

Smith v DMC Professional Contr. Inc.
2019 NY Slip Op 30933(U)
April 9, 2019
Supreme Court, New York County
Docket Number: 159298/2015
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. BARBARA JAFFE</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>JEAN SMITH,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p>	<p>PART IAS MOTION 12EFM</p> <p>INDEX NO. <u>159298/2015</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>003, 004</u></p>
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DMC PROFESSIONAL CONTRACTORS INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 80-85, 87, 98-107, 110, 111, 114, 118, 119-122
were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 56-78, 86, 88-97, 108, 109, 112, 113, 115-117
were read on this motion to/for summary judgment.

By notice of motion, defendant/third-party plaintiff DMC Professional Contractors, Inc. moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it (mot. seq. three). Plaintiff opposes and defendant/third-party defendant Sutton House, Inc. partially opposes to the extent that DMC contends that Sutton was negligent.

By notice of motion, Sutton moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and all cross claims against it, permitting it to amend its answer to the third-party complaint to include a counterclaim for contractual indemnity, and upon amendment, granting it judgment on its claim for contractual indemnity. Plaintiff opposes and DMC opposes the motion to amend the answer.

I. PERTINENT BACKGROUND

In this action, plaintiff alleges that she was injured when, while attempting to enter the

rear entrance of the building where she resides and which is owned by Sutton, she was struck by a door being opened outwardly by an employee of DCM, a private contractor doing renovations in a co-op unit in the building. Plaintiff claims that Sutton was negligent in failing to ensure that the window in the door had sufficient visibility for the employee to see through it before opening the door, and that DMC was negligent in failing to operate, maintain, supervise, and control the premises and the door. (NYSCEF 1).

Photographs of the door reflect the following: The door is part of a double-door opening to the building's service entrance. A square-shaped window, covered with diamond-shaped wiring, is in the top center of each door. The door on the left exterior side has a handle; there is no handle on the right side. The interior door on the right side opens by pressing a push-bar mechanism. (NYSCEF 82, 91).

A video recording of part of the incident shows the interior of the building from the vantage point of the ceiling above the hallway leading to the door. The street and vehicles driving by are visible through both windows. As DMC's employee approaches the door, he pauses in front of it for several seconds, and then pushes it open. As the door opens, plaintiff is seen on the other side of the door and she moves sideways.

At her deposition held on June 14, 2016, plaintiff testified that the accident occurred at 5 pm, when it was still light outside, and that there is no issue with lighting surrounding the area of her accident. As she approached the left outside door to open it, it opened and hit her, knocking her backwards to the ground. She did not know the speed at or force with which the door was opened, or whether it was defective. Plaintiff had never complained about the door or the door's windows before her accident. (NYSCEF 65).

DMC's employee testified at his deposition in June 2016, that he had approached the exit door from inside the building and stopped in front of it for two to three seconds to put in his earphones. He then looked through the window and pushed the push-bar with one hand, and the door opened two to three feet outside. He viewed the video of the incident and authenticated it as an accurate recording of the incident. (NYSCEF 66).

At a later deposition in 2017, plaintiff testified that the door's left window was dirty, effectively obscuring visibility from the outside. (NYSCEF 67).

The employee was deposed again in June 2017, and he testified that he was on his way out of the building that day as his workday had ended. When he reached the exit door, he stopped in front of it and put his earphones around his ears but did not put them in his ears or play any music in them. He placed his hand on the push-bar to the right door and "opened it slowly in a relaxed way." The employee recalled that he had looked through the window and saw nobody outside: "one could [not] see no one from the other side of the window, not for any special reason such as the window being dirty or that it would be too small, or, I don't know. There was no special reason why I did not see anybody from the other side, it's just that there was nobody." He denied having hit plaintiff with the door and characterized her as falling backwards as the door was opening. (NYSCEF 68).

Sutton's live-in superintendent testified at his deposition that he arrived at the accident scene within minutes of plaintiff's accident and learned from her that she had fallen to the ground as the employee was opening the door; he did not remember her telling him that the door had hit her. The employee told the superintendent that he had opened the door and "spooked" plaintiff, that she fell down, and that he never touched her with the door. The superintendent saw that the door's window was not dirty and one was able to see through it. He was in charge of

inspecting the premises, including the doors and windows, and never noticed that the windows were dirty. He did not, however, remember when he last inspected them, although he performed inspections once a month. No one had complained about the doors or windows before plaintiff's accident. He also authenticated the photographs taken of the door and building and the video as accurate representations. (NYSCEF 70).

II. DMC'S MOTION

In moving to dismiss, DMC argues only that the testimony and video footage evidence indisputably shows its employee opening the door in a non-negligent fashion, and that it therefore owed plaintiff no duty of care absent evidence that its employee had launched a force or instrument of harm. (NYSCEF 81). Plaintiff contends that the deposition transcripts and video footage are unauthenticated and thus inadmissible, and that even if considered, DMC does not establish that its employee did not create a dangerous condition by forcibly opening the door. (NYSCEF 98).

As plaintiff's assertion that the transcripts and footage are unauthenticated or unreliable is fatally conclusory and as she relies on the same evidence, she raises no issue as to their admissibility. In any event, the video was authenticated by two witnesses.

Absent an indication of the speed at or force with which the employee had opened the door or any expert analysis of the video or view from the outside which may have shown if and how plaintiff was hit by the door, the video is inconclusive as to whether the employee was negligent in the manner in which he opened the door. Consequently, DMC fails to demonstrate that its employee did not act negligently. (*Cf. Hollis v Marinelli*, 149 AD3d 922 [2d Dept 2017] [evidence submitted on summary judgment, including video disc containing footage of accident, demonstrated defendant's negligence]; *Atehortua v Lewin*, 90 AD3d 794 [2d Dept 2011], *lv*

denied 18 NY3d 811 [2012] [video surveillance footage established defendants' *prima facie* entitlement to summary judgment as dangerous condition open and obvious and footage supported defendants' assertion that plaintiff could have easily avoided condition]).

III. SUTTON'S MOTION

A. Dismissal of plaintiff's claims

Sutton denies that the window was dirty or that the view through it was obscured, or that there is evidence that the alleged dirtiness contributed to plaintiff's accident, and in any event, argues that the applicable building code did not require it to build or maintain any window in the door. Thus, Sutton maintains that it cannot be held liable for any defect associated with the window when no window was required. (NYSCEF 57).

Sutton establishes, *prima facie*, that whether the window was dirty is irrelevant, and thus, whether the window was too dirty for DMC's employee to see through is likewise irrelevant. In any event, his testimony that the window was not dirty is corroborated by the videotape that shows that vehicles on the street can be seen through the window. Thus, plaintiff's claim that the allegedly dirty window caused or contributed in any way to the happening of the accident is conclusively disproven. (*See eg, Rosario v City of New York*, 113 AD3d 492 [1st Dept 2014] [while plaintiff stated she could not see tree well before accident, photograph taken of tree well, even from a distance, showed that it was visible, and thus no evidence to support plaintiff's claim that defendant created dangerous condition by obscuring visibility of tree well]).

Plaintiff cites no authority or evidence to support her argument that the door was defectively designed or maintained, or that the alleged defect contributed in any way to her accident. That Sutton had ordered new doors sometime before her accident does not constitute proof that the door at issue was defective.

Thus, plaintiff raises no triable issue as to whether Sutton created or had actual or constructive notice of the dangerous condition of the window or the door, or that such condition contributed to or caused her accident.

B. Amendment to add contractual indemnification counterclaim

The contract between DMC and Sutton requires DMC to indemnify and hold harmless Sutton from any claims arising out of or connected with DMC's performance of work or the use by DMC or its employees of facilities or equipment furnished or owned by Sutton. As Sutton establishes that its counterclaim for contractual indemnification has merit, it is entitled to an order granting it leave to amend its third-party answer to assert the counterclaim.

Moreover, Sutton demonstrates that plaintiff's claim arose from the performance of its work at the premises or its use of the door and exit, and that therefore, DMC is contractually obligated to indemnify it. DMC offers no authority to support its argument that plaintiff's claim is not covered because the door is located within the building's common area or because DMC's employee had finished his work and was leaving the building to head home when the accident occurred.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that DMC Professional Contractors, Inc.'s motion for summary judgment (mot. seq. three) is denied; it is further

ORDERED, that Sutton House, Inc.'s motion for summary judgment (mot. seq. four) is granted, and the complaint and all cross claims are severed and dismissed as against it; it is further

ORDERED, that Sutton House, Inc.'s motion for leave to amend its third-party answer is

granted, and the amended answer, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; it is further

ORDERED, that upon amendment, Sutton House, Inc.'s motion for summary judgment on its third-party counterclaim against DMC Professional Contractors, Inc. for contractual indemnity is granted, and DMC Professional Contractors, Inc. must indemnify Sutton House, Inc. in this action; and it is further

ORDERED, that the clerk of the Trial Support Office is directed to restore this matter to the trial ready calendar for the earliest possible date.

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BARBARA JAFFE, J.S.C.

4/9/2019
DATE

CHECK ONE:

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<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: