SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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FIREMAN'S FUND INSURANCE COMPANY A/S/O CLOCK TOWER CONDOMINIUM,

Plaintiff,

- v -

ISSEKS BROS., INC., ISSEKS BROTHERS 32 GRAMERCY CLEANUP CORP., TWO TREES MANANGEMENT CO. LLC, ONE MAIN LLC., CLOCK TOWER ACQUISITIONS LLC, ONE MAIN CONSTRUCTION CORP., and ABR PLUMBING & HEATING CONTRACTORS INC

Defendants.

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INDEX NO. 160632/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Fireman's Fund Insurance Company brought this lawsuit against defendants Isseks Bros., Inc., Isseks Brothers 32 Gramercy Cleanup Corp., Two Trees Management Co. LLC, One Main LLC, Clock Tower Acquisitions LLC, One Main Construction Corp., and ABR Plumbing & Heating Contractors Inc to recover for damages suffered by its subrogor Clock Tower Condominium. In its answer to the Complaint, defendant One Main Construction Corp. cross-claimed against, inter alios, co-defendant Isseks Bros., Inc., alleging that any alleged damage was caused by the negligence of its co-defendants and that it was entitled to, inter alia, common law indemnity, contractual indemnification and/or compensation from them (Doc. 10). Isseks Bros., Inc., moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the Complaint and the cross claim of One Main Construction Corp. against it.

Plaintiff and One Main Construction Corp. oppose the motion. For the reasons set forth herein, the motion is granted in part and denied in part.

BACKGROUND

Plaintiff issued an insurance coverage policy (the "policy") to its subrogor, the nonparty Clock Tower Condominium (the "Insured"), for the real and business property that the Insured owned and/or occupied at One Main Street, Brooklyn, New York (the "Premises"). Defendants Two Trees Management Co., LLC ("Two Trees"), One Main LLC ("One Main"), and Clock Tower Acquisitions LLC ("Clock Tower Acquisitions") purchased, developed, and renovated certain units on the 16th-18th floors of the Premises. As part of this development and renovation, Two Trees, One Main, and/or Clock Tower Acquisitions removed the original fire standpipe tank and relocated the standpipe tank to a new location.[1] One Main Construction Corp. ("One Main Construction") was "engaged in the business of general contracting" at the Premises (Doc. 1 ¶ 12) and was specifically involved with an interior renovation project on the 16th floor (Doc. 29 ¶ 4; Doc. 28 ¶ 23).

On or about November 2, 2016 (the "date of loss"), Isseks Bros., Inc. ("the Movant") was called to repair, diagnose, and troubleshoot a water tank that did not properly function and, while performing its services, allegedly caused the subject tank to overflow, which resulted in the discharge of significant amount of water into the Premises resulting in damage to the Insured's property. Plaintiff reimbursed the Insured for this damage to the Premises pursuant to the policy and argues that it is contractually subrogated to its Insured's rights against Defendants.

[1] *But see* Doc. 29 ¶ 17.

1. The Affidavit of Scott Hochhauser

Scott Hochhauser ("Hochhasuer"), a principal of the Movant on the date of loss and the individual in charge of "overseeing [the Movant's] day-to-day operations," stated that the inspection requested by One Main Construction was performed by the Movant's supervisor, Guiseppe Chiappa, and was "limited to his observations of the water tank to diagnose the issues requiring attention" (Doc. 20; *see also* Doc. 21 [showing One Main Construction as "customer"][2]). Hochhauser stated that this first-time inspection was a "visual inspection" in compliance with the Movant's routine "Inspection Request" on an as-needed-basis, for which the dispatched supervisor "does not bring any tools, equipment, or materials to the inspection aside from paper, a pencil or pen, and a ruler," which the supervisor uses to record his or her observations on an Inspection Request Form (*see* Docs. 20 & 21).

Hochhasuer added that, on November 7, 2016, which was several days after the date of loss, the Movant started and completed its repair services for the subject tank at the Premises (Doc. 20 ¶ 10; *see also* Doc. 24 [the Invoice]).

2. The Affidavit of Guiseppe Chiappa

Guiseppe Chiappa ("Chiappa") was a supervisor for the Movant on the date of loss and was in charge of "overseeing all field personnel and performing inspections of water tanks to diagnose for needed repairs and/or replacement of the unit" (Doc. 25). On the date of loss, "while performing fieldwork, [Chiappa] was notified by [Hochhauser] of a request that came into [the] office for [the Premises]." Chiappa was instructed to report to the Premises and to ask to see the building superintendent. During his inspection, he observed that the water tank was comprised of steel and approximately 15 feet x 5 feet x 8 feet and that there was a "three-inch

[2] *But see* Doc. 28 ¶¶ 10-12.

ballcock in the water tank that needed to be replaced and included that as a recommendation." Chiappa further stated that a ballcock is a three-part mechanism used to fill a water tank and avoid overflow (*id.* ¶ 6). Chiappa also stated that "the Hi-Lo switch was not functioning properly[,]" and that such a switch "helps regulate the water level in a water tank" (*id.* ¶ 7).

Chiappa further observed that "[t]he building was undergoing renovations which included the roof and in the immediate vicinity of the water tank [he] observed construction debris consisting of dirt and sheetrock directly underneath the water tank in a pan that was supposed to function as a drain for the water tank" (*id.* ¶ 5). He also stated that he "completed [his] inspection and recorded [his] observations and recommendations on the Inspection Request [F]orm" (*id.*). Chiappa further represented that he "did not manipulate or repair the water tank in any way during [his] inspection on [the date of loss of] November 2, 2016, or at any time before … [and], [f]ollowing [his] inspection, [he] did not instruct, direct, or communicate to the building owner, the property manager, or any entity that the water tank was repaired or able to be filled" (*id.* ¶ 9).

3. The Affidavit of Ismet "Izzy" Perezic

Ismet Perezic ("Perezic"), the building manager[3] who was in charge of managing renovation work and mechanical projects on the date of loss, stated that "[o]n November l, 2016, the [Premises] underwent its 5-year hydrostatic sprinkler test with representatives of the FDNY and the plumbing contractor ABR Plumbing and Heating present [and] [t]he fire standpipe passed the test" (Doc. 34 ¶ 3).

Perezic further stated that "[w]ater for the fire suppression system [was] provided by a water tank located on the l7th floor of the building. On [the date of loss,] the supply valve for the

[3] *Cf.* Doc. 28 ¶ 13 (either employed by the Insured or the property manager Tudor Realty Services Corp.).

water tank was turned on to refill the water tank to the sprinkler system, but it would not fill" (*id.* ¶ 4).

Perezic then "contacted [the Movant] to repair the water tank [and] [a] technician arrived later that day to inspect the tank for repairs" (*id.* ¶ 5).

Perezic further stated that:

> … I observed the [Movant's] technician physically strike the connecting rod and float with a stick which had been on the top of the water tank. When the technician hit the connecting rod and float, it caused the tank valve to activate and the tank began to fill with water again.
>
> [The Movant's] service technician then left the building with the water to the tank running. He did not stay onsite [sic] to see that the valve would automatically close as designed once the system was filled with water.
>
> Ultimately, the valve never closed as it was supposed to once the tank was full and instead overflowed resulting in significant water damage to the building.
>
> … [T]he technician never warned me or my staff that the valve would not close and instead we would need to manually turn off the water to the tank. Furthermore, no one from [the Movant] informed me or my staff that there was a risk of water damage to the building by refilling the tank.

(*Id.* ¶¶ 5-8).

4. The Affidavit of Phillip Smalley, P.E.

Phillip Smalley, P.E. ("Smalley") stated in his affidavit that he is a professional engineer duly licensed in New York and is currently a consulting Principal Forensic Engineer with LGI Forensic Engineering, P.C. Smalley further stated that he performed a site inspection on November 10, 2016 to investigate the cause of the water damage in question (Doc. 35 ¶ 3). Smalley opined that the water damage was caused, in part, by the failure of the supply/tank valve, which was in disrepair and required service after the hydrostatic sprinkler test the day prior (*id.* ¶¶ 4, 5, 6).

Smalley further stated that the Movant "performed poor service workmanship by physically striking the valve and/or assembly to get it to work and not fully testing the valve for deficiencies (*id.* ¶ 7). He also opined that "proper service dictated that the subject valve be tested for proper opening and closing operation based on the failure of the valve necessitating the service call[;] [and] that if the defective [valve] was properly tested, prior to the service technician completing his work and leaving the site, it would have been expected that the valve would have been found to require replacement as was performed after the date of loss[;] [and that] the water damage would have been avoided had [the Movant] remained on site to observe the proper operation of the valve or at a minimum, communicated to building staff that valve would need to be manually turned off when the water level reached capacity" (*id.* ¶¶ 8, 9).

5. The Affidavit of Marina Trejo

One Main Construction submitted the affidavit of Marina Trejo ("Trejo") as an exhibit in opposition to the instant motion. Trejo was employed by Two Trees as a project manager on the date of loss. According to Trejo, One Main Construction did not contact the Movant to inspect the water tank on the date of loss (Doc. 29 ¶ 11). Trejo further stated that it was either Tudor Realty Services Corp. ("Tudor"), the property manager of the Premises, or the Insured that contacted the Movant to send out a supervisor for inspection and/or repair on the date of loss.

6. The Parties' Contentions

The Movant argues, in essence, that its motion should be granted and that the Complaint as against it should be dismissed with prejudice because (1) on the date of loss, it was an independent contractor, requested by One Main Construction to inspect the tank, without any contract or agreement with the Insured or Plaintiff, (2) it performed a visual inspection of the subject tank on its first visit to the Premises, (3) this inspection was not performed negligently,

and (4) this inspection did not make the subject tank less safe than it was beforehand. The Movant additionally argues that One Main Construction's cross claim against it should be dismissed because, on the date of loss, it did not have a contract with One Main Construction for services at the Premises.

In opposition, Plaintiff argues that (1) there are material issues of fact concerning, inter alia, whether the Movant physically struck the float on the water tank at the initial inspection on the date of loss, allegedly causing it to activate, fill with water, and overflow; (2) the Movant's supervisor could have mitigated the damage if he had cleared the debris or advised anyone to clear the debris that he observed to be blocking the tank's overflow drain pan due to construction debris; and (3) no discovery has taken place.

In reply to Plaintiff's opposition and in further support of its motion, the Movant argues that the Court should disregard the affidavit of Perezic based on certain alleged inconsistencies and the fact that Plaintiff was in violation of certain fire codes on the date of loss. The Movant further argues that the Court should disregard the affidavit of Smalley because, inter alia, he fails to cite the industry standards and does not establish that the water tank was in the same condition on the date of his examination as it was on the date of the incident. Additionally, the Movant argues that "[t]he facts which Mr. Smalley relies upon are contested at best" and that "his affidavit … [is] speculative and nonprobative" (Doc. 37 ¶ 12). Further, the Movant argues that no further discovery is needed where, as here, no triable issue of fact is raised.

In opposition to the branch of the motion seeking to deny One Main Construction's cross motion as against the Movant, One Main Construction argues that "there are triable issues of fact [as to] whether [P]laintiff's insured detrimentally relied on [the Movant's] inspection of the water tank and whether [the Movant] negligently failed to advise [P]laintiff's insured or its

managing agent … that the ballcock and Hi-Low switch were not properly working and needed to be replaced and that the drainage system was clogged" (Doc. 28 ¶ 44). Specifically, One Main Construction argues, in relevant part, that:

> Chiappa knew hours before the Water Tank failure that the: (1) ballcock valve was not working properly; (2) the Hi-Lo switch was not working properly; (3) that the drainage system was clogged; (4) that with a ballcock valve and Hi-Lo switch not working properly and the drainage system clogged that the Water Tank at any moment could overflow with nowhere to safely drain.

