

<b>Villezcas v 66 W. 84th St. Owners Corp.</b>
2019 NY Slip Op 32461(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 153932/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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EMMA VILLEZCAS,

Index No. 153932/2013

Plaintiff

- against -

66 WEST 84TH STREET OWNERS CORP., 66  
WEST 84TH EQUITIES, LLC, TIME  
EQUITIES, INC., TIME EQUITIES  
ASSOCIATES, LLC, and KYROUS REALTY  
GROUP, INC.,

Defendants

-----X  
-----X

66 WEST 84TH STREET OWNERS CORP.,

Third Party Plaintiff

- against -

N.Y.C. SUPER SERVICES, INC., and  
TRINITY DEVELOPMENT GROUP, INC.,

Third Party Defendants

-----X

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries  
sustained September 10, 2011, at approximately 10:45 a.m., when

she slipped on a wet lobby floor, caused by a leak through the lobby ceiling, on premises at 66 West 84th Street, New York County, managed by defendant Kyrour Realty Group, Inc., and owned by defendant-third party plaintiff 66 West 84th Street Owners Corp. It contracted with third party defendant N.Y.C. Super Services, Inc., for third party defendant Trinity Development Group, Inc., to maintain the premises' common areas. In an order entered March 20, 2018, the court (Mendez, J.), granted summary judgment dismissing all claims against defendant ES & DS, Inc. In an order entered October 22, 2018, the court granted summary judgment dismissing all claims against defendants 66 West 84th Equities, LLC, Time Equities, Inc., and Time Equities Associates, LLC.

66 West 84th Street Owners Corp. moves for summary judgment on the third party indemnification claims, C.P.L.R. § 3212(b) and (e), based on N.Y.C. Super Services' contractual obligation to maintain the lobby. Third party defendants separately move for summary judgment dismissing all claims against third party defendants, C.P.L.R. § 3212(b), on the ground that plaintiff's injury arose from a condition outside the scope of the contract. For the reasons explained below, the court grants third party defendants' motion in part and denies the remainder of the

motions.

## II. THE CONTRACT

The parties stipulated on the record October 18, 2018, that the contract presented by 66 West 84th Street Owners Corp. between it and N.Y.C. Super Services dated July 15, 2010, is authenticated and admissible for purpose of determining the pending motions for summary judgment. In the contract, N.Y.C. Super Services agreed to "render custodial and related services" to 66 West 84th Street Owners Corp. Aff. of Matthew Levy Ex. M, at 1. N.Y.C. Super Services undertook the duty to: "Report any work that needs to be done by an outside contractor to the management company and provide access to any apartment to which they need access. Also, supervise such contractors, inspectors, mechanics and/or personnel." Id. at 2. During emergencies, N.Y.C. Super Services was required to "take all necessary measures to prevent damage to the Building or its occupants." Id. at 3. As needed, N.Y.C. Super Services was required to "[r]eplace and adjust doorknobs and locks on the doors," id. at 4, and "[s]upervise any Building staff which may from time to time be employed by the Corporation on either a full or part time basis." Id. at 2. In the lobby, N.Y.C. Super Services was required to: "Sweep and mop floors" and keep the lobby "free of

waste and garbage" daily. Id. at 4.

III. 66 WEST 84TH STREET OWNERS CORP.'S MOTION

66 West 84th Street Owners Corp. seeks summary judgment on the third party indemnification claims based on third party defendants' responsibility for maintaining the lobby and safeguarding the building's occupants during emergencies. Third party defendants oppose the motion, claiming that they performed their maintenance duties under the contract and that 66 West 84th Street Owners Corp. was responsible for making the repairs to address the leak.

Since the contract does not provide for indemnification, the court denies 66 West 84th Street Owners Corp. summary judgment on the third party contractual indemnification claim. Sicilia v. City of New York, 127 A.D.3d 628, 628 (1st Dep't 2015); Hughey v. RHM-88, LLC, 77 A.D.3d 520, 523 (1st Dep't 2010); Neighborhood Partnership Hous. Dev. Fund v. Blakel Constr. Corp., 34 A.D.3d 303, 304 (1st Dep't 2006); Temmel v. 1515 Broadway Assoc., L.P., 18 A.D.3d 364, 365-66 (1st Dep't 2005). For non-contractual, implied indemnification, 66 West 84th Street Owners Corp. relies on the deposition testimony by Renato De Guzman, third party defendants' owner, to establish their negligence and fault in failing to protect the lobby from the leak that caused the wet

floor. De Guzman was not at the premises on the day plaintiff was injured, so he based all his testimony about all the occurrences on that day leading up to her fall on reports by Marco Muniz, a Trinity Development Group employee.

66 West 84th Street Owners Corp. may not rely on inadmissible hearsay to establish third party defendants' deficient performance of contractual duties. DeCanio v. Principal Bldg. Servs. Inc., 115 A.D.3d 579, 580 (1st Dep't 2014); Romero v. Morrisania Towers Hous. Co. Ltd. Partnersip, 91 A.D.3d 507, 508 (1st Dep't 2012); Steinberg v. New York City Tr. Auth., 88 A.D.3d 582, 582 (1st Dep't 2011); Enrique S. v. Genell M.D., 56 A.D.3d 396, 397 (1st Dep't 2008). Even if the court considers De Guzman, the owner of both third party defendants, to have adopted the reports by third party defendant Trinity Development Group's employee as De Guzman's account, so that they constitute third party defendants' admissions, see People v. Vining, 28 N.Y.3d 686, 690 (2017); People v. Campney, 94 N.Y.2d 307, 311 (1999); People v. Woodward, 50 N.Y.2d 922, 923 (1980); People v. Gomez, 21 A.D.3d 827, 828 (1st Dep't 2005), 66 West 84th Street Owners Corp. nevertheless fails meet the companion requirement for implied indemnification.

Regardless of the extent to which De Guzman's testimony may

recount third party defendants' failures contributing to plaintiff's injury, to be entitled to implied indemnification, 66 West 84th Street Corp. must establish the absence of its own negligence and fault in failing to protect the lobby from the leak that caused the wet floor. Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d 509, 511 (1st Dep't 2019); Mugattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500-501 (1st Dep't 2018); Dzidowska v. Related Cos., LP, 157 A.D.3d 447, 448 (1st Dep't 2018); Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016). The leak in the lobby was reported to Leonard Barish of Kyrous Realty Group, 66 West 84th Street Owners Corp.'s property manager, September 8, 2011. The next afternoon De Guzman determined that a stoppage in a shaftway caused the leak in the lobby. According to De Guzman, to ascertain the cause of the leak, he, together with Barish, poured water down the shaftway, and they, together with Muniz, observed water leaking through to the lobby afterward. Neither 66 West 84th Street Owners Corp. itself nor its property manager, upon learning of the leak September 8 or its cause September 9, arranged for repair of the condition until September 10, 2011. According to the deposition testimony by both Barish and the DS & ES mechanic himself, when the mechanic arrived at the building to

repair the leak September 10, 2011, he employed the same test De Guzman had employed to ascertain the cause of the leak and thus caused more water to accumulate on the lobby floor before finally repairing the leak.

No party disputes that plaintiff slipped on water in the lobby at approximately 10:45 a.m. September 10, 2011. Based on the further testimony by the mechanic that he arrived at the premises about 2:00 p.m. on that day, plaintiff's injury occurred before the mechanic's visit. If her fall preceded the repair, then 66 West 84th Street Owners Corp.'s delay in arranging for the repair contributed to her injury. Even if her fall in fact followed the mechanic's testing procedure pouring water down the shaftway into the lobby, then Barish's hiring of the mechanic on behalf of 66 West 84st Street Owners Corp., aware of the flooding such a testing procedure would cause without adequate precautions, contributed to plaintiff's injury.

66 West 84th Street Owners Corp. does not dispute that the cause of the leak and the damage it caused to the lobby ceiling entailed a structural condition that 66 West 84th Street Owners Corp. was responsible to repair and thus to repair safely, and therefore it was responsible for any unsafe condition the repair work caused. While third party defendants may be equally or more

culpable, because 66 West 84th Street Owners Corp. has not eliminated its own contributory fault, the court denies 66 West 84th Street Owners Corp. summary judgment on the third party non-contractual indemnification claim. Dzidowska v. Related Cos., LP, 157 A.D.3d at 448; Gardner v. Tishman Constr. Corp., 138 A.D.3d at 417; Martins v. Little 40 Worth Assoc., Inc., 72 A.D.3d 483, 484 (1st Dep't 2010).

