Martinez v Rector Trinity Assoc., LLC
2015 NY Slip Op 32106(U)
April 21, 2015
Supreme Court, New York County
Docket Number: 117249/2009
Judge: Debra A. James
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This opinion is uncorrected and not selected for official publication.

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FA 4/28/15 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

Index Number : 117249/2009
MARTINEZ, VICTOR
vs.
RECTOR TRINITY ASSOC.
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

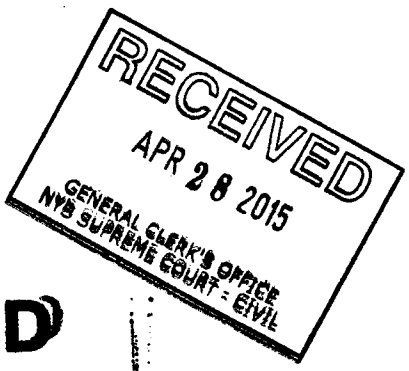
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

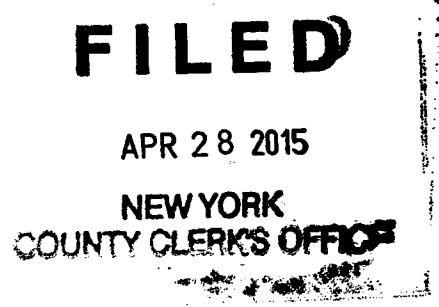
Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

resolved in accordance with the attached Memorandum Decision and Order.





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

Dated: APR 21 2015

_____, J.S.C.
DEBRA A. JAMES

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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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VICTOR MARTINEZ, individually and as Administrator of Estate of ERIDANIA RODRIGUEZ, Deceased, DENISSE FIGUEROA, RONNIE FIGUEROA, YANIRIS FIGUEROA,

Plaintiffs,

-against- Index No.: 117249/09

RECTOR TRINITY ASSOCIATES, LLC, HEATHER MANAGEMENT SERVICES CORP. d/b/a STELLAR MANAGEMENT, CORP., CLASSIC SECURITY, JOHN DOES 1-10, RICHARD ROES INCORPORATED 1-10, (said JOHN DOES 1-10 and RICHARD ROES INCORPORATED 1-10 being fictitious persons and/or Business entities, et al.)

Defendants.

FILED
APR 28 2015
NEW YORK
COUNTY CLERK'S OFFICE

CLASSIC SECURITY,

Third Party Plaintiff,

- against -

JOSEPH PABON,

Third Party Defendant.

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Debra A. James, J.S.C.

Plaintiffs, Victor Martin, the administrator of the estate of Ms. Eridania Rodriguez (Ms. Rodriguez), decedent and Ms. Rodriguez's daughters, seek compensation from defendants for the wrongful death of Ms. Rodriguez at the hands of third-party

defendant Joseph Pabon (Pabon). In April 2013, Pabon was convicted of murdering Ms. Rodriguez.

Defendant Classic Security LLC (Classic Security or Classic) moves for an order granting summary judgment in its favor dismissing the complaint and cross claims asserted against it. Defendants Rector Trinity Associates, LLC (Rector) and Heather Management Services Corp. (Heather) d/b/a Stellar Management, Corp. (Stellar) cross-move for summary judgment.

Classic provided security services at the building located at 2 Rector Street (the Building) where Ms. Rodriguez (Ms. Rodriguez or the decedent) was killed. Rector has an ownership interest in the Building. Stellar provided building services there and employed Pabon and Ms. Rodriguez.

Classic, Rector and Stellar previously moved for summary judgment and Classic moved for judgment on its third-party claims against Pabon. By order dated January 28, 2013, Classic's motion against Pabon was granted, but the motions were otherwise denied with leave to renew upon the submission of a complete set of pleadings. Defendants now renew their motions.

As background, in the third amended complaint, plaintiffs allege that on July 7, 2009, Rodriguez, then working in the Building, was assaulted, bound, brutalized, raped, asphyxiated,

and murdered. Plaintiffs allege that defendants hired, managed, or controlled Pabon, and knew or should have known of his violent and dangerous propensities and of accusations of other violent or vicious acts he had committed, and were negligent in hiring, training, retaining and supervising Pabon, and in failing to provide adequate security and warn and protect Rodriguez from him. Based on the theory of respondeat superior, plaintiffs allege that defendants are liable for prima facie tort, intentional infliction of mental distress, battery, assault, false imprisonment and wrongful death.

Classic Security interposed cross claims for contribution and indemnification against the other defendants. Rector and Stellar asserted cross claims against Classic for contribution, indemnification, and the failure to procure insurance.

At the time of the incident, Rodriguez and Pabon were both building services employees lawfully in the Building. Pabon was there to operate the freight elevator and Rodriguez to clean certain floors of the Building. Ms. Lisa Begzic, the decedent's supervisor, testified at the criminal trial that on the evening of the incident she traveled in an elevator with Rodriguez to the 18th Floor where Rodriguez was to begin her work. Ms. Begzic testified that later, at around 11 o'clock to midnight, she and

other Stellar employees, and movers who were in the Building, commenced a search for Rodriguez after a coworker noticed her absence, and that the police were called. Plaintiffs allege that on July 11, 2009 an NYPD detective discovered Rodriguez's body in an air conditioning duct or shaft between the 11th and 12th floors.

The moving party bears the burden of making "a prima facie showing of entitlement to judgment as a matter of law," by submission of sufficient admissible evidence to demonstrate the absence of genuine issues of fact for trial (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). "Once this showing has been made . . . the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material" fact issues for trial (*id.* at 324). Facts must be construed in a light most favorable to the plaintiff (Insurance Co. of N.Y. v Central Mut. Ins. Co., 47 AD3d 469, 472 [1st Dept 2008]). However, "mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary" judgment (Castro v New York Univ., 5 AD3d 135, 136 [1st Dept 2004]).

Classic Security argues that it did not owe or breach a duty to plaintiffs and that their injury was caused by the superseding

and intervening act of Pabon. The other moving defendants do not argue that they lack a duty of care (*Wayburn v Madison Land* Ltd. Partnership, 282 AD2d 301, 303 [1st Dept 2001] [landlord and managing agents have "a common-law duty to take minimal security precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties"]), but adopt Classic's causation argument alone.

In support of its motion, Classic Security submits the affidavit of Anne D. Fahy, who avers that she has held the position of executive vice president at Classic since 2008, and that Classic provided uniformed, unarmed security guards to staff the lobby desk at the Building, with duties of signing visitors in and out and ensuring that all others had proper identification. Fahy states that Classic employees were not responsible for patrolling the building or performing random searches above the lobby, and had no responsibilities above the lobby floor. Fahy also avers that Pabon was not an employee of Classic Security and was not hired, trained, supervised or controlled by Classic. Fahy states that Classic had no choice or input as to Pabon's retention, work schedule or duties, and is not in possession of any security video from the incident.

Classic submits a copy of three documents which it states

are the security agreements with Stellar. Fahy states that the copies are true, accurate and complete copies of the documents that are maintained by Classic, the only agreements regarding services to be performed at the Building, and that there were no modifications, riders or amendments to the documents. Fahey avers that Classic entered into a security services agreement with Stellar in 2000 (the 2000 Agreement) and 2005, and a "Security Services Proposal" dated April 3, 2007, and, to her knowledge, never entered into an agreement with Heather or Rector.[1] Each of these documents contains a provision stating that the services were provided only for the client's benefit, and that nothing in the document "shall confer any rights on any other party as a third party beneficiary or otherwise". Fahy states that Classic's copy of the 2007 document does not contain the signature of a Stellar representative. The submitted 2005 document also does not contain such a signature. Classic also submits Post Orders, which Fahy avers were in effect on July 7, 2009.

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[1] Classic's counsel affirms that Fahy avers that: "while Classic Security monitored surveillance cameras, there were none where the alleged incident occurred. Moreover, the surveillance equipment and videos were maintained by Stellar in a Stellar office", but Fahy does not make any such statements in the referenced affidavit.

Classic Security submits a copy of what its counsel states are employment files for Pabon and Rodriguez that he received from Stellar. Except for the termination letter in Pabon's file, dated after the incident, the documents are unremarkable concerning Pabon, containing a few warning letters concerning lateness, the failure to perform job duties twice, and calling out once when he did not have leave time. There is nothing in the files about violence or altercations, interactions between Pabon and the decedent, or other complaints.

Classic Security also submits testimony, from Pabon's criminal trial, of the Building's chief engineer, Jerry Prickett. Prickett testified that the security guards in the lobby were employed by Classic, which contracted with Stellar, and that the guard would sign guests into the Building. When asked about the responsibilities of the guard in the Building's lobby, Prickett responded "[h]e would sign guests into the building. The video system we have in the lobby. Giving them out ID badges. Maintaining the lobby area, you know, overseeing the tenants coming in also". He also testified that Pabon worked for Stellar, in some capacity, for nine years. A Classic Security guard, who worked at the Building, testified that his responsibilities included monitoring the cameras and the lobby

area, allowing access to the building and "[j]ust basically watching over the lobby". The decedent's supervisor testified that Rodriguez had worked at the building for over a year.

The elements of a negligence claim are that a defendant owes a duty to the plaintiff, breach of the duty owed and "that the breach proximately caused the plaintiff's injury" (Wayburn, 282 AD2d at 302). All of the moving defendants argue that this case should be dismissed based on the proximate cause element, as Pabon's acts were not foreseeable and were the superseding and intervening cause of plaintiffs' injuries. Concerning the proximate cause element of negligence, it is necessary

> that the defendant's negligence was a substantial cause of the events which produced the injury. Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. An intervening act may break the causal nexus when it is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct

(Maheshwari v City of New York, 2 NY3d 288, 295 [2004] [internal quotation marks and citation omitted]). Stated another way, the causal link between a plaintiff's injuries and the alleged negligence of a defendant may be severed when "the intervening

act was divorced from and not the foreseeable risk associated with the original negligence," or if the defendant's act "merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated" (Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315-316 [1980]).

A third party's criminal or intentional act is generally a superseding cause unless the act was reasonably foreseeable to the defendant due to prior notice, or where the defendant's act created the risk of the intentional or criminal act occurring (see Santiago v New York City Hous. Auth., 63 NY2d 761, 762-763 [1984]; Kush v City of Buffalo, 59 NY2d 26, 33 [1983]). Concerning random criminal attacks, generally, there is no recovery unless the attack was foreseeable in the normal course of events as a result of an alleged security breach (see Maheshwari, 2 NY3d at 294; Santiago, 63 NY2d at 762-763).

Regarding landlords, in the context of criminal acts, foreseeability "has generally been equated with the degree to which a landlord has been apprised of the incidence of criminality within a particular building under his or her proprietorship" (Todorovich v Columbia Univ., 245 AD2d 45, 46 [1st Dept 1997]). However, concerning intruders, the precautionary measures imposed upon landlords and managing agents

to secure premises has been described as minimal (see Mason v U.E.S.S. Leasing Corp., 96 NY2d 875, 878 [2001]; Burgos v Aqueduct Realty Corp., 92 NY2d 544, 548 [1998]; Gross v Empire State Bldg. Assoc., 4 AD3d 45, 46 [1st Dept 2004]). Moreover, concerning tenants injured in attacks

> the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder. Without such a requirement, landlords would be exposed to liability for virtually all criminal activity in their buildings

(Burgos, 92 NY2d at 55-551).

There is no dispute that Pabon was not an intruder and did not work for Classic Security. Plaintiffs assert that Classic's conduct in not performing irregular patrols of the building, as outlined in the Post Orders, improperly permitted Pabon and Rodriguez to be alone. This cannot be said to have created the risk here. Workers are often left alone with other workers, as well as with others who may be lawfully in a building, both at night and over the weekend. The record contains no indication that Classic was required to supervise Pabon in any respect, to

keep workers lawfully in the Building apart, or to monitor building staff. If, as in Maheshwari, a brutal attack is not the foreseeable result of a security breach at a large gathering of potentially rowdy people, it would be with great difficulty that the murder of an employee lawfully in a building by a coworker, on an upper floor of the building, would be deemed foreseeable to a security company with a primary obligation of providing an unarmed guard in a building lobby.

Plaintiffs argue that a security patrol might have stopped the crime in progress. Although each of the documents that the parties label as the security agreement contains a provision that no third party is an intended beneficiary (see Rahim v Sottile Sec. Co., 32 AD3d 77, 80 [1st Dept 2006]), presuming, arguendo, that the Post Orders conferred a duty to plaintiffs on Classic, there is nothing in the orders about patrols being required at any particular time or in any particular place in the Building, and the document indicates that they were to be done on an irregular basis. Therefore, plaintiffs' argument assumes that on the night that Rodriguez was killed an inspection would have, coincidentally, been performed at a time and place in the Building so as to avert the tragedy. However, such a conclusion is based on speculation, which is insufficient to defeat summary

judgment (Castro, 5 AD3d at 136).

Plaintiffs also assert that there is evidence that the security guard, presumably improperly, stepped away from the lobby desk; they contend that, had he not done so, he might have observed Pabon in a disheveled state and acted. Assuming the guard's stepping away was negligence, plaintiffs may only speculate that had he stayed at the desk (which would have precluded his patrolling elsewhere in the Building), he would have noticed that Pabon, a building worker, was disheveled, if that was the case, and from that observation known to commence a building-wide search for another employee, who worked on an upper floor, without knowledge that an employee was missing.

