Krnic v Park Tower Realty Corp.
2020 NY Slip Op 32308(U)
July 9, 2020
Supreme Court, New York County
Docket Number: 160245/2013
Judge: Francis A., III Kahn
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS A. KAHN, III** **PART** **IAS MOTION 32**

Acting Justice

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SUADA KRNIC,

Plaintiff,

- v -

PARK TOWER REALTY CORP., PARK TOWER MANAGEMENT LTD., MADISON TOWER CORP., MADISON TOWER ASSOCIATES, L.L.C., MADISON TOWER ASSOCIATES LIMITED PARTNERSHIP, EAST WEST BANCORP, INC.,MANHATTAN BUSINESS INTERIORS, INC. d/b/a MBI GROUP, LIBERTY DOOR WORKS, INC. d/b/a LIBERTY DOORWORKS, INC. and FOUR DAUGHTERS, LLC,

Defendants.

[ADDITIONAL THREE THIRD-PARTY ACTIONS][1]

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INDEX NO. 160245/2013

MOTION DATE N/A

MOTION SEQ. NO. 002, 004, 006 and 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 168-199, 248, 353, 360, 418; (Motion 004) 250-270, 356, 363, 421, 429, 430, 449; (Motion 006) 330-350, 358, 365, 377-388, 396-401, 408-417, 425, 435-442, 448; (Motion 007) 290-329, 351, 352, 354, 361, 402-407, 423, 424, 426-428, 445-447

were read on these motions to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motions and cross-motions are determined as follows:

Plaintiff Suada Krnic, ("Krnic") commenced this action arising out of an accident that occurred on April 29, 2013 at approximately 10:00 p.m. on the eighth floor of a commercial premises located at 535 Madison Avenue, New York, New York. On that day, Plaintiff was employed as a cleaning person by Defendant American Building Maintenance Co., ("ABM"). Madison Tower Associates, L.P. ("Madison") was the owner of 535 Madison Avenue and Park Tower Management Ltd. ("Park Tower") was the managing agent engaged by Madison and East West Bancorp, Inc. ("East West") leased the entire eighth floor from Madison. Park Tower contracted with ABM to perform cleaning services at 535 Madison.

As to the accident, Plaintiff claims as she opened a door in the leased premises (Door #39) it fell out of its frame and struck her causing injury. Approximately nine hours prior to Plaintiff's accident, personnel of East West attempted to open Door #39 to allow an exterminator to enter when it fell off its hinges. The exterminator, who is unnamed and not a party to this action, apparently caught the door before it fell and left it leaning in the door frame with the

[1] Two other third-party actions were discontinued.

knowledge and consent of East West personnel. Although personnel of East West placed a note on the door "warning" of its condition, no proof was adduced that East West notified ABM about the condition of Door #39 before Plaintiff's accident.

Prior to the accident East West contracted with Manhattan Business Interiors, Inc. d/b/a MBI Group ("MBI") to be general contractor for renovations at its leasehold on the eighth floor. MBI sub-contracted with Four Daughters, LLC ("Four Daughters") which installed doors at the leasehold, including Door #39. MBI also contracted with Liberty Door Works Inc. d/b/a Liberty Doorworks, Inc., ("Liberty") for the production and delivery of doors to the project, including Door #39.

Plaintiff commenced this action and asserted, *inter alia,* causes of action in negligence against, Madison, Park Tower, East West, MBI, Four Daughters and Liberty. Five third-party actions were subsequently commenced, but only three remain as two were discontinued by stipulation. As to the remaining third-party actions, East West commenced a third-party action against MBI. Park Tower and Madison commenced the second third-party action against ABM. MBI commenced the third third-party action against Four Daughters and Liberty. All the third-party plaintiffs asserted claims against the third-party defendants for common law and contractual indemnification, contribution as well as breach of contract for failure to obtain insurance.

Now, Liberty moves for summary judgment dismissing Plaintiff's complaint and all cross-claims (Seq No. 2). ABM moves for summary judgment dismissing Plaintiff's complaint, all cross-claims and the second third-party complaint (Seq No. 4). Plaintiff moves for partial summary judgment on the issue of liability (Seq. No. 6). East West cross-moves thereto against MBI and Four Daughters for summary judgment on its claims for indemnification and failure to obtain insurance. Four Daughters moves for summary judgment dismissing Plaintiff's complaint, dismissing the third-third party complaint and for summary judgment on its common-law indemnification claims (Seq No. 7). MBI cross-moves thereto for summary judgment dismissing Plaintiff's complaint, dismissing the East West's third-party complaint and for summary judgment against Four Daughters and Liberty on its third third-party complaint.

As to Plaintiff's motion, she "may be awarded summary judgment on the issue of a defendant's negligence where 'there is no conflict at all in the evidence' and 'the defendant's conduct fell far below any permissible standard of due care'" (*Davis v Commack Hotel*, 174 AD3d 501 [2nd Dept 2019], *citing* Andre v Pomeroy, 35 NY2d 361, 364-65 [1974]). Proof of the absence of Plaintiff's comparative fault is not necessary to obtain partial summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Plaintiff established entitlement to summary judgment on the issue of liability as against East West only. The evidence annexed to the moving papers established that on the same day of Plaintiff's accident, approximately nine hours earlier, Door #39 fell off its hinges and was left unattached in its frame by East West (*see Kenyon v Oneonta City School District*, 141 AD3d 994 [3rd Dept 2016]). In opposition, East West failed to raise in issue of fact. As to Madison, who was out-of-possession of the entire eighth floor and, therefore, generally not liable for injuries that occur on the leased premises (*see generally Ever Win, Inc. v. 1-10 Indus. Assoc., LLC,* 33

AD3d 845 [2nd Dept 2006]), Plaintiff failed to posit, much less establish as a matter of law, any theory upon which this Defendant was negligent (*see generally Dirschneider v Rolex Realty Co. LLC,* 157 AD3d 538, 539 [1st Dept 2018]). As to Park Tower, MBI, Four Daughters and Liberty, Plaintiff again offers no specific argument demonstrating under what theory these independent contractors owed a duty to Plaintiff and were negligent as a matter of law (*see Thayer v Community Services for the Mentally Retarded, Inc.*, ____AD3d____, 2020 NY Slip Op 03559 [2d Dept 2020]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). To the extent Plaintiff claims these Defendants were made aware of the condition in an email from Ms. Charton, Plaintiff failed to demonstrate this correspondence was forwarded to any of these Defendants.

Concerning the branches of the motions by Defendants Liberty and Four Daughters, as well as the cross-motion Defendant MBI, for summary judgment dismissing Plaintiff's complaint, these movants were required to demonstrate, *prima facie*, that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov,* 162 AD3d 804 [2nd Dept 2018]; *Nunez v Chase Manhattan Bank,* 155 AD3d 641 [2nd Dept 2017]).

Four Daughters established *prima facia* entitlement to judgment as a matter of law on the branch of its motion for dismissal of Plaintiff's complaint. The deposition testimony of the Movant's representative as well as those from East West, MBI and Liberty all demonstrated that Four Daughters properly installed Door #39 six months prior to the accident and that it had neither actual nor constructive notice of defective condition of the hinges (*see Lewis v MBD Silva Taylor Hous. Dev. Fund Co., Inc.,* 161 AD3d 489 [1st Dept 2018]; *Demaio v Door Automation Corp.*, 119 AD3d 517 [2nd Dept 2014]). Four Daughters also demonstrated that any negligence on its part in installing Door #39 was not the proximate cause of Plaintiff's injuries as East West's actions in leaving the unsecured door leaning in the door frame superseded their actions (*see Van Dyk v C & M 974 Rte. 45 LLC,* 181 AD3d 457 [1st Dept 2020]). At most, Four Daughter's actions "merely contributed to the setting for the accident--a condition for the occurrence, rather than one of its causes" (*Hoenig v. Park Royal Owners, Inc.,* 249 AD2d 57, 59 [1st Dept 1998]; *see also Starks v R+L Carriers*, 134 AD3d 500 [1st Dept 2015]). In opposition, Plaintiff failed to raise an issue of fact and acknowledged that "Four Daughters also does not appear to be a responsible party". The only other party that offered an argument in opposition to this branch of the motion was Madison, but their opposition on this point was entirely conclusory and failed to raise an issue of fact. To the extent that the arguments proffered by East West in support of its cross-motion for summary judgment on its causes of action for indemnification from MBI and Four Daughters could be considered opposition to this motion, it fails to raise an issue of fact. East West's reliance on the opinions expressed by Kenneth Tam[2] in his deposition is misplaced as he admitted, ultimately, that he did not know why Door #39 failed.

Liberty and MBI also established entitlement to dismissal of Plaintiff's complaint because each demonstrated that it was an independent contractor which owed no duty of care to Plaintiff (*see generally Espinal v Melville Snow Contractors, Inc.,* supra). In opposition, Plaintiff failed to specifically counter either of these movant's arguments and admitted that Liberty and MBI were not the "responsible" parties. Rather, Plaintiff asserted in its opposition

[2] East West's professional engineer on the construction project.

that it is "clear" East West is the responsible party. Parenthetically, although neither Liberty nor MBI raised the issue of superseding cause in their moving papers, any liability on their parts is also absolved by East West's actions (*see Van Dyk v C & M 974 Rte. 45 LLC,* supra).

The common-law indemnification and contribution cross-claims and third-party claims by, between and against Liberty, Four Daughters and MBI must be dismissed as these parties have been found not negligent (*see eg Astrakan v City of New York,* ____AD3d____, 2020 NY Slip Op 03276 [1st Dept 2020]). Similarly, any contractual indemnification claims by and between these parties fail as the indemnification provisions of the contracts were not triggered (*see Hanna v Milazzo,* 179 AD3d 907 [2nd Dept 2020]).

East West's third-party claims against MBI for common-law indemnification and contribution also fail as MBI is free from negligence (*see eg Higgins v TST 375 Hudson, L.L.C.,* 179 AD3d 508 [1st Dept 2020]). Furthermore, since East West has been determined negligent as a matter of law, the contractual indemnification agreements between these parties is void and unenforceable (*see* GOL §5-322.1; *Crouse v Hellman Constr. Co., Inc.*, 38 AD3d 477 [1st Dept 2007]; *Cavanaugh v 4518 Associates*, 9 AD3d 14 [1st Dept 2004]; *see also Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2nd Dept 2009]["[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor"]). The branch of East West's motion for summary judgment on its failure to procure insurance cause of action against MBI, while a separate issue from indemnification (*Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]), is not established as the contracts it relies on was not properly authenticated (*see Eksarko v Associated Supermarket*, 155 AD3d 826, 827 [2nd Dept 2017]) and the annexed contract between MBI and Four Daughters is unsigned (*see Ruane v Allen-Stevenson School*, 82 AD3d 615 [1st Dept 2011]; *Geha v 55 Orchard Street, LLC*, 29 AD3d 735 [2d Dept 2006]). The branch of MBI's cross-motion for summary judgment dismissing East West's insurance procurement cause of action is denied as MBI's affirmation in support sets forth no argument supporting that relief.

The branch of East West's motion for summary judgment against Four Daughters is denied as East West pled no cross-claim or third-party cause of action for the relief demanded. Moreover, the court's determination that Four Daughters was not negligent precludes claims for indemnification and contribution against this party. Movant also proffered no agreement between Four Daughters and East West requiring the procurement of insurance nor demonstrated as a matter of law insurance was not obtained (*see Astrakan v City of New York, supra*; *Rivera v 203 Chestnut Realty Corp.*, 173 AD3d 1085, 1087 [2nd Dept 2019]).

The branch of Four Daughters' motion for summary judgment dismissing MBI's claim for failure to procure insurance is granted as Four Daughters demonstrated it did acquire insurance as required under its contract with MBI (see *Astrakan v City of New York*, supra).

As to ABM's motion for summary judgment dismissing Park Towers and Madison's third-party complaint, the branch of the motion to dismiss the contractual indemnification claim is granted. Per its contract, ABM obligation to indemnify was expressly limited to negligent acts which arose out of its work. Here, the evidence proffered failed to establish any evidence of a negligent act on the part of ABM. Additionally, the accident arose out of Plaintiff's attempt to

open a door at the leased premises, not work that ABM was contracted to perform, to wit "janitorial and related services".

However, the branch of its motion ABM's motion to dismiss the failure to procure insurance claims is denied. While ABM readily admits that its contract required it to procure insurance for Park Tower and Madison, it submits nothing to demonstrate that it fulfilled this aspect of the contract. Its arguments confuse this obligation with indemnification, which are two distinct responsibilities (see *Kinney v Lisk Co., supra*; *Rubinstein v 115 Spring Street Owners Corp.*, 146 AD3d 618 [1st Dept 2017]).

As for the branch of ABM's motion to dismiss the common-law indemnification and contribution claims, those are dismissed as Workers' Compensation Law §11 precludes liability for same absent a grave injury. ABM demonstrated with Plaintiff's bill of particulars and deposition testimony that she did not sustain a grave injury under WCL §11 (*see Aramburu v Midtown West B, LLC*, 126 AD3d 498, 501 [1st Dept 2015]; *Perillo v Durr Mechanical Const., Inc.*, 306 AD2d 25, 26 [1st Dept 2003]). Moreover, to the extent this motion was opposed by Plaintiff, Park Tower and Madison, no question of fact was raised (*see Aramburu v Midtown, supra*).

Accordingly, in accordance with the foregoing, it is

ORDERED that Plaintiff's is granted summary judgment on the issue of liability against Defendant East West Bancorp, Inc. only and no finding is made as to Plaintiff's negligence, and it is

ORDERED that Plaintiff's complaint as against Defendants Manhattan Business Interiors, Inc. d/b/a MBI Group, Liberty Door Works Inc. d/b/a Liberty Doorworks, Inc. and Four Daughters, LLC is dismissed, and it is

ORDERED that all common-law indemnification and contribution claims against Manhattan Business Interiors, Inc. d/b/a MBI Group, Liberty Door Works Inc. d/b/a Liberty Doorworks, Inc. and Four Daughters, LLC are dismissed, and it is

ORDERED that the contractual indemnification claims against Manhattan Business Interiors, Inc. d/b/a MBI Group, Liberty Door Works Inc. d/b/a Liberty Doorworks, Inc. and Four Daughters, LLC are dismissed, and it is

ORDERED that the third-party breach of contract claims for failure to procure insurance against Liberty Door Works Inc. d/b/a Liberty Doorworks, Inc. and Four Daughters, LLC are dismissed, and it is

ORDERED that the branch of Manhattan Business Interiors, Inc. d/b/a MBI Group's motion for summary judgment dismissing the third-party claims for failure to procure insurance is denied, and it is

ORDERED that East West Bancorp, Inc.'s motion for summary judgment is denied in its entirety, and it is

ORDERED that American Building Maintenance Co.'s motion for summary judgment is granted only to the extent that the third-party claims for contractual indemnification as well as common-law indemnification and contribution pled by Park Towers and Madison are dismissed.

7/9/2020
DATE

FRANCIS A. KAHN, III, A.J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE