| **Allied World Natl. Assur. Co. v Deer Stags Concepts, Inc.** |
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| 2020 NY Slip Op 33098(U) |
| September 14, 2020 |
| Supreme Court, New York County |
| Docket Number: 151591/2017 |
| Judge: Francis A. Kahn III |
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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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INDEX NO. 151591/2017

MOTION DATE N/A

MOTION SEQ. NO. 001 and 002

ALLIED WORLD NATIONAL ASSURANCE COMPANY as subrogee of SAFAVIEH GROUP, LLC, LEXINGTON INSURANCE COMPANY as subrogee of ROSEN GROUP PROPERTIES LLC and ROSEN GROUP PROPERTIES LLC,

Plaintiffs,

- v -

DEER STAGS CONCEPTS, INC. and GENERAL PLUMBING CORPORATION,

Defendants.

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**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 48-61, 75, 77, 79-101, 125, 127; (Motion 002) 62-74, 76, 78, 102-124, 126, 128-134

were read on these motions to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motions are decided as follows:

In this action Plaintiffs allege that on February 10, 2016, a flexible braided cold-water supply line connected to a pantry sink burst in the leasehold of Deer Stags Concepts, Inc. ("Deer Stags"), located on the third floor of 902 Broadway, New York, New York which resulted in water flow that caused damage to the common area of the building as well as damage to the downstairs tenant, Safavieh Group, LLC ("Safavieh"). Rosen Group Properties LLC ("Rosen Group") owned 902 Broadway at the time of the incident. Deer Stags occupied the premises pursuant to a 15-year lease which commenced on November 1, 2009. Allied World National Assurance Company ("Allied") paid over $683,000.00 to Safavieh, its insured, to satisfy its claim for damages. Lexington Insurance Company ("Lexington") paid over $528,000.00 to Rosen Group, its insured, to satisfy its claim for damages. General Plumbing Corporation ("General Plumbing") was retained by Deer Stags to perform plumbing work for three days prior to the incident in response to Deer Stags' report of a water leak in the premises. Although General Plumbing performed work in the pantry sink area, it did not install or repair the flexible braided cold-water supply line that failed. It is undisputed that Deer Stags installed the pantry sink and line that failed some time after it took occupancy.

The Plaintiff insurance companies commenced this action as subrogees of their insureds against Defendants to recover the amount paid on the insurance claims. Plaintiff Rosen Group seeks to recover $25,000.00 not covered by its insurance because of a deductible. Plaintiffs assert a cause of action in negligence against both Defendants alleging, *inter alia*, a failure to properly maintain the premise and failing to perform workman-like plumbing repairs. Plaintiffs

pled a second cause of action for breach of contract based upon a claim that Deer Stags failed to properly maintain its leasehold as required by the lease agreement. In its amended answer, Deer Stags asserts affirmative defenses that Plaintiffs waived their subrogation claims and that Rosen Group is barred from collecting its deductible pursuant to the lease agreement. It also asserts a crossclaim for contribution against General Plumbing. General Plumbing asserts contribution and indemnification crossclaims against Deer Stags in its answer.

Now, Deer Stags moves for summary judgment dismissing Plaintiffs' complaint (Motion Seq. 001). Likewise, General Plumbing moves for summary judgment dismissing Plaintiffs' complaint as well as all crossclaims asserted against it (Motion Seq. 002).

Turning first to the branch of Deer Stags' motion for summary judgment dismissing Lexington's causes of action, all parties agree that the lease agreement entered into between Rosen and Deer Stags contains a waiver of subrogation at Section 9 (e), which reads, in pertinent part:

> "...[E]ach party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damages resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby release and waive all right of recovery against the other or any one claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance."

This contract language precludes the tort claims brought by Allied and Lexington as subrogees of the insureds against Deer Stags (*see Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 661 [1997]). In opposition, Plaintiffs contention that movants failed to prove the insurance policies did not contain the necessary clauses "providing that such a release or waiver shall not invalidate the insurance" is without merit as the insurance policies, including subrogee Lexington's, contain the required clauses. Thus, Lexington's negligence cause of action against Deer Stags is dismissed.

As to the branch of Deer Stags' motion to dismiss Plaintiffs' breach of contract cause of action, a waiver of subrogation clause can bar breach of contract causes of action which are determined to be "a mere subterfuge designed to evade the effect of the insureds' failure to obtain a subrogation provision" (*see AIG Property Cas. Co. v Modi*, 154 AD3d 552 [1st Dept 2017]). As pled, Plaintiffs' breach of contract action is in fact a tort-based claim since it is based upon Deer Stags' "duty to properly maintain the leasehold." Further, the cause of action does not set forth a citation to the lease provision that was breached (*see American Motorist Ins. Co. v Morris Goldman Real Estate Corp.*, 277 F Supp2d 304, 309 [S.D.N.Y. 2003]; *Gap, Inc., v Red Apple Companies, Inc.*, 282 AD2d 119, 125-126 [1st Dept 2001]). In opposition, Plaintiff again merely asserts that Deer Stags failed to provide the insurance policies as discussed above which fails to raise an issue of fact. As such, Lexington's breach of contract cause of action against Deer Stags is dismissed.

As to the branch of Deer Stag's motion to dismiss Rosen Group's causes of action in negligence and breach of contract, the parties' agreement to waive their insurer's right of subrogation, "reflect the parties' allocation of the risk of liability whereby liability is shifted to the insurance carriers of the parties to the agreement" (*see Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812 [2d Dept 2013] *quoting Liberty Mut. Ins. Co. v Perfect Knowledge,* 299 AD2d 524, 526 [2d Dept 2002]). Indeed, the waiver of subrogation clause bars all recovery between Rosen Group and Deer Stags since in addition to prohibiting subrogation claims, it also states the parties "release and waive all right of recovery" against each other (*see Wilk v Columbia University*, 171 AD3d 570, 571-572 [1st Dept 2019]; *Lim v Atlas-Gem Erectors Co.*, 225 AD2d 304, 306 [1st Dept 1996]). Furthermore, pursuant to paragraph 66 (c) of the lease agreement, this waiver of subrogation expressly included "any deductibles and or self-insured retentions each chooses to retain." Thus, this case is unlike the cases *GAP, Inc. v Red Apple Companies, Inc.*, (282 AD2d 119, 123-124 [1st Dept 2001) and *Federal Ins. Co v Honeywell, Inc.*, (243 AD2d 605 [2d Dept 1997]), that were relied upon by Plaintiffs.

As for the branch of Deer Stags' motion for summary judgment dismissing Allied's causes of action, Allied stands in Safavieh's shoes with no greater rights (*see Millennium Holdings LLC v Glidden Co.,* 176 AD3d 423 [1st Dept 2019] *citing Hartford Acc. & Indemn. Co. v CNA Ins. Co.*, 99 AD2d 310 [1st Dept 1984]).

Concerning Allied's breach of contract claim, Deer Stags established this cause of action fails since no contract existed between Safavieh and Deer Stags (*see Prospect Funding Holdings, LLC v Paiz*, 183 AD3d 486 [1st Dept 2020]; Kleinberg v 516 West 19th LLC, 121 AD3d 459, 460 [1st Dept 2016]). Further Allied established Safavieh is not a third-party beneficiary under the lease agreement between Rosen Group and Safavieh to support this cause of action (*see State of California Public Employees' Retirement System v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]).

In opposition, Plaintiffs failed to raise an issue of fact. In order to demonstrate that a party was an intended third-party beneficiary of a contract, one must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [the third party's] benefit and (3) that the benefit to him is sufficiently immediate ... to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006] *quoting Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 336 [1983]). When the contract provides that a performance is to be rendered directly to a third party, that party is deemed an intended beneficiary (*Internationale Nederlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 123 [1st Dept 1999]). Claiming that Safavieh is the main floor tenant and that Deer Stags was required "to get a minimum amount of $2MM combined single limit per occurrence/$4MM general aggregate liability insurance with respect to alterations, improvements and the like…" Allied argues that this establishes that the lease afforded protections to Safavieh. Contrary to Plaintiffs' argument, this does not show that Safavieh was to benefit from the lease agreement, directly or otherwise, or that any duty was established to compensate Safavieh if the benefit was lost (*compare to Tarrant Apparel Group v Camuto Consulting Grp., Inc.*, 40 AD3d 556, 557 [1st Dept 2007]). Thus, Allied's breach of contract cause of action is dismissed.

With regard to the branch of Deer Stags' motion for summary judgment dismissing Allied's negligence claim, movant was 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 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]).

To the extent that Allied's negligence cause of action is premised on a claim it is responsible for the work performed by General Plumbing, the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts (*see Rosenberg v Equitable Life Assur. Soc. Of U.S.*, 79 NY2d 663, 668 [1992]; *Flagship Intern. Corp., v Dennelisse Corp.*, 38 AD3d 307 [1st Dept 2007]). However, an exception to this rule occurs when the employer is under a duty to keep the premises safe (*see Pesante v Vertical Indus. Develo. Corp.*, 29 NY3d 983, 984 [2017]; *Rosenberg v Equitable Life Assur. Soc. Of U.S.*, 79 NY2d at 668). Nevertheless, in this case, as discussed below, General Plumbing neither installed the failed pipe nor repaired it. As such, General Plumbing did nothing so to impose vicarious liability upon Deer Stags (*see generally Mojica v Gannett Company Inc.*, 71 AD3d 963 [2d Dept 2010]).

As pled, Allied's negligence claim against Deer Stags is also founded upon a lessee's duty to keep its premises in a reasonably safe condition to the third parties and to those on adjoining premises (*see generally Basso v Miller,* 40 NY2d 233, 241 [1976]; *Pappalardo v New York Health & Racquet Club,* 279 AD2d 134, 141–142 [1st Dept 2000]; *see also 532 Madison Ave. Gourmet Foods, Inc. v Finladia Center, Inc.*, 96 NY2d 280, 290 [2001]). Therefore, to establish entitlement to summary dismissal of this claim, Deer Stags was required to demonstrate it did not create the condition at issue and that it lacked actual or constructive notice of the existence of the condition (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012]; *see also Piacquadio v Recine Rlty. Corp.,* 84 NY2d 967, 969 [1994]; *Leo v Mt. St. Michael Academy,* 272 AD2d 145, 145–146 [1st Dept 2000]). In order to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the Deer Stag to discover and remedy it (*Gordon v American Museum of Natural History,* 67 NY2d 836, 837 [1986]; *O'Connor–Miele v Barhite & Holzinger, Inc.,* 234 AD2d106 [1st Dept 1996]; *Perez v Bronx Park South Assocs.,* 285 AD2d 402, 403 [1st Dept 2001]).

The pipe that failed was a flexible braided cold-water supply line that fed from the building riser to the water filter under the pantry sink. While Deer Stags installed this pantry sink sometime in 2009 when it initially leased the space, it claims that it is not responsible for the work performed by an unknown plumbing independent contractor. It also maintains that it did not have actual or constructive notice of the broken pipe. In opposition, Plaintiffs contend that Deer Stags created the condition and had a non-delegable duty to test the water pressure. Contrary to Plaintiffs' position, the New York City Plumbing Code requires a licensed master plumber, not the tenant, to perform said tests (*see* New York City Administrative Code §312.1). Despite Deer Stags argument, as stated above, Deer Stags may be vicariously liable for the work performed by the independent contractor since it has an obligation to keep the leasehold in safe condition (*Pesante v Vertical Indus. Develo. Corp.*, 29 NY3d at 984). In addition, Plaintiffs' expert describes the failed pipe to have a ruptured inner tube and compromised surrounding

stainless-steel braiding. Elsewhere the expert also found disturbed stainless steel adjacent to the burst with a bulging inner tube. The condition of this pipe was confirmed at the deposition of General Plumbing and by Deer Stags' expert. So aside from potential vicarious liability, this degradation of the stainless-steel braiding and bulging also constitutes a triable question of fact as to the length of time these conditions existed in that it may have provided constructive notice to Deer Stags. As such, Deer Stags' motion to dismiss Allied's negligence claim is denied (see *Schnell v Fitzgerald,* 95 AD3d 1295 [2d Dept 2012] quoting *Gordon v American Museum of Natural History,* 67 NY2d at 837; *Segretti v Shorenstein Co., East , L.P.*, 256 AD2d 234 [1st Dept 1998]).

Turning to General Plumbing's motion for summary judgment on the negligence claims, it established that it did not install said pipe, that prior to the burst it performed no work on the failed pipe and was under no obligation to inspect or maintain the pipe and thus, owed no duty to Plaintiffs (*see Vasquez v Port Authority of New York and New Jersey*, 100 AD3d 442 [1st Dept 2012]). In opposition, Plaintiffs fail to raise a triable issue of fact as to any duty owed to them (*see generally Espinal v Melville Snow Contractors*, 98 NY2d 136, 139 [2002]; *Medinas v MILT Holdings LLC*, 131 AD3d 121 [1st Dept 2015]). Thus, Plaintiffs' cause of action in negligence against General Plumbing is dismissed.

Because it has been found to be not negligent, Deer Stags' contribution crossclaim against General Plumbing is dismissed (*see Nassau Roofing & Sheetmetal Co., Inc., v Facilities Development Corp.*, 71 NY2d 599, 603 [1988]).

Accordingly, Deer Stags Concepts, Inc.'s motion for summary judgment is granted to the extent that all of Plaintiffs' claims against it are dismissed except for the negligence cause of action brought by Allied World National Assurance Company. Also, General Plumbing Corporation's motion for summary judgment is granted in its entirety and all of Plaintiffs' claims against it as well as the contribution crossclaim are dismissed.

9/14/2020
DATE

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

| CHECK ONE: | [ ] CASE DISPOSED | | [X] NON-FINAL DISPOSITION | |
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| APPLICATION: | [ ] GRANTED | [ ] DENIED | [X] GRANTED IN PART | [ ] OTHER |
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