Plaintiffs point to no cases where liability has been imposed upon a security company in circumstances similar to those here. Where a security company's unarmed guard's primary duty involves screening people who enter a building, one employee killing another many floors up is not a normal or a natural consequence of permitting two employees, both lawfully in the building, to work unmonitored, or, in the normal course of events, of a security guard stepping away from a desk.[2]

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[2] Ms. Rodriguez's absence was eventually noticed that night, as Begzic testified that toward the end of the shift, another

Plaintiffs also do not raise a fact issue to counter Fahy's averment that Classic did not hire, retain, supervise or train Pabon.

Plaintiffs also argue that the motion is premature because they have not been given a reasonable opportunity to conduct discovery. CPLR 3212 (f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 103 [1st Dept 2006]). "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (Bailey v New York City Tr. Auth., 270 AD2d 156, 157 [1st Dept 2000]). "The mere hope that further disclosure might uncover evidence likely to help [a plaintiff's] case" provides no basis for postponing

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Stellar employee working in the Building reported that Rodriguez was missing.

summary judgment (Maysek & Moran v Warburg & Co., 284 AD2d 203, 204 [1st Dept 2001]).

Plaintiffs note that the documents submitted by Classic do not delineate the guards' duties and argue that unspecified ambiguities in contract terms may require more discovery to determine the parties' understanding of their meaning, and whether or not there is an enforceable agreement, and if so, which version. Plaintiffs state that depositions are necessary to determine the common practices of security guards, and the guards' understanding of their duties, and whether the guard on duty was negligent in performing his duties, as there is testimony that the guard on duty left his post unattended at some point.

Plaintiffs' assertion about the guard leaving the lobby desk was addressed above, as the court presumed, arguendo, that the guard stepped away and that Classic maintained a duty to conduct irregular roving patrols, which are plaintiffs' only negligence assertions concerning Classic. While plaintiffs are correct that the contracting documents do not delineate the guards' duties, Fahy's affidavit establishes that, other than perhaps the roving patrol, those duties were in the lobby. Other testimony submitted supports this and plaintiffs do not sufficiently

demonstrate that discovery may lead to relevant evidence that would change the outcome here concerning causation and foreseeability as to Classic.

Plaintiffs contend that depositions need to be taken to uncover why the security agreement includes language that Stellar chose the number of guards and types of services and was advised that additional guards and services were available, and whether the Building needed but refused to pay for more security services. The documents submitted concern the provision of hourly-rate security services and plaintiffs provide no basis for imposing upon Classic a duty to advise as to the Building's security needs, and nothing to demonstrate that it is likely that there is other evidence on this issue. Whether or not the Building engaged adequate security services is not a question about Classic Security's performance of its duties.

In light of the foregoing, the complaint must be dismissed as to Classic. Therefore, it is unnecessary to reach Classic's other arguments for dismissal.

Unlike Classic Security, Stellar and Rector do not argue or move based on duty or breach, and Stellar does not dispute that it was Pabon's employer. Instead, these defendants adopt only Classic's causation argument, relying on Classic's submissions.

On this record, Rector and Stellar have not met their prima facie burden.

The complaint, discussed above, contains many claims, including negligent hiring, supervision and retention. In support of its contention that Pabon's acts were unforeseeable, Classic submitted what it states are the employment files for Pabon and Rodriguez. Classic's implicit argument is that these documents sufficiently demonstrate that there was nothing to suggest that Pabon was violent or would engage in the horrific acts that he did, such as, for example, disciplinary warnings or threats to Rodriguez, or anyone else. That an attorney affirmation may be used as a vehicle to submit documentary evidence is well known. However, Classic's counsel did not submit its own client's records or otherwise provide a foundation for the records' admissibility. There is nothing submitted from which the court may conclude that the records are authentic, or that a full copy of them has been submitted, as no affidavit from a person with knowledge about the files has been submitted. Therefore, this submission does not suffice to meet the movant's burden on a summary judgment motion to eliminate fact issues with admissible evidence.

Further regarding the files, Classic repeatedly emphasized

that Pabon was a Stellar employee for nine years prior to the 2009 incident, reasoning that because he was a long-time employee with a clean record there was no reason to anticipate that he would engage in such heinous conduct. However, the records that Classic submitted, while on Stellar's letterhead, show a hire date of about three years before Rodriguez was killed, not nine. In addition, the copy of the workers' compensation adjudication that Classic submitted states the Rector, not Stellar, was Rodriguez's employer. Together, these documents are not prima facie evidence of a lack of any notice of Pabon's propensity toward violence since there is an issue whether or not the complete employment records were submitted, or whether there are other records maintained by Rector. Even without these issues, the court may not draw inferences in movants' favor and against the non-moving party from the records that are unaccompanied by an affidavit from either Stellar or Rector's custodian of the records or other employee of those entities who possessed personal knowledge concerning Pabon's hiring, retention, or supervision.

Defendants also do not support the assertions made about

foreseeability concerning the Building.[3] For example, in reply, Classic asserts that there were no prior incidents of violent crime on the upper floors of the Building, but submits no supporting evidence demonstrating this. While, ultimately, Rector and Stellar may demonstrate entitlement to summary judgment, here they moved only on Classic's causation argument, and without sufficient supporting evidence. Therefore, at this juncture, the court shall deny Rector and Stellar's motion, but grants their request that denial be without prejudice to another summary judgment motion after discovery's completion.

Classic argues that the cross claims against it should be dismissed because it did not breach a duty to Stellar and Rector and their claims are barred by a provision in the security agreement that states:

> [Classic] shall not be liable to [Stellar] for any claim asserted by [Stellar] unless such claim resulted from the gross negligence or willful misconduct of [Classic] or its employees within the scope of their employment hereunder.

Classic contends that it is entitled to summary judgment because its codefendants do not allege that the Classic was grossly negligent or acted willfully, and because Classic did not

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[3] Classic states, but did not demonstrate, that Pabon had no criminal record.

operate, manage or control the premises or have any responsibility, at any time, to patrol the upper floors, or to supervise the decedent and Pabon. Classic maintains that Fahy's affidavit demonstrates that it did not breach a duty or act in a grossly negligent manner.

In opposition, Stellar and Rector argue that two of the three documents that Classic submits were not fully executed, and that the only fully executed agreement appears to be the 2000 Agreement, dated August 24, 2000. Stellar and Rector point out that the two other documents specify that they become binding only upon the signing by one party and that party's delivery to the other, which has not been shown here. These defendants argue that the 2000 Agreement should control, and that it does not contain the exculpatory provision upon which Classic relies, but, instead, section C. of the paragraph entitled Insurance of Classic's agreement, states that Classic is liable to Stellar for Classic's negligence. Stellar and Rector also argue that there was an implied-in-fact agreement, relating back to the 2000 Agreement, which controls, and raises a fact issue concerning the cross claims and that Classic's motion is premature.

Classic's motion to dismiss the contribution and common-law indemnification claims shall be granted as the complaint has been

dismissed against Classic. However, Classic has not demonstrated entitlement to summary judgment concerning the cross claims for contractual indemnification or the failure to procure insurance. Regarding the latter claim, Classic cites only to a copy of a certificate of insurance form. This certificate states that it is for informational purposes only and confers no rights upon the holder, and it is well settled that such a certificate of insurance cannot by itself establish coverage (*see* Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co., 5 AD3d 198, 200 [1st Dept 2004]).

Concerning the contractual indemnification claim, in moving, Classic initially relied on a provision from a July 11, 2005 Agreement that is not signed by either Stellar or Rector and a April 3, 2007 proposal, which is not signed by any party. In reply to the cross motion, Classic cites the 2000 Agreement, but refers to the General Conditions that were not a part of the either the July 11, 2005 agreement or the August 3, 2007 proposal, the latter documents upon which Classic relied in moving. Classic may not raise new arguments relying on different evidence for the first time in reply (see Mulligan v City of New York, 120 AD3d 1155, 1156 [1st Dept 2014]). In addition, the

record reveals that Classic was in possession of what appears to be an addendum to the 2000 Agreement, dated August 30, 2000, which references the August 24, 2000 agreement as well as the related document entitled General Conditions, which contains additional indemnification language. Consequently, no interpretation of any of these myriad agreements can be made at this juncture, as the court cannot determine on this record, which if any, were applicable at the time of the incident at bar.

In light of the foregoing, it is

ORDERED that Classic Security's motion for summary judgment is granted to the extent that the complaint and the cross claims of Rector Trinity Associates, LLC and Heather Management Services Corp. d/b/a Stellar Management Corp. for common-law indemnification and contribution are dismissed against Classic Security and the motion is otherwise denied; and it is further

ORDERED that Rector Trinity Associates, LLC and Heather Management Services Corp. d/b/a Stellar Management Corp.'s motion for summary judgment is denied.

Dated: April 21, 2015

FILED
APR 28 2015
NEW YORK
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DEBRA A. JAMES J.S.C.