[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------X

JEWELERS MUTUAL INSURANCE COMPANY,

Plaintiff,

-against-

STRUCTURE TONE, INC. and RITE-WAY INTERNAL REMOVAL, INC.

Defendants.

----------X

Index No. 157372/2012

**DECISION AND ORDER**
Motion Seq. 002 and 003

**CAROL R. EDMEAD, J.**

This is a property damage/negligence subrogation action brought by Plaintiff Jewelers Mutual Insurance Company, as Subrogee for their insured, Aaron Farber (Farber).

Each Defendant now moves separately for summary judgment to dismiss all claims and cross-claims against them.[1] Structure Tone also moves for an order requiring contractual indemnification, legal fees, and costs from Rite-Way.

***Background***

The underlying action, out of which this action arises, relates to flooding of Farber's 666 Fifth Avenue jewelry gallery and repair center ("the Premises") on July 8, 2010, the claim for which was subsequently paid by Plaintiff. Plaintiff alleges that Defendant/General Contractor Structure Tone, Inc. ("Structure Tone") and Defendant/Subcontractor Rite-Way Internal Removal, Inc. ("Rite-Way") were conducting renovations on the commercial property above the Premises ("the Renovation Site') and caused the flooding.

In support of dismissal, Structure Tone argues that as a general contractor pursuant to a

[1] Motion Sequences 002 (Rite-Way) and 003 (Structure Tone), respectively, which are consolidated here for decision.

contract with non-party "Uniqlo," Structure Tone had no duty to Plaintiff or its insured. Furthermore, Structure Tone argues that there is no evidence that one of the Defendants struck a water valve, which caused an over-pressurization of a pipe, coupling failure, and water leak and particularly, no evidence that Structure Tone caused the accident given that Structure Tone did not directly perform any construction.

Instead, argues Structure Tone, its independent contractor Rite Way, which was engaged to perform demolition at the Renovation Site, caused the flooding by opening or damaging a water supply valve thereat. And, Structure Tone is not liable for such independent contractor's negligent acts. As such, Structure Tone also seeks indemnity, including fees and costs, from Rite-Way based on the mutual Purchase Order and Blanket Insurance Indemnity Agreement. Structure Tone argues that the indemnity clause was triggered because the incident arose out of, and during the work Rite-Way was performing.

Rite-Way opposes Structure Tone's motion, arguing that Structure Tone presents no evidence that Rite-Way's demolition caused the water damage. Rite-Way points out that Plaintiff's adjuster did not use a ladder to inspect the valve, does not have an engineering or plumbing background, and that his photograph of the valve indicates only that the valve was "allegedly" struck by a contractor.

In support of its own motion for summary judgment to dismiss, Rite-Way asserts that no competent evidence exists demonstrating that it caused a leak or water damage. The only evidence, according to Rite-Way, is unproven secondhand statements provided to Plaintiff's adjuster, Donald Kinnear (Kinnear or the adjuster), who was engaged to assess the insured's claim. And, the record indicates that Rite-Way did not begin its demolition work until after the

plumbing was disconnected by another contractor, and all water was drained out.

Rite-Way also opposes Structure Tone's indemnity claim, arguing that Rite-Way was not, as its work order required, provided with timely notice that would have allowed it to investigate the flooding claims, and that indemnity is unjustified because the flooding did not arise out of Rite-Way's work. In response, Structure Tone claims that Rite-Way produced no records showing that the latter was not at the site or did not cause the damage.

Plaintiff opposes both motions, arguing that both Defendants were present and working at the Renovation Site on the date of the flooding, that Structure Tone exercised sufficient control and supervision over Rite-Way to be found liable for Rite-Way's actions, and that therefore issues of fact remain as to the liability of one or both.[2] Plaintiff also argues that any deficiencies in its case will be remedied when it calls at trial Kevin Kiernan, the building's superintendent, to testify about the facts and circumstances of the water leak as he reported them to Kinnear, Plaintiff's adjuster.

In reply, Defendants argue, *inter alia*, Plaintiff's intent to call at trial Kiernan, who was not deposed, and for whom no affidavit was presented, is insufficient to defeat summary judgment. Rite-Way also argues, for the first time, that this Court's decision in a prior, related declaratory action bars, *via* collateral estoppel, the current claims.[3]

---

[2] The Court will consider Plaintiff's belated opposition, notwithstanding Rite-Way's objections, because of New York's strong preference that actions be decided on their merits (*see, e.g.*, *Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 521 [2009]; *Marks v Vigo*, 303 AD2d 306, 306 [1st Dept 2003]; *Perez v NYC Hous. Auth.*, 290 AD2d 265, 265 [1st Dept 2002]). Defendants also had, and took advantage of, an opportunity to submit replies.

[3] Though raised for the first time in Rite-Way's reply, the Court will consider this argument for the sake of

**Discussion**

*Summary Judgment*

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, 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 (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc3d 1216(A), 2014 WL 5859387 [Sup Ct NY Cty 2014] *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set

forth averments of factual or legal conclusions" (*Genger v. Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv to appeal denied*, 24 NY3d 917 [2015] *citing Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

*Defendant Structure Tone*

As to Structure Tone's initial claim that it lacked any duty to the Plaintiff or its insured, it is undisputed that non-party Uniqlo engaged Structure Tone to perform construction at the Renovation Site above Plaintiff's Premises. Although a contractual obligation standing alone will generally not give rise to tort liability in favor of a third party, the Court of Appeals has identified three situations in which a contracting party may be said to have assumed a duty of care to third persons:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.
> (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002] [citations omitted]).

Structure Tone established, and it is undisputed, that plaintiff (and its insured) did not detrimentally rely on the continued performance of Structure Tone's contractual duties, and that Structure Tone did not entirely displace any other party's duty to maintain the Premises safely. And, Structure Tone established that there is no evidence that it launched "a force or instrument

of harm" that caused any flooding. In this regard, the Contract between Uniqlo and Structure Tone, deposition of Rite-Way's principal Leroy Barroca, affidavit of Mark Dalton, Structure Tone's Director of Purchasing (at the relevant time period) and Purchase Order between Structure Tone and Rite-Way, upon which Structure Tone relies, establish that Uniqlo hired Structure Tone as the Construction Manager who, in turn, engaged Rite-Way as the subcontractor to perform demolition work at the Renovation Site. As pointed out by Structure Tone, Plaintiff's adjuster's deposition testimony does not reference Structure Tone in connection with the adjuster's inspection of the Premises. Plaintiff's adjuster testified that upon his investigation, he was advised that the supply valve on the second floor (*i.e.*, the Renovation Site) was impacted and left open, and caused a leak. Further, the Purchase Order indicates that Rite-Way's work included the "[r]emoval of the sprinkler piping" and "[r]emoval of temporary sprinkler piping." Thus, Structure Tone established that there is no evidence that it caused the leak at issue, or more specifically that it did not create a duty by "launch[ing] a force or instrument of harm" (*Espinal,* 98 NY2d at 142).

In opposition, Plaintiff and Rite-Way failed to raise an issue of fact as to Structure Tone's freedom from liability for Plaintiff's damages.

The entirety of Plaintiff's proofs appears to rest on the report of its adjuster, Kinnear, wherein he states that his "meeting with the building superintendent, Mr. Kevin Kiernan [Kiernan] . . . indicates that a two-inch drain line at the ceiling . . . failed due to pressurization" and that it "appear[ed] a contractor performing work at [the Renovation Site] had erroneously struck a water valve causing same to be in the 'on' position. . . . [and] caused a large quantity of water to enter into this two inch drain. . . ." Such is insufficient to raise an issue of fact as to

whether Structure Tone was performing any work at the Renovation Site which caused the alleged leak. And, although Rite-Way points out that, *inter alia*, the adjuster was not a licensed engineer or plumber, and only concluded that the value was "allegedly" struck by a contractor, Rite-Way points to no evidence indicating that Structure Tone performed any work at the Renovation Site.

Further, Structure Tone also established that as the General Contractor, it is not responsible for the negligent acts, if any, of its independent contractor, Rite-Way. The general rule is that a "party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligence. . . ." (*Kleeman v Rheingold*, 81 NY2d 270, 273-74 [1993]; *Tytell v. Battery Beer Distributing, Inc.*, 202 A.D.2d 226, 608 N.Y.S.2d 225 [1st Dept 1994] [citations omitted]). "Exceptions to this rule exist where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty (*Tytell, supra citing Kleeman v. Rheingold*, 81 N.Y.2d at 274, 598 N.Y.S.2d 149, 614 N.E.2d 712 [1993] internal citations omitted); *Chaouni v Ali*, 105 AD3d 424, 425 [1st Dept 2013 (dismissal warranted where defendant Dial 7's established that it could not be held liable for defend ant Shajahan Ali's conduct, as he was an independent contractor and not Dial 7's employee. Dial 7 submitted a host of evidence showing that it did not control the method or means by which Ali's work was to be performed)).