(*Id.* ¶ 49). One Main Construction further argues that there is outstanding discovery in the case (*id.* ¶¶ 47, 57-63).

In reply to One Main Construction's opposition and in further support of its motion, the Movant argues that "[w]hether or not [it] performed the inspection properly is irrelevant in this analysis where it did not a signed [sic] agreement and its conduct did not fall into one of the three recognized exceptions set forth in *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 (2002)[4]" (Doc. 39 ¶ 8). The Movant further argues that neither Plaintiff or nor its Insured could "be a third-party beneficiary to an agreement [that] did not exist[]" (*id.*) Further, the Movant argues that only "Tudor (the property management company) was aware of [its] presence [on the date of loss] and therefore the Insured or One Main Construction could not have detrimentally relied on the Movant's performance" (*id.* ¶ 6). Further, the Movant argues that it owes no further discovery to One Main Construction.

LEGAL CONCLUSIONS

1. The Summary Judgment Standard

"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 eliminate any

[4] *See infra* discussion under the Applicable Law.

material issues of fact from the case" (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is well-established that "[t]his burden is a heavy one," requiring that the "facts . . . be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). "Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

2. Common-Law Negligence

The elements of a cause of action alleging common-law negligence are: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty proximately caused injury to the plaintiff (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1st Dept 2016]). "The existence of a duty depends on the circumstances, and the issue is one of law for the court; the court is to apply a broad range of societal and policy factors" (*Id.* at 459 [internal quotations and citations omitted]). This Court's function on a motion for summary judgment is issue finding, not issue determination[,]" necessitating the denial thereof where this Court finds that a material issue of fact exists (*Sillman v. Twentieth Century–Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

"[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). However, "[t]hree exceptions to this rule exist: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk"; (2) "where the plaintiff has suffered injury as a result of

reasonable reliance upon the defendant's continuing performance of a contractual obligation"; and (3) when the promisor has entirely displaced the other party's duty to safely maintain the premises" (*Wyant v Professional Furnishing and Equip., Inc.*, 31 AD3d 952, 953 [3d Dept 2006] citing *Espinal*, 98 NY2d at 139-40; *see also Espinal*, 98 NY2d at 141-43; *Sarisohn v Plaza Realty Services, Inc.*, 109 AD3d 654, 655 [2d Dept 2013] [analyzing an oral agreement under the third *Espinal* exception]; *see also* Restatement (Second) of Torts § 324A [1965]).

Additionally, "[s]everal types of defendants—including professionals—can be held liable in tort for failure to exercise reasonable care, irrespective of their contractual duties" (*Dormitory Auth. v Samson Constr. Co.,* 30 NY3d 704, 711 [2018]). "The general standard that professionals who agree to inspect are under a duty to exercise reasonable care in reporting on what they find and may be subject to tort liability for their failure to do so" (*Hayes v Niagara Mohawk Power Corp.,* 261 AD2d 748, 750 [3d Dept 1999]; *cf. Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 256 [2007]).

3. The Application

In *Espinal*, the Court of Appeals held that "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (*Espinal*, 98 NY2d at 142; *see also* Restatement (Second) of Torts § 324A [1965]). Here, the Movant failed to meet its burden of demonstrating, as a matter of law, with competent evidence, that it "did not create an unreasonable risk of harm to others, or increase that risk" (*St. Paul Travelers Companies, Inc. v Joseph Mauro & Son, Inc.*, 93 AD3d 658, 661 [2d Dept 2012]). There are triable issues of fact as to whether the Movant negligently created or exacerbated a dangerous condition by physically manipulating the subject water tank.

Even assuming that the *Espinal* exception does not apply, this Court still finds that the Movant owed a limited duty to the Insured and One Main Construction to use ordinary care and skill when, on the date of loss, it undertook to, inter alia, inspect a water tank that was approximately 15 feet x 5 feet x 8 feet located above a condominium unit at the Premises and, upon observing "construction debris consisting of dirt and sheetrock directly underneath the water tank in a pan that was supposed to function as a drain for the water tank," "physically [struck] the connecting rod and float with a stick which had been on the top of the water tank, caus[ing] the tank valve to activate and the tank … to fill with water again" (*see Dormitory Auth.,* 30 NY3d at 711; *Hayes,* 261 AD2d at 750; *Stiver*, 9 NY3d at 256).

This duty raises an issue of fact for trial as to whether Chiappa, upon inspection, observed the debris in the drain pan and, if so, if he had a duty to immediately report it, and also as to whether he struck the rod and float with a stick causing the tank to fill and overflow (*see St. Paul Travelers Companies, Inc.*, 93 AD3d at 661 [holding that the electrical repair company "owed a duty to use ordinary care and skill in its electrical panel box repair activities to avoid danger and injury to the person and property of others, and this duty included investigating the underlying cause of the problem which it was hired to fix under the circumstances presented"]; *Sutherland v Thering Sales and Serv., Inc.*, 38 AD3d 967, 968 [3d Dept 2007] [holding that there were triable issues of fact as to whether a service technician who was present at the incident site on the day of the incident to inspect and repair breached its limited duty of care]). The Movant failed to establish, prima facie, that it did not breach its duty when it performed its inspection and/or repair work on the water tank at the Premises or that any breach of this duty was not a

proximate cause of the flooding. Accordingly, the instant motion for summary judgment dismissing the Complaint is denied.[5]

These issues of fact also preclude summary judgment dismissal of One Main Construction's common law contribution and indemnification cross claims as against the Movant (*see Tamhane v Citibank, N.A.*, 61 AD3d 571, 573 [1st Dept 2009]; *see also Aiello v Burns Intern. Sec. Services Corp.*, 110 AD3d 234, 247 [1st Dept 2013]). However, the branch of the cross motion seeking contractual indemnification is dismissed against the Movant since the Movant made a prima facie showing that there is no written contract between the parties that would entitle One Main Construction to contractual indemnification, and One Main Construction failed to raise triable issues of fact as to the existence of a contract containing an indemnification provision.

Accordingly, the branch of the instant motion for summary judgment dismissing the Complaint is denied, and the branch of the motion for summary judgment dismissing One Main Construction's cross claim is denied in part and granted in part. The parties' remaining contentions are either without merit or need not be addressed.

CONCLUSION

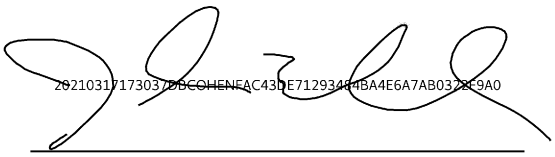
Accordingly, it is hereby:

ORDERED that the motion by defendant Isseks Bros., Inc. seeking dismissal of the Complaint is denied; and it is further

[5] The Movant argues that Plaintiff's "claims for breach of contract and indemnification (whether contractual or based in common law)" should also be dismissed against it (Doc. 15 at 13); however, such claims are, in effect, not raised as against the Movant in the Complaint (*see* Doc. 1 ¶¶ 21-29). Likewise, Plaintiff's opposition only addresses negligence claims (Doc. 33).

ORDERED that the motion by defendant Isseks Bros., Inc. for summary judgment seeking dismissal of the cross claim by defendant One Main Construction Corp. for contractual indemnification is granted and the cross claim seeking contractual indemnification is dismissed, and the motion for summary judgment dismissing the other cross claims is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference in this matter on April 19, 2021 at 1:00 p.m., which will be held by Microsoft Teams, with a link to the conference to be sent via a subsequent court notice, unless, prior to that day, the parties meet and confer in order to complete a bar coded preliminary conference form to be provided by the Part 58 Clerk at SFC-Part58-Clerk@nycourts.gov, in which case the conference will be cancelled.



3/17/2021
DATE

DAVID BENJAMIN COHEN, 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