, 975 NYS2d 280 [4th Dept 2013]). In determining whether a franchiser may be held vicariously liable for the acts of its franchisee, the most significant factor to consider is the degree of control that the franchiser maintains over the daily operations of the franchisee or, "more specifically, the manner of performing the very work in the course of which the accident occurred" (***Hart v Marriott Intl.***, 304 AD2d 1057, 758 NYS2d 435 [3d Dept 2003] quoting ***Andreula v Steinway Baraqafood Corp.***, 243 AD2d 596, 596, 668 NYS2d 891 [2d Dept 1997]; *see also* ***Martinez v Higher Powered Pizza, Inc.***, 43 AD3d 670, 841 NYS2d 526 [1st Dept 2007]).

However, it has been held that an additional basis for the imposition of vicarious liability upon a franchiser for the acts of its franchisee exists when an "apparent agency relationship exists" between the two (***Friedler v Palyompis***, 12 AD3d 637, 784 NYS2d 902 [2d Dept 2004]; *see also* ***Baldassarre v Morwil Supermarket***, 203 AD2d 221, 609 NYS2d 345 [2d Dept 1994]). "In order to create apparent authority, there must be words or conduct of the principal, communicated to a third party, which give

rise to the appearance and belief that the agent possesses authority to act on behalf of the principal (***Begley v City of New York***, 111 AD3d 5, 30, 972 NYS2d 48, 67 [2d Dept 2013]; ***Marshall v Marshall***, 73 AD3d 870, 905 NYS2d 182 [2d Dept 2010]). In addition, the "third party must reasonably rely on the appearance of authority based on misleading words or conduct attributable to the principal, and must accept the services of the agent in reliance upon the perceived relationship between the agent and the principal, and not in reliance on the agent's skill (***Begley v City of New York***, 111 AD3d at 30, 972 NYS2d at 67; *see also* ***Hallock v State of New York***, 64 NY2d 224, 485 NYS2d 510 [1984]).

In opposition to Marriott's motion, the plaintiff submits, among other things, his affidavit, his deposition and the deposition of CSC's chief engineer at the Hotel, the Hotel's incident report, and materials regarding his relationship with Marriott and his stay at the Hotel. At his deposition, the plaintiff testified that he arrived at the Hotel at approximately 8:00 p.m. on June 28, 2010, that he has been a patron of Marriott for 25 or 26 years as he has "always enjoyed their properties," and that he went to bed at approximately 11:30 p.m. that night. He stated that he awoke in the middle of the night feeling nauseous, that he next awoke on the bathroom floor in his room, and that he returned to bed and did not get out of bed until approximately 4:00 or 4:30 p.m. the next day. He indicated that he opened the door to his room to see members of the fire department in the hallway, that they came into his room "with machines," and that he went out into the hallway and collapsed. The plaintiff further testified that he was taken to a local hospital, that he did not know if his room was equipped with carbon monoxide detectors, and that he did not remember if any alarms went off while he was in his hotel room.

Nonparty witness Craig Lampitok (Lampitok) was deposed on May 22, 2013 and testified that he was employed by CSC as chief engineer at the Hotel from early Spring 2010 to January 2011. He stated that his duties included overseeing a three-man crew dealing with preventative maintenance, "suite care of the rooms," and taking temperature readings of the hot water systems. He indicated that the two hot water heaters in the subject boiler room, including the unit, were gas-fired hot water heaters, that he had not received any training regarding the maintenance of gas-fired heaters prior to his employment at the Hotel, and that he was not trained as a plumber or engineer. Lampitok further testified that he was not aware of the maintenance required for the hot water heaters at the Hotel, but that the hot water heaters at hotels where he had been previously employed were "cleaned out totally" on a yearly basis, and that his responsibilities include inspecting the equipment in the boiler room to determine "if anything was leaking, anything was cracked, [or] gauges weren't working." He declared that he or his crew would inspect the temperature gauges and pressure gauges in the boiler room twice a day. He indicated that he had been employed by Marriott from 1996 to 2001 and "probably" received formal training at that time regarding "guest safety," but that he did not receive any such training from the Hotel. He stated that he did not know if Herber had recommended replacing the hot water heaters prior to this incident, and that some of the hot water heaters looked "kind of old" at the time. Lampitok further testified that he recalled hearing that two guests had gone to the hospital with carbon monoxide poisoning on the day of this incident, that there were no carbon monoxide detectors in the Hotel in June 2010, and that he had recommended that such detectors be installed "not too long after [he] started" working at the Hotel and prior to this incident. He indicated that, when he first learned of the carbon monoxide issue, he called the fire department, that he then went to the guest rooms directly over the boiler room to open the windows, and that there were no guests in those rooms when he got there. He stated that prior to this incident he did not remember observing soot in or near the hot water heaters, that he never observed a

