

Starr Indem. & Liability Co. v 493 Fulton LLC
2018 NY Slip Op 31793(U)
July 26, 2018
Supreme Court, New York County
Docket Number: 651997/2018
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART

IAS MOTION 59EFM

Justice

-----X

STARR INDEMNITY & LIABILITY COMPANY, AS SUBROGEE OF
OREN S. LANGNAS d/b/a FRENCH CORNER,

Plaintiff,

- v -

493 FULTON LLC and IMPACT BUILDERS CORP.,

Defendants.

INDEX NO.

651997/2018

MOTION DATE

07/24/2018

MOTION SEQ. NO.

001

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for

DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant 493 Fulton LLC to dismiss the complaint pursuant to CPLR 3211(a)(1) herein is GRANTED and the complaint is DISMISSED in its entirety as against such defendant, with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining defendant shall serve and file an answer to the complaint within twenty (20) days of service of this order with notice of entry; and it is further

ORDERED that the remaining parties are directed to appear in IAS Part 59, Room 331, 60 Centre Street, New York, New York, for a preliminary conference on August 28, 2018, 9:30 AM.

DECISION

This court concurs with the moving defendant that the Lease between it and plaintiff's subrogor, and the comprehensive general liability insurance policies (CGL) that each party

purchased¹, irrefutably establish that plaintiff and defendant agreed to and effectuated waivers of their respective rights of subrogation on any claim arising from alleged acts of negligence resulting in damages or injury to person or property on the Premises. See Kaf-Kaf, Inc. v Rodless Decorations, 90 NY2d 654 (1997).²

Defendant is incorrect that paragraph 56., captioned "Maintenance and Repair" of the Rider to the Lease, conflicts with the waiver of subrogation provisions of paragraph 9. entitled "Casualty" of the Lease. That Rider paragraph admittedly conflicts with paragraph 8., captioned "Tenant's Liability" of the Lease, in that it makes the Owner responsible for any leaks even when not arising out of the Owner's negligence.

¹The moving defendant attaches its CGL policy (insured: Avi Dishy, et al) for the first time in its reply in further support of its motion, which ordinarily the court would not consider. However, as plaintiff forewent this court's invitation to submit a sur-reply, in its discretion and in the interest of judicial economy, the court considers the late submission.

²The court notes that in the WHEREFORE clause of its complaint, plaintiff seeks no more than the amount that it paid on the subrogor's claim under its CGL policy but does not seek any damages for uninsured losses incurred by its insured.

Nonetheless, Rider paragraph 56. is entirely consistent with Lease paragraph 9(b), (d) and (e) regarding damage from fire or other casualty, fault or no fault, for which each party released and waived its respective rights of recovery against the other.

<u>7/26/2018</u>		<u></u>	
DATE		DEBRA A. JAMES, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE