Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CHERYL JONES,
Plaintiff,

-against-

ROCHDALE VILLAGE, INC. et al.,
Defendants.

Index
No. 33054 2009

Motion
Dates Jan 27 & Feb 24, 2016

Motion
Cal. Nos. 68, 69, 71, 81 & 82

Motion
Seq. Nos. 5, 6, 7, 8 & 9

The following papers numbered 1 to 76 read on these motions by defendants Champion Aluminum Corp. (Champion), Howard L. Zimmerman Architect, P.C. (Zimmerman), Rochdale Village, Inc. (Rochdale), Arcadia Architectural Products, Inc. (Arcadia), and Werfel & Assoc. Architects, P.C. and Lawrence Werfel (collectively Werfel), all seeking, *inter alia*, summary judgment dismissing plaintiff's (second supplemental summons and) complaint and all and cross-claims, pursuant to CPLR 3212.

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Plaintiff seeks to recover damages for personal injuries alleged to have been sustained on May 25, 2007, when she was caused to trip and fall while stepping through the sliding door of her cooperative apartment onto her balcony at Rochdale Village, Queens, New York. Plaintiff contends that the balcony sliding door was designed, constructed and/or installed in violation of multiple sections of the New York City Building Code, and negligently created a tripping hazard, causing her serious injuries.

Rochdale was the owner of the building containing plaintiff's residence. Rochdale hired Zimmerman, and later, Werfel, as architects to design and manage the installation of new windows and balcony sliding glass doors at all of the balcony residences in Rochdale Village. At the time of the manufacture and installation of the windows and doors, Werfel was the architect on the project, having replaced Zimmerman. Rochdale hired Champion as the general contractor for the job, and Champion sub-contracted the manufacture of the doors to Arcadia, and sub-contracted the installation of such doors to NYTech Window Systems, Inc. (NYTech). Plaintiff's injury occurred more than two years after the doors were installed in plaintiff's apartment. Rochdale alleges it had no complaints about any of the new doors, and there had been no similar accidents involving the doors, prior to plaintiff's accident. Plaintiff admits that neither she, nor anyone in her family, made complaints about the door prior to her injury.

Champion, Zimmerman, Rochdale, Arcadia, and Werfel, moved for, among other things, summary judgment, dismissing plaintiff's complaint on the ground that plaintiff has failed to demonstrate defendants' liability for the accident, alleging that the Building Code was inapplicable to the subject sliding doors at the time of this accident, and that there was a lack of notice of any defect.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062 [1993], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Ctr.,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motions for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683 [2009]; *see Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is 'arguable' " (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957] [citations omitted]; *see also Rotuba Extruders vCeppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 [2011]; *Dykeman v Heht*, 52 AD3d 767 [2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be

drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014][internal quotation marks omitted]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Med. Ctr.*, 64 NY2d 851 [1985]).

Rochdale moved for summary judgment dismissing plaintiff's complaint against it; for common-law indemnity against codefendants; and for dismissal of all cross-claims against it. Initially, a property owner will be held liable for a dangerous condition on its premises, which caused plaintiff's accident, when it either created the dangerous condition or had actual or constructive notice of it in time to have corrected the condition (*see Scott v Avalonbay Communities, Inc.*, 125 AD3d 839 [2015]).

In support of its motion, Rochdale submitted an affidavit of Thomas R. Turkel, an architect, sworn to on November 9, 2015, who, after a site inspection at plaintiff's apartment, opined that "[t]he sill, water board, threshold and other component parts of the sliding door involved in Plaintiff's accident were properly constructed, maintained in its constructed condition, and are in compliance with all applicable codes, rules, regulations and statutes." Based upon his allegation that "Rochdale Village was built between 1960 and 1962," Mr. Turkel concludes that the New York City Building Code of 1938 is the applicable code in this matter and that, because the subject sliding door "is not a point of egress or part of an exit out of the building," it does not serve as a "required exit," as would be necessary to fall within the provisions of the 1938 Code.

The question of whether the Building Code provisions apply to a particular structure is an issue of statutory interpretation. Consequently, it is a purely legal one, and expert opinion cannot usurp the function of the court as the sole arbiter of the law (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1 [2005]. Expert testimony which is speculative, conclusory, and unsupported by an evidentiary foundation, has no probative value (*see id.*; *Littles v Yorkshire Business Corp.*, 114 AD3d 646 [2014]; *Flushing Sav. Bank v Bital*, 106 AD3d 690 [2013]). In the case at bar, Rochdale's architect, noting that the sliding door was replaced in plaintiff's apartment in 2005, failed to adequately explain why this action did not amount to a substantial renovation, which would mandate the utilization of the 1968 Code (*see generally Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984 [2003]), and why the 1938 Code was still applicable, proffering only the circular reasoning that "the 1938 Building Code of the City of New York remains the applicable Building Code because it was the code of jurisdiction prior to the issuance of the 1968 Building Code of the City of New York." As such, the architect's report and opinion, along with Rochdale's other evidence, lacking proof of the building's classification, its maximum occupancy load, or its assigned category, could

not establish the applicability of one or the other dated versions of the Building Code (*see Ercegovic v P&T Mgt. Co, LLC,* 44 AD3d 995 [2007]; *Roman v Parkash*, 4 AD3d 408 [2004]; *Sparrock v City of New York*, 219 AD2d 705 [1995]).

Even assuming Rochdale was correct in its assertion that, *inter alia*, the 1938 Building Code remains applicable and that, as such, the sliding door was in compliance therewith, it has nevertheless failed to meet its prima facie burden establishing that: (1) it did not owe plaintiff a duty; and (2) it did not create or have notice of the condition complained of.

To the extent Rochdale contends that plaintiff's alleged "hazardous condition," *i.e.*, a water board/ draft bar constructed at the base of the sliding door, that was too high, and constituted a tripping hazard, invokes the "open and obvious" doctrine, relieving Rochdale of a duty to warn of the danger (*see Tagle v Jakob*, 97 NY2d 165 [2001]), it is initially noted that the application of such doctrine would only relieve Rochdale of any duty to warn plaintiff, and not of any liability for the dangerous condition itself (*see Devlin v Ikram,* 103 AD3d 682 [2013]; *Cooper v American Carpet & Restoration Servs, Inc.*, 69 AD3d 552 [2010]). Further, Rochdale has failed to demonstrate that such condition was of such a dangerous nature that it could not be overlooked by anyone in the area whose eyes were open (*see Tagle v Jakob*, *supra*; *Liriano v Hobart Corp.*, 92 NY2d 232 [1998]), especially in light of Rochdale's assertion that no such tripping hazard existed. Finally, given the conflicting evidence as to, *inter alia*, the appropriateness of the height of the draft bar, Rochdale has not established that the condition was, as a matter of law, open and obvious and not inherently dangerous such that there was no duty to protect against it (*cf. Lapera v Montana*, 124 AD3d 844 [2015]).

Further, Rochdale contends that if any negligence is to be attributed to it for the condition of the door, such liability would be purely vicarious. Such argument fails, as Rochdale has not sufficiently demonstrated that it did not create the condition (by deciding on renovation itself) nor that it lacked actual or constructive notice of any such defect. Evidence has been submitted in these several motions that the Rochdale Board had a hand in approving and revising the plans, and approving the manufacturer and installer, of the doors, and that Rochdale employees had inspected each installed door on the premises prior to plaintiff's accident, raising a triable issue of fact as to notice.