yellow or orange flame within the hot water heaters, and that he did not remember observing any discoloration of the exterior walls of the hot water heaters. Lampitok further testified that the Hotel should have had a preventative maintenance or service contract with a contractor for the hot water heaters, that he did not know if any such contract was implemented by the Hotel, and that Herber inspected the hot water heaters "on a call basis." He stated that he understood that the normal safe operation of hot water heaters results in carbon monoxide being channeled outside of the building through the exhaust system, and that "backdrafting" occurs when air "comes back into the unit" which would cause carbon monoxide to "go all over the basement." He indicated that a person would expect to see a "bluish color" flame during normal safe operation of a hot water heater, and that otherwise one might see the flame "go from yellow to orange." Lampitok further testified that photographs taken of the unit after this incident showing orange discoloration on the exterior indicate "years of high flames," that he did not recall if he ever informed Herber that the unit had heat damage, and that he did not know who was responsible to check if the unit was being maintained according to the manufacturer's instructions. He stated that, before this incident, he was "pretty sure that I asked [Herber] about [the cleaning of the hot water heaters] and they said they did not have a [service] contract, if I'm not mistaken," that he believes he spoke with the Hotel to get such a contract "and it never happened," and that he relied on Herber to make recommendations concerning the maintenance of the hot water heaters.

In his affirmation in opposition to the motion, counsel for the plaintiff contends that there is an issue of fact regarding Marriott's control over the conduct of Lampitok and his crew relative to the maintenance of the unit. Counsel for the plaintiff cites to the Franchise Agreement which provides in subsection A of paragraph 5.1, entitled "Standard Operating Procedures," that "Franchisee shall operate [the Hotel] in accordance with the System as from time to time amended by Marriott. Franchisee acknowledges receipt of the Marriott Inn Standard Operating Procedures (MISOP). The MISOP contains the operating rules and procedures for [the Hotel] ..." In subsection G of paragraph 5.6, entitled "Performance," the Franchise Agreement provides that the Hotel shall "permit the duly authorized representatives of Marriott to enter Franchisee's facilities and inspect same at all reasonable times to insure that Franchisee is complying with the terms and standards of this Agreement and of the MISOP, and to test any and all equipment ... located at [the Hotel] at all reasonable times ..."

In addition, counsel for the plaintiff contends that there is an issue of fact regarding Marriott's liability for it's own negligence in failing to train the Hotel's employees regarding the maintenance of the unit and procedures for evacuating the Hotel in an emergency, as opposed to any vicarious liability for the Hotel's alleged negligence. In this regard counsel for the plaintiff cites to article VI, entitled "Marriott's Obligations," Section 6.1(D) which provides that "Marriott shall, at such times and places as it deems advisable, conduct training courses for personnel engaged in operating Marriott Inns," and Section 6.1(B) which provides that "Franchisee shall, at no cost to Marriott, conduct such training for Franchisee's employees as may be required in order to train them properly to operate, administer and manage the Inn in accordance with the standards and procedures specified by Marriott in the MISOP or otherwise; in the event that new employees are hired by Franchisee as additional or replacement employees, Marriott shall have the right to require that any such employee or any other employee of Franchisee attend such training courses."

In his affidavit submitted in opposition to Marriott's motion, the plaintiff swears, among other things, that he has been a patron of Marriott Hotels for over 20 years, that he has always tried to stay in said hotels during vacations and his extensive business travels, and that he has been a Marriott Visa cardholder since 1990. The plaintiff further swears that "I have always relied on Marriott and frequented its hotels because I counted on them to provide me with clean and safe accommodations, good service and assistance, and competent and helpful hotel staff." He states that, prior to his injury in June 2010, he believed that "Marriott's were all one chain of hotels based on materials I have received from Marriott over the years ... and from my experiences at Marriott hotels." He indicates that all of the employees at all of the Marriott hotels where he has stayed have worn Marriott uniforms, that he has never seen any indication in any such hotel that it was operated by another entity, and that the hotel receipt or guest folio for his stay at the Hotel, includes the Marriott logo with no mention of any other entity being involved with the operation of the hotel.

