

**Delgaudio v Townhouse Co. LLC**

2019 NY Slip Op 32506(U)

August 22, 2019

Supreme Court, New York County

Docket Number: 160445/2013

Judge: Julio Rodriguez III

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. JULIO RODRIGUEZ III

PART

*Justice*

-----X

ANTHONY DELGAUDIO,

Plaintiff,

- v -

TOWNHOUSE COMPANY LLC, SOLOW REALTY &  
DEVELOPMENT CO LLC, BEEKMAN THEATER COMPANY  
LLC, THE CITY OF NEW YORK, NEW YORK CITY FIRE  
DEPARTMENT, NEW YORK CITY BUREAU OF  
EMERGENCY MEDICAL SERVICES, CITY CINEMAS  
LLC, ARISTA AIR CONDITIONING CORP.,

Defendants.

-----X

TOWNHOUSE COMPANY LLC, SOLOW REALTY &  
DEVELOPMENT CO LLC, BEEKMAN THEATER COMPANY  
LLC

Third-Party Plaintiffs,

-against-

CITY CINEMAS, LLC,

Third-Party Defendant.

-----X

TOWNHOUSE COMPANY LLC, SOLOW REALTY &  
DEVELOPMENT CO LLC

Second Third-Party Plaintiffs,

-against-

ARIST AIR CONDITIONING CORP.

Second Third-Party Defendant.

-----X

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 590913/2013

Second Third-Party  
Index No. 595054/2015

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63,  
64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 126, 127, 128

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Plaintiff commenced this action seeking damages allegedly sustained in an accident on July 23, 2013, in an HVAC machine room located in the basement movie theater of 265 East 66th Street, New York, New York. Plaintiff was employed as a plumbing mechanic for Evergreen Mechanical on the date of the accident. Defendant Townhouse Company LLC (“Townhouse”) owned the property at issue; Solow Realty & Development Co. LLC (“Solow”) was the property management company; City Cinemas LLC (“City Cinemas”) was the operator of the movie theater in the lower area of the building.

Plaintiff was injured while performing plumbing work in the HVAC machine room at the movie theater. He allegedly fell in the room and injured his hand when it came into contact with the belts and pulleys of an equipment motor in the room. Arista Air Conditioning Corp. (“Arista”) was the air conditioning (“AC”) maintenance and repair company for the unit at issue (amongst others).

Two third-party complaints have been filed thus far in this action. As is relevant here, in the second third-party action, second third-party plaintiffs Townhouse, Solow, and Beekman Theater Company LLC (“Beekman Theater”) assert claims for common law contribution and indemnification as against second third-party defendant Arista. Subsequent to the filing of the second third-party complaint, Arista was added by plaintiff Delgaudio as a direct defendant.

Defendant/Second third-party defendant Arista now moves for summary judgment pursuant to CPLR 3212 to dismiss the complaint, all cross-claims, and the third-party claims as against it. The only party opposing Arista’s motion is defendant City Cinemas; by its verified answer with cross-claims to the second amended complaint dated February 3, 2015, City Cinemas asserted cross-claims for common law contribution and indemnification as against Arista.

### Facts and Testimony

Arista performs preventative maintenance on the HVAC units at issue on a quarterly basis. The last time prior to the accident that Arista was at the building to provide such quarterly preventative maintenance was on April 9, 2013.

Plaintiff alleges that at the time of the accident, on July 23, 2013, at approximately 11:00 a.m., pulleys and belts which run the motor of the HVAC unit at issue were exposed because a motor cover was not in place. However, defendant City Cinemas opposes the instant motion on the basis, it contends, that there is conflicting testimony as to whether the motor cover was in place during the period from April 9, 2013, to July 23, 2013.

A representative for Arista, Mr. Vincent Eckerson, testified that Arista technicians always remove the motor cover when performing quarterly preventative maintenance because the technicians must inspect the fan belts under the cover. Without removing the cover, the technicians would not know whether the belts require, for example, repair or replacement. Mr. Eckerson did not have personal knowledge as to the April 9, 2013, maintenance visit; however, Mr. Eckerson testified that the practice of Arista technicians is to always replace the motor cover. Mr. Eckerson stated that the tools used by Arista are standard tools, and that the motor cover is affixed to the unit with ordinary hardware.

Mr. Marc Ramos was a handyman for Solow at the property at issue. Mr. Ramos performed daily inspections of the mechanical room at issue and filled out daily logs recording said inspections. In support of its motion for summary judgment, Arista annexed Mr. Ramos' daily logs for the period from July 11, 2013, to July 24, 2013. Mr. Ramos testified that he would have indicated on his logs if he observed that the motor cover was not on the unit at issue; the logs from July 11, 2013, to July 23, 2013, do not note the absence of the motor cover. Mr. Ramos also testified that if the motor cover was not on the unit at issue, he would have shut off the unit and reported the uncovered unit to his boss. Moreover, Mr. Ramos testified that on July 22, 2013, and on July 23, 2013, he observed that the motor cover was in fact on the unit. Both these inspections, according to Mr. Ramos' logs, occurred between 8:30 a.m. and 9:30 a.m.

Plaintiff Delgaudio testified that he went to the building on July 22, 2013, to determine what supplies and tools were needed to repair a leak and clogged drain in the mechanical room. On July 22, 2013, plaintiff and Mr. Ramos were in the mechanical room for between twenty and thirty minutes. Plaintiff determined what he needed, and he also noted that there was garbage covering the floor of the mechanical room. Plaintiff told Mr. Ramos that he could not work with all the garbage on the floor. The next day, July 23, 2013, plaintiff Delgaudio returned to the building to perform the work of repairing the leak and clogged drain. Plaintiff arrived at approximately 9:00 a.m. Upon arriving, he noticed that the garbage had been pushed to the side away from the work area. Plaintiff performed the work and finished up at approximately 11:00 a.m. As he was exiting the mechanical room by crouching under some overhanging duct work, plaintiff slipped on "garbage" and fell into the HVAC unit at issue. His injuries allegedly occurred because his hand came into contact with the uncovered pulleys and belts of the now operating HVAC unit. Plaintiff did not notice that the unit was operating until he was falling into it.

### Parties' Positions

Arista now moves for summary judgment on the basis that 1) the last time it was at the building was April 9, 2013, 2) Arista's general procedure was to reattach the motor covers on units for which maintenance is performed upon the completion of work, and 3) Mr. Ramos personally observed the motor cover on the HVAC unit at issue both on July 22, 2013, and July 23, 2013. Consequently, argues Arista, even assuming that Arista failed to put the cover back on the unit on April 9, 2013, the cover was in place a day before the alleged accident and therefore Arista cannot be liable here.

In opposition to the motion, City Cinemas argues that a question of fact lies in the testimony of Mr. Ramos (that he observed a covered unit) and the testimony of plaintiff Delgaudio (that the unit was uncovered when his hand allegedly went into it).

In reply, Arista stresses that Mr. Ramos testified that he observed the motor cover in place 1) on the morning of July 23, 2013, at some point between 8:30 a.m. and 9:30 a.m., approximately two hours before plaintiff's alleged accident, and 2) on July 22, 2013, a day prior to the alleged accident and a date on which plaintiff Delgaudio testified that, despite being present in the mechanical room, he did not notice whether the cover was on or off.

### Applicable Law – Summary Judgment Standard

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing, “the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so” (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

### Discussion and Analysis

Before the accident at issue, which occurred on July 23, 2013, Arista last worked on the HVAC unit at issue, unit number 6, on April 9, 2013 (Perkowski aff. in supp., Ex D, Ramos dep. at 69).

Mr. Ramos, a handyman for Solow, testified 1) that he inspected the mechanical room on a daily basis during his morning walkthroughs (*id.* at 32-3); 2) that he kept logs of those daily walkthroughs (*id.* at 29-32); 3) that “part of [his] duties when [he] did the morning log, the inspection, [was] to observe whether certain equipment was missing that should have been in place” (*id.* at 247); 4) that he would note any missing equipment in the notes of his log (*id.* at 247-8); 5) that he would have made such a note in his logs dated July 11, 2013, to July 23, 2013, if the motor cover at issue was not in place (*id.* at 248); 6) that, in addition to making such a note, he would have “lock[ed] it out and tag[g]ed it out”, meaning that he would have “shut [the unit] down and locked it” (*id.*); and, 7) that he made no such notes in his logs dated July 11, 2013, to July 23, 2013 (*id.* at 249). Mr. Ramos further testified that the motor cover was on the unit on the morning of July 22, 2013 (*id.* at 149). Finally, Mr. Ramos testified that when he inspected the mechanical room on the morning July 23, 2013, before 9:00 a.m. (*id.* at 267), the motor cover was on the unit (*id.* at 149).

Plaintiff Delgaudio testified that he entered the room “a little after 9:00” (Perkowski aff. in supp., Ex G, plaintiff dep. at 115). Plaintiff did not notice whether the motor was covered or uncovered until the accident occurred (*id.* at 114-5).

The court therefore finds that Arista has made its *prima facie* showing of entitlement to judgment insofar as the testimony of Mr. Marc Ramos established that the cover at issue was affixed and in place in between Arista’s last preventative maintenance job on April 9, 2013, and the accident at issue, which occurred at approximately 11:00 a.m. on July 23, 2013. Any potential causal connection from Arista’s acts on April 9, 2013, to plaintiff’s accident was thereby severed. Contrary to City Cinemas’ contentions, the court finds that plaintiff’s testimony does not controvert nor create a question of fact as to Mr. Ramos’ testimony regarding July 22 or 23, 2013, or Mr. Ramos’ logs covering the period of July 11, 2013, to July 23, 2013. The court therefore finds that City Cinemas failed to create a question of fact in opposition to the motion.

Although the court is to view the papers in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]), the court cannot ignore unrebutted portions of the record on summary judgment, which here indeed sever Arista's connection to the cover during the relevant time period (see *Maldonado v Hunts Point Co-op. Market, Inc.*, 82 AD3d 510 [1st Dept 2011] citing *Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 315 [1980] ["the question of legal cause may be decided as a matter of law...[where] independent intervening acts...operate upon but do not flow from the original negligence"]; see also *Burlington Ins. Co. v NYC Transit Authority*, 29 NY3d 313, 321 [2017] [discussing "but for" and "proximate" cause]).

Even assuming *arguendo* that Arista left the motor uncovered at the conclusion of its work on April 9, 2013 (despite reaffixing the cover being an essential step in completing work [Perkowski aff. in supp., Ex B, Eckerson dep. at 102-3]), the unrebutted testimony established that the motor was subsequently covered at some point between April 9, 2013, and the occurrence of the accident at approximately 11:00 a.m. on July 23, 2013. The foregoing entitles Arista to summary judgment.

Finally, the court finds that all cross-claims and third-party claims against Arista sounding in common law contribution and indemnification should similarly be dismissed, as the severed causal connection established by the record forecloses the possibility that Arista "had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY3d 177 [1997] citing *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599 [1988]) or can be held responsible for indemnification (*Raquet* at 183 [indemnification based on principle that "every one is responsible for the consequences of his own negligence"] [emphasis added]).

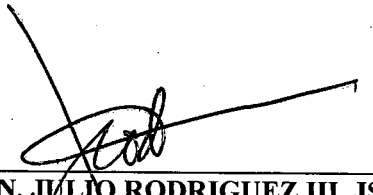
Accordingly, and upon the parties' respective papers and exhibits, it is ORDERED that defendant/second third-party defendant Arista Air Conditioning Corp.'s motion for summary judgment is hereby granted, and the complaint, all cross-claims, and all third-party claims, including the second third-party complaint are severed and dismissed as against defendant/second third-party defendant Arista Air Conditioning Corp.; and it is further

ORDERED that defendant/second third-party defendant Arista Air Conditioning Corp. is to serve a copy of this order with notice of entry upon all parties and the General Clerk's Office within twenty days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

August 22, 2019



HON. JULIO RODRIGUEZ III, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
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