

**Tuchman v East River Hous. Corp.**

2016 NY Slip Op 32212(U)

October 26, 2016

Supreme Court, New York County

Docket Number: 152642/12

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
MARION TUCHMAN and BENJAMIN TUCHMAN,

Plaintiffs,

-against-

Index No. 152642/12

**DECISION/ORDER**

EAST RIVER HOUSING CORPORATION, CENTURY  
ELEVATOR MAINTENANCE CORPORATION and  
CAMBRIDGE SECURITY SERVICES CORP.,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Marion Tuchman and Benjamin Tuchman commenced the instant action seeking to recover for injuries allegedly sustained by plaintiff Marion Tuchman while she was exiting one of the elevators in the building in which she resides. Defendant East River Housing Corporation ("East River") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment on its cross-claims for contractual indemnification and breach of contract against defendant Century Elevator Maintenance Corporation ("Century") and declaring that Century is obligated to defend and indemnify East River as well as reimburse East River for all fees incurred in this action. For

the reasons set forth below. East River's motion is denied.

The relevant facts are as follows. Plaintiff alleges that on or about December 21, 2011, she tripped and fell while exiting one of the elevators in the building in which she resides, located at 568 Grand Street, New York, New York (the “subject premises” or “building”). Specifically, plaintiff testified that as she was walking out of the elevator, her foot got caught on something and she tripped and fell (the “accident”). Plaintiff testified that she did not look down at the floor prior to exiting the elevator nor did she look at the floor or the elevator after she fell and that she could not be certain what it was she tripped over. She also testified that she witnessed the elevator mislevel on a few occasions prior to her accident and specifically, on the morning of her accident.

The building is owned by defendant East River and the elevators in the building were maintained by defendant Century pursuant to an exclusive, full-service contract for the elevators at the subject premises entered into between Century and East River in or around January 2004 (the “Agreement”). Pursuant to the Agreement, Century was responsible for maintaining and fixing the elevators in the building and a representative from Century remained on-site in the building from 9:00 a.m. until 5:00 p.m. Monday through Friday.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. See *Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

The court first turns to East River's motion for summary judgment on its cross-claim against Century for contractual indemnification. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2<sup>nd</sup> Dept 2008).

In the instant action, the court finds that East River is not entitled to summary judgment on its cross-claim against Century for contractual indemnification. Pursuant to the Agreement,

[Century] hereby agrees, to the fullest extent permitted by law, to assume the entire responsibility and liability for the defense of and to pay and indemnify [East River], their agent and employees against any loss, cost, expense, liability or damage and will hold each of them harmless from and pay any loss, cost, expense, liability or damage (including without limitation, judgment, attorney's fees, court costs and the cost of appellate proceedings) which [East River] incurs because of...injury to...any person...or any other claim *arising out of, in connection with, or as a consequence of the performance of the services or the furnishing of the equipment and supplies and/or any acts or omissions of [Century]* or any of its officers, directors, employees, agents, subcontractors, or anyone directly or indirectly employed by [Century] for whom it may be liable as it relates to the scope of this [Agreement]. (Emphasis added).

Thus, as the indemnification provision in the Agreement makes clear, Century must indemnify and hold harmless East River if plaintiff's accident "ar[ose] out of, in connection with, or as a consequence of the performance of the services or the furnishing of the equipment and supplies and/or any acts or omissions of [Century]." However, East River is not entitled to summary judgment as it has failed to demonstrate, at this stage of the litigation, that plaintiff's accident arose out of, in connection with or as a consequence of Century's performance of services, or Century's furnishing of equipment and supplies or any acts or omissions of Century. Plaintiff testified that she did not know what specifically caused her to trip and fall as she was exiting the elevator as she

never looked down or inspected the elevator to see what caused her to fall. Although plaintiff testified that she witnessed the elevator mislevel on the morning of her accident and on a few other occasions over the many years she resided in the building, she testified that she did not know what caused her accident. Thus, as East River has not established, as a matter of law, that plaintiff's accident arose out of, in connection with or as a consequence of the performance of services or the furnishing of the equipment and supplies and/or any acts or omissions of Century, East River's motion for summary judgment on its cross-claim against Century for contractual indemnification is denied.

Additionally, as this court has denied East River's motion for summary judgment on its cross-claim against Century for contractual indemnification, that portion of East River's motion for an Order declaring that Century is obligated to defend and indemnify East River as well as reimburse East River for all fees incurred in this action must also be denied.

The court next turns to East River's motion for summary judgment on its cross-claim against Century for breach of contract. In order to establish entitlement to summary judgment on a breach of contract claim, a party must establish (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010).

In the present case, the court finds that East River is not entitled to summary judgment on its cross-claim against Century for breach of contract. The Agreement between East River and Century required as follows:

5. Prior to the commencement of operations, [Century] will purchase and maintain the following minimum insurance as will protect it, [East

River] and [East River's] agents from any claim which may arise out of a result of [Century's] operations under this service [Agreement] whether such operation shall be by [Century], its employees or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable:

a. Commercial General Liability Insurance on Occurrence basis including:

(1) Personal Injury including death...

...

(a) The minimum limit for this coverage shall be the greater of the usual limits carried by the contractor or the following:

(1) Separate limits for bodily injury and property damage of \$1,000,000 per occurrence and \$2,000,000 in the aggregate.

(2) Excess liability limits of not less than \$4,000,000 per occurrence and in the aggregate. To follow form of the underlying policy.

...

B. The foregoing insurance policies shall be primary to any other insurance which may be carried by [East River] and shall name as additional insured with a specific policy endorsement as follows:

2. East River Housing Corporation....

Here, East River argues that it is entitled to summary judgment on its cross-claim against Century for breach of contract on the ground that Century failed to obtain excess liability insurance which is primary to any other additional insurance which may be carried by East River. However, the court finds that East River has failed to establish such breach as a matter of law. Initially, it is undisputed that Century obtained an excess insurance policy from Chartis Insurance ("Chartis") ("hereinafter referred to as the Chartis excess policy") with limits of not less than \$4 million. With regard to other insurance, the Chartis excess policy states as follows:

If other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the Other Insurance. *However, this provision will not apply if the Other Insurance is specifically written to be excess of this policy.* (Emphasis added).

Thus, in order to establish a breach of the Agreement, East River must make a *prima facie* showing that it does not carry insurance that is specifically written to be excess of the Chartis excess policy, either by affidavit or by other means. However, East River has failed to make such a showing. The mere fact that Chartis may have declined to defend or indemnify East River in the instant action is not proof that Century breached the Agreement.

Accordingly, East River's motion for summary judgment against Century on its cross-claim for contractual indemnification is denied; East River's motion for an Order declaring that Century must defend and indemnify East River and reimburse East River for all fees incurred in this action is denied; and East River's motion for summary judgment against Century on its cross-claim for breach of contract is denied without prejudice with leave to renew. This constitutes the decision and order of this court.

Dated: 10/28/15

Enter: \_\_\_\_\_

eaK  
HON. CYNTHIA S. KERN  
J.S.C.