Here, there are triable issues of fact regarding the degree of control, if any, that Marriott had over the manner in which the Hotel employees maintained and operated the unit, as well as Marriott's alleged negligence in training said employees, pursuant to the standards and terms of the MISOP. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]). Marriott's contention that, because discovery has been completed and the plaintiff has failed to request a copy of the MISOP, the plaintiff cannot successfully oppose its motion or raise the issue of the standards imposed by Marriott, is belied by the fact that Marriott has failed to submit a copy of the MISOP in its reply (*see e.g.* ***Repeti v McDonald's Corp.***, 49 AD3d 1089, 855 NYS2d 281 [3d Dept 2008]). Without ascribing motive to said failure, the fact remains that the plaintiff has raised the issues, and the evidence submitted by the parties does not resolve the questions as a matter of law.

In addition, the plaintiff's submission raises an issue of fact regarding the applicability of apparent agency under these circumstances. In its reply, Marriott contends that a link at its website states "[Marriott] is a leading hospitality company with more than 3,900 properties, 18 brands, and associates at our headquarters, managed and franchised properties around the world," making it clear that some of its hotels are franchised. In addition, Marriott contends that it is common practice for hotel chains to franchise locations and that "common knowledge" precludes reasonable reliance on Marriott either owning or operating the Hotel, citing ***Francis v Starwood Hotels & Resorts Worldwide, Inc.***, 2011 WL 3351320 [D Colo 2011]). In ***Francis***, the Court found that language on the page setting forth the "Terms and Conditions for Use of This Site" on the defendant's website stating "[t]his website ... make[s] available information on hotels ... owned, managed or franchised by Starwood Hotels & Resorts Worldwide, Inc." established that "no reasonable juror could conclude that it was objectively reasonable for plaintiffs to believe that the Le Méridien was an agent of defendant." Setting aside for the moment whether the link in Marriott's website is as readily accessible as that in ***Francis***, and whether the language quoted by Marriott herein would also establish that no reasonable juror could conclude that it was objectively reasonable for the plaintiff to believe that the Hotel was an agent of Marriott, Marriott

has failed to submit any evidence as to the format of its website, or the language therein, prior to the date of this incident. Accordingly, Marriott's motion for summary judgment dismissing the complaint is denied.

Herber now moves for summary judgment dismissing the complaint and all cross claims against it. In support of its motion, Herber submits the pleadings, the affidavit of its president, the depositions of the plaintiff and Lampitok, and the deposition of its employee who responded to the subject incident at the Hotel. The testimony of the plaintiff and Lampitok has already been adequately summarized herein.

At his deposition, William Molldene (Molldene) testified that he was employed by Herber as a plumber prior to this incident, that he had received certification in gas-fired boilers, and that had been trained to properly test for "drafting, [carbon monoxide], ... proper tuning and combustion analyzation." He stated that he had done work at the Hotel for several years, and that he responded to a call to go to the Hotel on the day of this incident to investigate a "carbon monoxide leak." He described the layout of the boiler room at the Hotel, and the structure of the unit. He indicated that a worker would have to remove four screws and the "draft hood' to inspect the interior of the unit from the top, and to remove a couple of screws and the pan or plate under the burner to inspect the unit from the bottom. Molldene further testified that, because carbon monoxide is colorless and odorless, it is important to use a combustion analyzer, because even viewing a blue flame in the burner "does not necessarily prelude ... high levels of [carbon monoxide]." He explained that inadequate air combustion volume means that "[y]ou will get, probably, a yellow flame, carbonization, ... and carbon monoxide," and that to see the burner flame a person needs to get under the unit and visibly inspect it. He indicated that he previously did work at the Hotel on May 27, 2010, that he "adjusted the aquastats" and inspected the "flow switches" on the back wall of the boiler room, and that he got within five to ten feet of the two hot water heaters located there. He stated that discoloration of a gas-fired hot water heater usually results from "flame rollout" which results when the heat exchanger in the hot water heater is obstructed causing the flame to "roll out of the bottom because it has nowhere to go." Molldene further testified that flame rollout does not necessarily indicate high carbon monoxide production, that rust on the heater can look like flame rollout, that he did not inspect the hot water heaters on May 27, 2010, and that he did not see any flame rollout on the heaters that day. He stated that invoices indicating that he or other Herber employees performed work at the Hotel earlier on the day of this incident, and on May 1, 2010, December 30, 2009, and December 8, 2009, reveal that the work was not related to the hot water heaters, or was performed outside the subject boiler room. He indicated that, on the day of this incident, he arrived in the afternoon and used certain equipment to test for carbon monoxide in the boiler room, that he obtained very high readings when he tested the unit, and that he immediately shut the unit down. Molldene further testified that he was not aware of any maintenance or service contract between Herber and the Hotel regarding plumbing and heating work, that he never inspected, neither was he asked to inspect, the hot water heaters prior to this incident, and that he never performed preventative maintenance, neither was he asked to perform such work, on said heaters prior to this incident. He stated that he never observed "back-drafting," soot build up, or "carbonization" in the hot water heaters, that he did not look for those indicators of the need for maintenance, and that he did not know how the operation of the hot water heaters was checked prior to this incident. He indicated that, to his knowledge, no one at Herber ever recommended to the Hotel that it replace any deteriorated parts of the hot water heaters or upgrade to a more efficient heating system.

In his affidavit, Robert Herber swears that he is the president of Herber, that Herber did not have a maintenance agreement with its codefendants at any time prior to the date of this incident, and that all work at the Hotel was performed on an as-needed basis. He states that a comprehensive search of Herber's business records reveals that Herber never performed work on the "faulty water heater" prior to the date of this incident, and the Herber did not install said heater. He indicates that Herber has never had an agreement with the Hotel to be the sole plumber to service the Hotel, and that the Hotel never requested Herber to inspect, maintain, or comment upon the hot water heater in question.

It is well settled that "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (***Merchants Mut. Ins. Co. v Quality Signs of Middletown***, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013], quoting ***Daniels v Kromo Lenox Assoc.***, 16 AD3d 111, 791 NYS2d 17 [1st Dept 2005]; *see also* ***Bevilacqua v Bloomberg, L.P.***, 70 AD3d 411, 895 NYS2d 347 [1st Dept 2010]). Specifically, boiler maintenance or repair companies owe no duty of care to parties injured on premises where they have worked on heating systems as independent contractors, without a services contract with the premises owner, or on an "as-needed basis" (*see* ***Mauskopf v. 1528 Owners Corp.***, 102 AD3d 930, 958 NYS2d 759 [2d Dept 2013]; ***Rodriguez v Sung Hi Kim***, 42 AD3d 442, 841 NYS2d 590 [2d Dept 2007]; ***Daniels v Kromo Lenox Assoc.***, *supra*).

Here, the adduced evidence reveals that Herber did not have a contract with the Hotel for systematic or preventative maintenance of the unit, and that Herber has established, at a minimum, its prima facie entitlement to summary judgment dismissing the complaint. The motion is unopposed by the plaintiff. Accordingly, that branch of Herber motion which seeks summary judgment dismissing the complaint is granted.

However, through counsel, Marriott, the Owner and CSC (collectively the Hotel Group) submit opposition to Herber's motion for summary judgment dismissing the complaint and all cross claims against it. A review of the answers served by the Hotel Group reveals that they have asserted cross claims against Herber sounding in contribution and common-law indemnification. It is well settled that the dismissal of the complaint against the plaintiff renders said claims or causes of action academic (***Boone v 100 Marcus Drive Assocs.***, 61 AD3d 798, 877 NYS2d 433 [2d Dept 2009]; ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; ***Hajdari v 437 Madison Ave. Fee Assocs.***, 293 AD2d 360, 740 NYS2d 328 [1st Dept 2002]).

Nonetheless, in his affirmation in opposition, counsel for the Hotel Group contends, among other things, that the longstanding relationship between Herber and the Hotel, Molldene's testimony that he was aware of the risks posed by a malfunctioning hot water heater, and Lampitok's testimony that he relied on Herber to make recommendations concerning the maintenance of the hot water heaters establish that Herber owed a duty to the Hotel Group. As noted above, counsel's contention is without merit. In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***,

96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]).

The record reveals that the Hotel Group did not have a contract with Herber for the systematic or preventative maintenance of the hot water heaters, and that Herber performed work on said heaters on an as-needed basis or, as Lampitok testified, "on a call basis." Thus, Herber has established its entitlement to summary judgment dismissing all cross claims against it (*see* ***Ledesma v Aragona Mgt. Group***, 50 AD3d 510, 857 NYS2d 519 [1st Dept 2008]). Accordingly, Herber's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The claims against Herber Plumbing & Heating Corp. dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 8/26/15

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**