#### IV. THIRD PARTY DEFENDANTS' MOTION

66 West 84th Street Owners Corp.'s third party action claims contractual and implied indemnification, breach of a contract to procure insurance, and contribution. Third party defendants seek dismissal of all these claims based on the absence of any contractual duty of care to plaintiff or duty regarding the premises' exterior, which third party defendants claim includes the shaftway where the drain that caused the leak in the lobby was located. 66 West 84th Street Owners Corp. contends that the absence of third party defendants' duty of care to plaintiff under the contract does not alter their obligation to perform the contract, which in turn displaced 66 West 84th Street Owners Corp.'s duty to maintain the premises.

A. Unsustainable Claims

As set forth above, the contract does not require third party defendants to indemnify 66 West 84th Street Owners Corp. Therefore the court dismisses the third party claim for contractual indemnification. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549-50 (1st Dep't 2018); Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d 587, 587 (1st Dep't 2018); Galue v. Independence 270 Madison LLC, 119 A.D.3d 403, 403 (1st Dep't 2014); Echevarria v. 158th St. Riverside Dr. Hous. Co., Inc., 113 A.D.3d 500, 502 (1st Dep't 2014). Since the contract did not require third party defendants to procure insurance either, the court dismisses the third party claim for breach of contract as well. Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d at 587; Clavin v. CAP Equip. Leasing Corp., 156 A.D.3d 404, 405 (1st Dep't 2017); Sicilia v. City of New York, 127 A.D.3d at 629; Galue v. Independence 270 Madison LLC, 119 A.D.3d at 403.

The contract did require N.Y.C. Super Services to safeguard the building's occupants during emergencies. The leak in the lobby was reported to Barish, Kyrous Realty Group's property manager, who reported it to De Guzman September 8, 2011. The next afternoon De Guzman determined that a stoppage in a shaftway, accessible only through apartment 2F, caused the leak

in the lobby. Although Barish denies his presence in the building that afternoon, he does not deny his awareness of De Guzman's further findings, including the water accumulation in the lobby after De Guzman poured water down the shaftway. Since 66 West 84th Street Owners Corp., itself or through its property manager, having learned of the leak September 8 and its cause September 9, did not arrange for repair of the condition until September 10, 2011, up to that point 66 West 84th Street Owners Corp. did not treat the leak as an emergency. At least up to that point, 66 West 84th Street Owners Corp., given its own conduct, may not hold N.Y.C. Super Services to its obligation during an emergency to safeguard the building's occupants. See McCullough v. One Bryant Park, 132 A.D.3d 491, 492-93 (1st Dep't 2015); Hopper v. Regional Scaffolding & Hoisting Co., Inc., 21 A.D.3d 262, 263 (1st Dep't 2005).

B. Sustainable Claims

Nevertheless, as contractors providing services to 66 West 84th Street Owners Corp., third party defendants are liable to plaintiff for their negligence or other culpable conduct in performing the contract, when their breach of a contractual duty caused plaintiff's injury under any of the following sets of circumstances. (1) Third party defendants displaced 66 West 84th

Street Corp.'s duty to maintain its premises in a safe condition.

(2) Plaintiff detrimentally relied on third party defendants' performance of the contract. (3) Third party defendants launched the "instrument of harm" that caused plaintiff's injury. Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 257 (2007); Church v. Callanan Indus., 99 N.Y.2d 104, 111 (2002); Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140 (2002); Stimmel v. Osherow, 133 A.D.3d 483, 485 (1st Dep't 2015). Although the written contract in the record does not impose any obligations directly on Trinity Development Group, neither does the evidence eliminate a complementary oral or written contract between either N.Y.C. Super Services or 66 West 84th Street Owners Corp. and Trinity Development Group to carry out maintenance and repairs in the building, to which the same principles apply.

Given the terms of the contract in the record and the consistent deposition testimony, the contract displaced 66 West 84th Street Owners Corp.'s duty to maintain the lobby. Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 515 (1st Dep't 2010); Tamhane v. Citibank, N.A., 61 A.D.3d 571, 573 (1st Dep't 2009); Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d 341, 342 (1st Dep't 2008). See Evans v. Norecaj, 172 A.D.3d 576, 577-78 (1st Dep't 2019); Santiago v. Kmart Corp., 158 A.D.3d 596, 596 (1st

Dep't 2018); Stimmel v. Osherow, 133 A.D.3d at 486. The deposition testimony establishes that Barish visited the premises only once per month; only N.Y.C. Super Services, through Trinity Development Group, performed maintenance; and 66 West 84th Street Corp. employed no workers at the premises and only provided cleaning materials to Trinity Development Group's maintenance worker. In the event that 66 West 84th Street Owners Corp. employed any building staff, N.Y.C. Super Services was to supervise that staff; the owner did not supervise third party defendants' maintenance workers. Levy Aff. Ex. M, at 2.

Third party defendants nonetheless contend that they are not liable because the contract included no obligation regarding the building exterior. Even if third party defendants were not required to work outside the building, they fail to demonstrate that on the day of or even the day before plaintiff's fall they performed their contractual obligation to sweep and clean the lobby daily, the breach of which contributed to her fall. As set forth above, De Guzman testified that he was not at the premises on the day plaintiff fell. Barish testified that he did not visit the premises until two days after plaintiff fell, contradicting De Guzman's testimony that both Barish and De Guzman were at the premises the day before she fell. De Guzman's

and Barish's testimony that the lobby was cleaned is based on Muniz's hearsay reports, as is De Guzman's testimony that Muniz did not observe any water when he arrived at the premises on the day plaintiff fell. Therefore none of this testimony establishes third party defendants' performance of their contractual obligations. DeCanio v. Principal Bldg. Servs. Inc., 115 A.D.3d at 580; Romero v. Morrisania Towers Hous. Co. Ltd. Partnersip, 91 A.D.3d at 508; Steinberg v. New York City Tr. Auth., 88 A.D.3d at 582; Enrique S. v. Genell M.D., 56 A.D.3d at 397. De Guzman's testimony that the lobby was clean and dry the day before plaintiff fell does not establish the absence of a leak and resulting wet condition the following day.

Third party defendants further fail to demonstrate that they did not a launch a force of harm. Stimmel v. Osherow, 133 A.D.3d at 486-87; Greater N.Y. Mut. Ins. Co. v. ERE LLP, 125 A.D.3d 417, 418 (1st Dep't 2015). The only deposition witness who testified that he was in the lobby on the day of plaintiff's injury was Dwayne Watson, the ES & DS mechanic who repaired the drain. He testified that, when he arrived at the premises about 2:00 p.m., water from a ceiling leak was on the lobby floor and, when he left the premises a half hour later after clearing the drain, water was still there.

Insofar as the mechanic, albeit without fault, may have caused the wet condition on which plaintiff fell, third party defendants insist that Muniz was required to provide access to the apartment to which the mechanic needed access and to supervise him there. *Levy Aff. Ex. M*, at 2. Despite this contractual duty, once Muniz became aware that the mechanic was about to employ the same test De Guzman had employed, it was incumbent on Muniz to take adequate precautions by placing buckets or other protection against a wet lobby floor, before ascending to the apartment, or by ushering the mechanic out of the apartment until Muniz took protective measures. Moreover, even if the leak was not an emergency when the mechanic arrived, any leak that he caused became an emergency, triggering third party defendants' obligation to safeguard the building's occupants. *McCullough v. One Bryant Park*, 132 A.D.3d at 492-93; *Hopper v. Regional Scaffolding & Hoisting Co., Inc.*, 21 A.D.3d at 263.


Although third party defendants attribute the delay in remedying the leak to Barish's failure to arrange immediately for a locksmith to gain access to the locked apartment that provided the only access to the shaftway to address the leak's source, third party defendants owed a contractual duty to replace and

adjust locks. Third party defendants fail to demonstrate either that they performed that contractual duty or that their failure to perform that duty did not cause plaintiff's injury. For this reason as well as all the other reasons explained above, the court denies dismissal of the third party claims for implied indemnification and contribution. Stimmel v. Osherow, 133 A.D.3d at 486; McCullough v. One Bryant Park, 132 A.D.3d at 493; Greater N.Y. Mut. Ins. Co. v. ERE LLP, 125 A.D.3d at 418; Tamhane v. Citibank, N.A., 61 A.D.3d at 573. See Cahn v. Ward Trucking, Inc., 101 A.D.3d 458, 458-59 (1st Dep't 2012).

V. CONCLUSION

In sum, the court grants third party defendants' motion for summary judgment to the extent of dismissing the third party claims for contractual indemnification and for breach of a contract to procure insurance, otherwise denies their motion, and denies defendant-third party plaintiff's motion for summary judgment on its third party indemnification claims. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: August 13, 2019



LUCY BILLINGS, J.S.C.