

<b>Jones v Harvard Maintenance Inc.</b>
2020 NY Slip Op 33439(U)
September 2, 2020
Supreme Court, Kings County
Docket Number: 505216/13
Judge: Wavny Toussaint
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At an IAS Term, Part 70, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of September, 2020.

**P R E S E N T:**

HON. WAVNY TOUSSAINT,  
Justice.

-----X

CLARENCE JONES and RICK BUSH,  
  
Plaintiffs,

-against-

Index No.: 505216/13  
MS # 10 & 11

HARVARD MAINTENANCE INC., 116 NASSAU ST.  
ASSOCIATES, LLC, FEDERATION EMPLOYMENT  
and GUIDANCE SERVICE, INC., and AMTRUST  
REALTY CORP.,

Defendants,

-----X

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and Affidavits (Affirmations)  
Annexed \_\_\_\_\_

147-148, 159-160

Opposing Affidavits (Affirmations) \_\_\_\_\_

177, 186, 189, 190, 193<sup>1</sup>

Affidavits/ Affirmations in Reply \_\_\_\_\_

191, 192 194, 195

Upon the foregoing papers, defendant Harvard Maintenance Inc. (Harvard) moves for an order pursuant to CPLR 3212 granting summary judgment in its favor, dismissing plaintiffs Clarence Jones' and Rick Bush's (collectively, plaintiffs') claims and the other

<sup>1</sup> Though Amtrust's opposition to Harvard's motion was untimely, it, and the reply thereto will be considered.

defendants' cross claims against it (Mot. Seq. 10). Defendants 116 Nassau St. Associates, LLC (Nassau) and Amtrust Realty Corp. (Amtrust) also move for summary judgment on their cross-claims, seeking a finding that defendant Federation Employment and Guidance Service, Inc. (FEGS) is liable to indemnify them against plaintiffs' claims and breached its contract by failing to procure insurance for their benefit (Mot. Seq. 11).<sup>2</sup> The motions were consolidated for determination.

### **Background Facts and Procedural History**

The instant action arises out of a March 1, 2013 accident in which plaintiffs were struck and allegedly injured by a falling window, which partially shattered. At the time, they were on premises owned by Nassau, managed by Amtrust, and leased to FEGS. Harvard's employee, David Parker (Parker), was the superintendent of the building.

The facts are largely undisputed. Plaintiffs were attending a class offered by FEGS and were sitting in the back row of the classroom in front of a row of windows. One of the windows unexpectedly fell open inward and struck plaintiffs from behind, hitting them on their heads and necks and the inner pane of glass shattered. Parker was called to the scene by FEGS' building manager shortly afterward and reported the incident to AMTRUST, which had the window repaired.

It is unclear exactly what led to the accident. Parker testified that the window in question was not intended to be opened other than for cleaning. There were clips holding it closed that, when manipulated, allowed the lower panel of the window to be tilted

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<sup>2</sup> As FEGS produced proof of insurance, this latter argument appears to have been dropped by the movants in reply.

inward to allow both the interior and exterior glass to be cleaned. FECS allegedly utilized an outside vendor to do so, though Parker did not recall the frequency that this was done. While he was not sure what happened to cause the accident, he noted that based on his observations that day, there did not appear to be a structural problem with the window and, thus, the clips must have been released to allow the window to fall inward.

By summons and complaint dated September 3, 2013, plaintiffs commenced the instant action against Nassau, FECS, and Amtrust. The complaint alleged that the defendants were negligent, causing their injuries. Three months later, an amended summons and complaint were filed, adding Harvard as a defendant. FECS, Nassau and Amtrust jointly, and Harvard answered and asserted cross claims against each other for indemnification and/or contribution.

Following a plethora of discovery orders and discovery-related motion practice, a note of issue was filed on October 21, 2019 and the instant motions timely followed.

#### *Discussion*

It is well settled that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries, Inc.*,

10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]; see also *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

“To hold a defendant liable in common-law negligence, a plaintiff must show that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the injury” (*Federico v Defoe Corp.*, 138 AD3d 682, 684 [2d Dept 2016]). “If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant” (*Han Hao Huang v Doe*, 169 A.D.3d 1014, 1015 [2d Dept 2019]).

Harvard argues that it had no duty to plaintiffs. It posits that, while it paid Parker’s salary, it was not responsible for his performance; rather, Amtrust controlled and directed the manner and details of his work and he reported solely to Amtrust. While this is borne out by Parker’s testimony (Parker tr. 11:11-13, 78:6-79:7), the arrangement between Harvard and Amtrust was not memorialized in writing (Holker tr. 58:24-59:4), so the details and rationale thereof have not been provided to the court. As such, it is unclear whether Parker’s responsibilities could be imputed to Harvard as well as to Amtrust.

Harvard further argues that, even if it were responsible for any potential negligence on the part of Parker, he also had no duty to plaintiffs. To that end, it notes that both Parker and Anne Holker, Amtrust's Senior Vice President, testified that FECS was responsible for maintaining the floors that it leased other than as to structural issues and, in fact, had its own employees who did so<sup>3</sup> (Parker tr. 13:18-24, 20:23-22:2; Holker tr. 22:20-23:24, 73:10-74:6). It was Amtrust, however, which replaced the windows several years previously (Parker tr. 32:19-25, 68:13-69:6), which had the broken window herein repaired (Parker tr. 43:3-18, 67:13-68:13; Holker tr. 52:23-53:21, and which was contractually obligated to clean the exterior of the windows (Holker tr. 25:11-22). Parker, who served as Amtrust's eyes on site, walked around the building daily and was responsible to report any problems that he noticed or which were reported to him to Amtrust (Parker tr. 18:10-19:9; Holker tr. 26:14-28:5). He was aware of a past incident of a window being tampered with in the Board of Education portion of the building (Parker tr. 69:11-70:1). As such, it is possible that Parker (and, arguably, Harvard) was remiss in failing to inspect the window and to have it rendered safe.

"The right to contractual indemnification depends upon the specific language of the contract" and "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Alfaro v. 65 West 13th Acquisition, LLC*, 74 AD3d 1255, 1255-1256 [2d Dept 2010]). In addition, a party seeking contractual indemnification must prove itself free from negligence (*Reisman v. Bay Shore Union*

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<sup>3</sup>

As FECS went bankrupt and no longer exists, it did not produce a witness for deposition. As such, the Court must rely solely upon the testimony of the other parties and the documentary evidence.

*Free School Dist.*, 74 AD3d 772, 774 [2d Dept 2010]). Herein, FECS contracted to indemnify Nassau and Amtrust. However, issues of fact remain as to whether Amtrust had any relevant obligations regarding the windows and, if so, whether it was negligent.

**Conclusion**

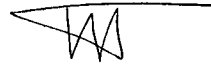
Accordingly, it is

**ORDERED** that Harvard's motion for summary judgment dismissing the claims and cross claims against it is denied; and it is further

**ORDERED** that Nassau and Amtrust's motion for summary judgment is denied.

This constitutes the decision and order of the Court.

ENTER:



J.S.C.

KINGS COUNTY CLERK  
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