It is uncontested that Structure Tone hired Rite-Way, and there is no indication in the record that Structure Tone was negligent in selecting, instructing or supervising Rite-Way, that Rite-Way was employed to do work that is inherently dangerous ,or that Structure Tone bore any

specific nondelegable duty. Plaintiff's only substantive argument to the contrary is that "Structure Tone's Construction Supervisor Michael Sassone['s] . . . duty as a construction supervisor was to coordinate and oversee all the subcontractors on the project" (*Pl counsel Affirm*, ¶ 25 [*citing Rite-Way Exh C*, 11:5-10]). This is insufficient to raise a triable issue of fact because it is indicative of mere incidental or general supervisory control (*see Chaouni*, 105 AD3d at 425 [citations and internal quotations omitted]). Thus, even if Rite-Way is found negligent, Structure Tone would still not be liable to Plaintiff.

Therefore, Structure Tone, having established its freedom from negligence concerning the alleged water damage, is entitled to summary judgment dismissing the claims and cross-claims asserted against it.

However, as to the branch of Structure Tone's motion for indemnification against Rite-Way, Structure Tone failed to establish its *prima facie* burden of showing its entitlement to contractual indemnity pursuant to the indemnity clause in the Purchase Order. The Purchase Order contemplates indemnity by Rite-Way upon "any and all claims, suits, liens, judgments, damages, losses and expenses . . . arising in whole or in part and in any manner *from the acts, omissions, breach or default of Subcontractor* . . . ."

Inasmuch as Structure Tone's motion for indemnification is based on the investigation of Plaintiff's insured, Structure Tone failed to establish, as a matter of law, that the incident arose out the work Rite-Way so as to trigger the indemnification clause. Although Structure Tone points to the deposition testimony of Plaintiff's adjuster, Kinnear, (pp. 18-21), a review of such testimony indicates that (1) his "understanding" was based on second-hand information *from the insured* Richard Sirkin, that "a supply valve was *apparently* impacted by the contractor or

subcontractor doing work at that space . . . ."; (2) he inspected the location "where the valve was allegedly impacted somehow by one of the contractors . . ." and (3) he was "advised that the valve was actually struck and left in the open position . . . ." (Emphasis added). In the absence of any affidavit or deposition testimony from the insured, such testimony of the adjuster is insufficient to establish that the source of the water damage emanated from the Renovation Site. The fact that Rite-Way was performing work at the Renovation Site, in and of itself, is insufficient to establish that plaintiff's insured's water damage arose out of Rite-Way's work.[4] Therefore, the branch of Structure Tone's motion for contractual indemnification against Rite-Way is denied.

*Rite-Way*

*Res Judicata/Collateral Estoppel*

Rite-Way argues that *res judicata* and collateral estoppel should apply to preclude Plaintiff's claims based on the Court's previous determination that

> there is no evidence, or indeed, any indication, other than the hearsay reported by Kinnear, that the water damage of which [Plaintiff's insured] complained arose in any way out of, or in connection with, the work performed by Rite Way. (*Structure Tone v. Endurance American Ins.*, Sup Ct NY Cty, December 2, 2015, Edmead, J., Index No. 153157/2013 at p. 4.)

Under the doctrine of *res judicata*,

> a party may not litigate a claim where a judgment on the merits

[4] In any event, Rite-Way points out, that the adjuster did not use a ladder to inspect the valve, has no background in plumbing or engineering, indicated on a photograph of the valve that the valve was "allegedly" struck by a contractor, and that his conclusion was based on hearsay statements by the insured and building superintendent. Such factors raise an issue as to the adjuster's conclusion that the alleged water damage was caused by any contractor.

> exists from a prior action between *the same parties* involving the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again.
> (*Mays v NYC Police Dept.*, 48 AD3d 372, 852 NYS2d 106 [1st Dept 2008] *citing Matter of Hunter*, 4 NY3d 260, 269, 794 NYS2d 286, 827 NE2d 269 [2005] [emphasis added]).

Collateral estoppel applies when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) *there was a full and fair opportunity to litigate in the prior proceeding*; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 928 NYS2d 515 [1st Dept 2011] *citing Ryan v New York Tel. Co.*, 62 NY2d 494, 500–501, 478 NYS2d 823, 467 NE2d 487 [1984] [emphasis added]).

Though the issues in the adjoining case are similar (if not identical), Plaintiff was not a party to that action, and therefore did not have a full and fair opportunity to litigate its claims and counter Defendants' arguments. Accordingly, that branch of Rite-Way's motion is denied.

Turning to the merits of Rite-Way's motion, Rite-Way established its entitlement to summary dismissal of Plaintiff's claims.

While there is no dispute that Rite-Way was conducting demolition work on or about the date of the damage to the Premises (*Rite-Way Exh D, Barroca Tr* 24:9-15; *Structure Tone Exh G*), the dispositive issue is not – as Structure Tone asserts – Rite-Way's presence on or about July 8, 2010. Rather, the issue is Rite-Way's connection, if any, to the flooding of Plaintiff's insured's property. Rite-Way has met their *prima facie* burden of introducing competent evidence that there was no such connection.

Rite-Way's vice president Leroy Barroca, who was present at the site weekly during the duration of Rite-Way's demolition (*Rite-Way Exh D, Barroca Tr*, 14:21-15:3), testified at his deposition that prior to Rite-Way's demolition work, another contractor was engaged in electrical and plumbing disconnection, followed by cutting and capping (*id.* at 23:9-25). Barroca's statements are supported by the undisputed contents of the purchase order, which require Rite-Way to remove the sprinkler piping (*Structure Tone Exh G*). Thus, the record demonstrates that even if Rite-Way had been present on-site on or about July 8, 2010, and had caused the valve to become opened, the water would have been disconnected.

Further, as pointed out by Rite-Way, the record fails to demonstrate any connection between the valve located at the Demolition Site, that allegedly caused the flooding upon the Premises. The adjuster's conclusions, on which Plaintiff's claims are based, were based on hearsay statements made by the building superintendent, not based on any actual inspection of the water valve, and not based on any engineering or plumbing background. Thus, as there is no competent evidence of any causal link between Rite-Way's demolition work and the alleged water damage, or even that the valve had ever been opened or impacted, Rite-Way met its burden on its motion.

Plaintiff fails to meet its shifted burden by substantively refuting any of the above, or demonstrating with any competent evidence that an issue of fact exists with regard to Rite-Aid's liability. Plaintiff's remaining factual arguments merely restate Kinnear's reports and testimony (*Pl counsel Affirm*, ¶¶ 13-19), which themselves cite only the unsupported hearsay discussed and discounted above, and speculative to boot.

Plaintiff's intent to call the building "superintendent" at trial to provide supporting

testimony is "an ineffectual mere hope, insufficient to forestall summary judgment," particularly in light of Plaintiff's failure to seek the deposition testimony of the superintendent (*see Kramer v Danalis*, 66 AD3d 539, 540 [1st Dept 2009]). Notably, Plaintiff does not set forth the substance of Kiernan's proposed testimony, or how his testimony will advance Plaintiff's cause. While the Court is empowered to search the record to grant or deny summary judgment, Plaintiff must contribute to it. Plaintiff may not, to defeat dual motions for summary judgment, force the Court to divine the contents of future testimony.

Consequently, any cross-claims against Rite-Way are also, by necessity and for the reasons discussed above, dismissed. This includes Structure Tone's indemnity claim against Rite-Way, given that the Purchase Order contemplates indemnity only upon "any and all claims, suits, liens, judgments, damages, losses and expenses . . . arising in whole or in part and in any manner *from the acts, omissions, breach or default of Subcontractor* . . . ." and the Court's finding that there is no evidence of such acts, omissions, or breaches by Rite-Way.

*Conclusion*

For the reasons set forth above, it is hereby

ORDERED that the motion for summary judgment of Defendant Rite-Way Internal Removal, Inc., sequence 002 is hereby granted, and Plaintiff's Complaint and any and all claims and cross-claims against Rite-Way are dismissed, with prejudice; and it is further

ORDERED that the branch of Defendant Structure Tone, Inc.'s motion, sequence 003, for summary judgment dismissing the Complaint and all cross-claims asserted against it is granted, and Plaintiff's Complaint and any and all claims and cross-claims against Structure Tone are hereby dismissed, with prejudice; and it is hereby

ORDERED that the branch of Defendant Structure Tone, Inc.'s motion, sequence 003, for summary judgment on its indemnification cross-claim against Rite-Way is hereby denied; and it is further

ORDERED that Rite-Way shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the Order and Decision of the Court.

Dated: February 16, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.