With respect to the branch of Rochdale's motion seeking summary judgment on the ground of common-law, or "implied," indemnification against codefendants, the law is clear that if it is determined that the owner is liable to plaintiff, and its liability is only vicarious, a contract to reimburse or indemnify is implied by law, and the owner is entitled to implied indemnity, shifting the loss, on the basis that failure to do so would result in the unjust enrichment of the actual wrongdoer at the expense of the owner (*see Brown v Rosenbaum*,

287 NY 510 [1942]; *Baek v Red Cap Servs., Ltd.*, 129 AD3d 752 [2015]). A "key element . . . is not a duty running from the indemnitor to the injured party, but rather is a 'separate duty owed the indemnitee by the indemnitor' " (*Raquet v Braun*, 90 NY2d 177[1997], quoting *Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]). "[A] party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*McCarthy v Turner Const., Inc.*, 17 NY3d 369 [2011]; *see Bermejo v New York City Health & Hospitals Corp.*, 119 AD3d 500 [2014]). Liability predicated on a party's own fault obviates a common law indemnity recovery (*see Lui v Town of E. Hampton*, 117 AD3d 689 [2014]). Since Rochdale has not affirmatively established that it was free from negligence, it cannot, therefore, establish that it should be indemnified by codefendants.

Further, Rochdale moves to dismiss all cross-claims against it seeking contribution - a claim in which the loss to one who has discharged the joint liability of the tortfeasors is, automatically, proportionally distributed amongst such tortfeasors (*see Rosado v Proctor & Schwartz*, 66 NY2d 21 [1985]). On the evidence submitted, the branch of the motion seeking common-law indemnification, along with the branch seeking to dismiss any and all cross-claims for contribution against Rochdale, are denied, as plaintiff's injury has not yet been shown to be attributable solely to one or more of the codefendants herein (*see Arrendahl v Trizechahn Corp.*, 98 AD3d 699 [2012]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]; *George v Marshalls of MA, Inc.*, 61 AD3d 925 [2009]).

Champion, the general contractor on the renovation project, moves for summary judgment dismissing plaintiff's complaint, and for dismissal of all cross-claims against it. Champion concedes that, by the terms of its contract with Rochdale, it had a hand in retaining Arcadia to manufacture the doors and retained NYTech to install the doors. As such, Champion contends that it had no duty to plaintiff in this matter, as it did not manufacture or install, and had no obligation to inspect, the sliding glass doors, so it could not have been negligent.

A finding of negligence must initially be based upon a breach of duty of care owed to the injured plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Federico v Defoe Corp.*, __AD3d__, 2016 NY Slip Op 02615 [2016]). Here, any duty Champion had with respect to the sliding glass door would have arisen from the contract with Rochdale. While, generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third person (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Rodriguez v County of Westchester*, __AD3d__, 2016 NY Slip Op 02635 [2016]), there are three exceptions to this general rule, *i.e.*, (1) where a contracting party, in failing to exercise reasonable care in the performance of its duties, launches 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 (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Rothstein v Elohim*, 133 AD3d 839 [2015]). No evidence adduced on the record herein demonstrated that plaintiff detrimentally relied upon the continued performance of Champion's duties; that Champion entirely displaced Rochdale's duty to maintain a safe premises; or that Champion created the alleged dangerous condition by failing to exercise reasonable care in the performance of its duties. As such, Champion did not owe a duty of care to plaintiff, resulting from its contract with Rochdale, as none of the aforementioned exceptions was shown to be applicable to the facts of this matter (*see Miller v Infohighway Communications Corp.*, 115 AD3d 713 [2014]).

However, while the court has determined that Champion owed no duty to plaintiff in this action, Champion may still be liable to Rochdale for indemnity. Champion's contract with Rochdale states that Champion will perform all work "in compliance with the applicable Municipal, State and Federal Laws, Ordinances and Regulations," creating "a separate duty owed"by Champion to Rochdale (*Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]), making indemnification appropriate, if warranted by the factual evidence.

Zimmerman, the original architect hired by Rochdale on the renovation project, moves for summary judgment dismissing plaintiff's complaint; for dismissal of all cross-claims against it; and for judgment on its claim for contractual indemnity against Rochdale. Zimmerman contends that it had no duty to plaintiff in this matter, as it was fired by Rochdale before a contract for the manufacture of the doors had been entered into and construction of the doors commenced; that Zimmerman's plans did not specify a particular door to be installed, but, merely, directed that certain performance requirements be satisfied in the door's installation; and that Zimmerman had no obligation or part in designing, inspecting, approving, supervising, installing, or maintaining the Arcadia sliding glass door finally selected, some two-plus years after Zimmerman was terminated from the project.

As with Champion, any legal duty Zimmerman might have owed to plaintiff would have come from the contract it had with Rochdale, and tort liability in favor of plaintiff would have to emanate from one of the three exceptions to the general rule, as aforementioned. The undeniable fact that Zimmerman was terminated years before the manufacture and installation of the subject sliding glass door, obviates any determination that plaintiff could have relied upon any continuation of Zimmerman's duties, or that Zimmerman could have displaced Rochdale's duty, with regard to the subject door.

Zimmerman contends that it was incapable of launching a force or instrument of harm in this matter because it was terminated during the design phase of its contract with Rochdale and had no part in the alleged improper manufacture and/or installation of the doors; that its

plans for the sliding glass doors were prepared in conformance with the DHCR guidelines; that its plans did not specify a specific type of door, but merely required a door that satisfied the performance requirements listed; that Rochdale and DHCR reviewed and approved the plans; and that Rochdale and/or Werfel either adopted Zimmerman's unfinished plans outright or modified such plans prior to manufacturing and installing the doors. Questions of fact exist as to whether Zimmerman's abbreviated compliance with its contractual obligation to Rochdale was sufficient to ascribe negligence, in the form of a launching of a force or instrument of harm, to Zimmerman, or whether any use of Zimmerman's work product by Werfel, on behalf of Rochdale, was merely gratuitous and amounted to an adoption of such product by Werfel and Rochdale, which could not serve to revive Zimmerman's former contractual duties. Consequently, the branch of Zimmerman's motion seeking dismissal of the complaint against it is denied.

It should be noted that, though Zimmerman did not previously move for summary judgment against plaintiff, it previously moved for summary judgment dismissing codefendants' cross-claim for contribution, as well as for summary judgment in its favor on its cross-claim against Rochdale (the latter two discussed, *infra*), which motion was later the subject of an appeal before the Appellate Division, Second Department (96 AD3d 1014 [2012]). Notably, the Second Department has already held that Zimmerman "failed to eliminate all triable issues of fact as to whether it negligently designed the doorway threshold upon which the plaintiff tripped."

Werfel, the second-retained architect, also moves for summary judgment dismissing plaintiff's complaint, and seeks contribution from codefendants. Werfel contends that its contract with Rochdale stated that Werfel would utilize the plans of Zimmerman in constructing and installing the doors. Unlike Zimmerman, Werfel was contractually responsible for choosing the manufacturer and the installer of the doors, and for seeing that the work was done properly. Evidence has been presented that Werfel inspected the doors after their installation, which raises a triable issue of fact regarding control (*see generally Palmana Realty Corp. v Zandieh*, 136 AD3d 768 [2016]; *Gorham v Reliable Fence & Supply Co., Inc.*, 92 AD3d 834 [2012]). As plaintiff's expert opined that the negligence attributable to plaintiff's accident involved improper manufacturing and installing of the doors, a question of fact as to Werfel's negligence exists with regard to whether it launched a force or instrument of harm, warranting the denial of summary judgment.

Arcadia, the manufacturer of the subject sliding door, moves for summary judgment dismissing plaintiff's complaint and all cross-claims against it. Arcadia contends that plaintiff, through her experts, determined that the negligence in this accident consisted of a door that was "inappropriate" for its application, that the installation was defective, and that the resulting dangerous condition should have been corrected, but that said experts failed to

opine that the door, itself, was defectively manufactured. Manufacturers may be held strictly liable for injury caused by their products due to either a design defect, a manufacturing defect, or a failure to provide adequate warnings for the use of the product (*see Doomes v Best Tr. Corp.*, 17 NY3d 594 [2011]; *Singh v Gemini Auto Lifts, Inc.*, 137 AD3d 1002 [2016]). However, where a product is made in accordance with specifications provided by the purchaser, as was the case here, the manufacturer is not liable for design defects "unless the specifications are so patently defective that a manufacturer of ordinary prudence would be placed on notice that the product is dangerous and likely to cause injury" (*Houlihan v Morrison Knudsen Corp.*, 2 AD3d 493 [2003]), or where the manufacturer is involved in the design and installation of the product (*see Sprung v MTR Ravensburg*, 99 NY2d 468 [2003]; *Lagman v Overhead Door Corp.*, 128 AD3d 778 [2015]).

While there has been no evidence presented of defective manufacturing of the door by Arcadia, and no claim made that Arcadia took part in its installation, or contracted to inspect and maintain the door, plaintiff's experts raise the issue of Arcadia's failure to provide adequate warnings on the water board/draft bar. Opinion evidence based on the facts in the record or personally known to the witnesses, which is not speculative, conclusory, and does not assume facts not supported by the evidence, is admissible in opposition to a summary judgment motion (*see Cassano v Hagstrom*, 5 NY2d 643 [1959]; *Garcia v Richter*, 132 AD3d 809 [2015]). Plaintiff's experts have opined that the manufactured door was "inappropriate for its application." Thus, plaintiff's experts' opinions, having been based in part on their on-site inspections of the subject door, are admissible herein.

Further, evidence has been presented that Arcadia, having been presented with "performance specifications" for the water board/draft bar, necessarily provided consultation and advice with regard to the design of such components. Arcadia, in a letter dated July 17, 2002 to Larry Werfel, the architect, and copied to Champion, stated that it would have to modify its "standard door . . . to increase the sill height from 2" to 2 3/8" in height for achieving the water performance of 6.75#." Consequently, plaintiff's opposition raises questions of fact sufficient to deny Arcadia's entitlement to summary judgment, and the branches of the motion seeking dismissal of plaintiff's complaint, and any and all cross-claims, against it are denied.

Defendants, Rochdale, Arcadia, Champion and Zimmerman instituted cross-claims for indemnification, either common law, contractual, or both, and each moved to dismiss such cross-claims as brought against it. As previously discussed with regard to Rochdale's motion, an action for common law indemnification remains available against any negligent party, provided the seeking party is not negligent (*see Fernandez v Abelene Oil Co., Inc.*, 91 AD3d 906 [2012]), and the answers to the negligence issues herein are unresolved, and, therefore, premature at this time. Consequently, denial of the branches of each motion

seeking to dismiss any common-law indemnification and contribution claims is warranted.

With regard to the branches of the motions seeking dismissal of contractual indemnification claims, five contracts have been introduced in this matter. Champion has contracted with Arcadia. The Rochdale/Werfel contract, the Rochdale/Champion contract and the Champion/Arcadia contract do not contain an indemnity provision. Consequently, there can be no claims for contractual indemnification between Rochdale and Werfel, between Rochdale and Champion, or between Champion and Arcadia (*see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2011]; *Araujo v City of New York*, 84 AD3d 993 [2011]). The branch of the motion seeking to dismiss the claim for contractual indemnification between Rochdale and Zimmerman – and that branch of Zimmerman's motion as against Rochdale – is denied, as premature, for the same reasons as applied to the denial of the common law indemnity claims (*see Arrendahl vTrizechahn Corp.*, *supra*; *Bellefleur v Newark Beth Israel Med. Ctr.*, *supra*; *George v Marshalls of MA, Inc.*, *supra*).

Movants' remaining contentions are either without merit, or need not be addressed in light of the aforementioned determinations.

Accordingly, the branches of the motions by defendants Zimmerman, Rochdale, Arcadia and Werfel, seeking summary judgment dismissing plaintiff's complaint, are denied. The branch of Champion's motion seeking dismissal of plaintiff's complaint is granted, as Champion has no duty toward plaintiff. The branch of Champion's, Rochdale's, Arcadia's and Werfel's motions seeking dismissal of cross-claims against them for contractual indemnification are granted, with the exception of Zimmerman's cross-claim seeking indemnification against Rochdale, which is denied. The remaining branches of all defendants' motions are denied.

Dated: April 26, 2016

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J.S.C.