

**Rochdale Ins. Co. v 150 W. 28th St., LLC**

2021 NY Slip Op 31349(U)

April 22, 2021

Supreme Court, New York County

Docket Number: 158679/2019

Judge: David Benjamin Cohen

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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. DAVID BENJAMIN COHEN **PART** **IAS MOTION 58EFM**

*Justice*

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**INDEX NO.** 158679/2019

ROCHDALE INSURANCE COMPANY, AS ASSIGNEE OF  
SHAKAWAT BHUIYAN, ASSIGNOR,

Plaintiff,

**MOTION SEQ. NO.** 003

- v -

150 WEST 28TH STREET, LLC, 150 WEST 28TH STREET  
SUITE 404, LLC, BREATHER PRODUCTS US INC.,  
BREATHER PRODUCTS INC., TBRO'S RENOVATION  
INC., and JOHN DOE,

Defendants.

**DECISION + ORDER ON  
MOTION**

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TBRO'S RENOVATION INC.,

Defendant/Third-Party Plaintiff,

Third-Party  
Index No. 595323/2020

-against-

FT HARDWOOD FLOORS & CONSTRUCTION, INC.,

Third-Party Defendant.

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BREATHER PRODUCTS US INC. and BREATHER  
PRODUCTS INC.,

Second Third-Party Plaintiff,

Second Third-Party  
Index No. 595652/2020

-against-

FT HARDWOOD FLOORS & CONSTRUCTION, INC.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85,  
86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 117, 118, 119, 120,  
121, 123, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for DISMISS.

In this personal injury action commenced by plaintiff Rochdale Insurance Company  
("RIC"), as assignee of Shakawat Bhuiyan ("Bhuiyan"), assignor, third-party defendant/second

third-party defendant FT Hardware Floors & Construction, Inc. (“FTF”) moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint filed against it by TBRO’s Renovation Inc. (“TBRO”) and the second third-party complaint filed against it by Breather Products US Inc. (“BPUS”). RIC opposes the motion and cross-moves against FTF for sanctions pursuant to 22 NYCRR 130-1.1. FTF opposes RIC’s cross motion. BPUS and TBRO oppose FTF’s motion in part. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on September 8, 2016 in which Bhuiyan, an employee of Mahir Floral & Events Design Inc. (“Mahir”), located at 156 West 28<sup>th</sup> Street in Manhattan (“the premises” or “the building”), was injured on the street outside his workplace when a pane of glass fell from a window in Suite 404 at the premises and struck him. Doc. 1. RIC, Mahir’s workers’ compensation insurer, thereafter paid Bhuiyan workers’ compensation benefits related to his injuries and, after it did so, Bhuiyan assigned his rights to collect from any tortfeasors to RIC. Doc. 1.

RIC commenced the captioned action by filing a summons and verified complaint against 150 West 28<sup>th</sup> Street, LLC (“150”), 150 West 28<sup>th</sup> Street Suite 404, LLC (“Suite 404”), Breather Products Inc. (“BPI”), BPUS, and TBRO on September 6, 2019, alleging that Bhuiyan was injured due to their negligent ownership, management, and/or control of the premises. Doc. 1. RIC also asserted the applicability of the doctrine of *res ipsa loquitur*.

At the time of the incident, the premises were owned by 150 and BPUS was the tenant in suite 404 of the building. BPUS hired TBRO as a contractor to perform renovations in suite 404 and TBRO in turn hired FTF as a subcontractor at the project. Docs. 84 and 86.

BPUS and BPI joined issue by their answer filed October 15, 2019, in which they denied all substantive allegations of wrongdoing and cross-claimed against 150 and Suite 404. Doc. 7.

On December 3, 2019, TBRO joined issue by its answer, in which it denied all substantive allegations of wrongdoing and cross-claimed against 150, Suite 404, BPUS, and BPI. Doc. 8.

In January 2020, 150 joined issue by its verified answer, in which it denied all substantive allegations of wrongdoing and cross-claimed against Suite 404, TBRO, BPUS, and BPI. Doc. 11.

On May 20, 2020, TBRO commenced a third-party action against FTF. Doc. 12. FTF joined issue in the third-party action on July 27, 2020, denying all substantive claims of wrongdoing and cross-claiming against 150, Suite 404, BPUS, BPI, and TBRO. Id.

On August 13, 2020, BPUS commenced a second third-party action against FTF. Doc. 33. FTF joined issue by its answer to the second third-party action, in which it denied all substantive allegations of wrongdoing and cross-claimed against 150, Suite 404, BPUS, BPI and TBRO. Doc. 78.

In September 2020, RIC moved, pursuant to CPLR 3215, for a default judgment against Suite 404 (“RIC’s default motion”). Doc. 67. In an affirmation in support of RIC’s default motion, RIC’s attorney claimed, inter alia, that:

[Suite 404] was responsible for the falling glass and was careless, reckless and negligent in the design, structure, construction, operation, maintenance, management, supervision and control of the [premises] where [Bhuiyan] was working near where that the glass from a window at the [premises] struck him and caused him to be precipitated to the ground.

Doc. 68 at par. 9.

RIC's attorney further alleged that Bhuiyan was injured due to the negligence and recklessness of Suite 404. *Id.* at par. 10.

By order entered November 22, 2020, this Court granted RIC's default motion against Suite 404 and noted that the damages against said defendant would be determined at the time of trial. Doc. 116.

FTF now moves, pursuant to CPLR 3211(a)(7), to dismiss the third-party complaint filed against it by TBRO, as well as the second third-party complaint filed against it by BPUS, on the ground that the statements made by RIC's attorney in paragraphs 9 and 10 of his affirmation in support of RIC's default motion, i.e., that Suite 404 was "reckless", "negligent", and "responsible for the falling glass", constitute judicial admissions which are chargeable against RIC and which exculpate FTF. Docs. 81-82. Counsel for FTF further asserts that the admission exculpates BPUS and TBRO despite the fact that the admission was made by RIC's attorney. Doc. 82 at par. 14.

In opposition, RIC's attorney argues that the statement in his affirmation in support of the default motion, i.e., that Suite 404 was liable for the occurrence, is not an admission since it is not clear and unequivocal. Doc. 91. Counsel also maintains that the statement cannot be an admission since counsel lacked personal knowledge about how the accident occurred. *Id.* Further, argues counsel, his contention that RIC was entitled to a default judgment against Suite 404 does not preclude it from asserting that BPUS and TBRO were negligent. *Id.* RIC also cross-moves for sanctions against FTF pursuant to 22 NYCRR 130-1.1 on the ground that FTF's motion to dismiss based on the alleged admission of its attorney is frivolous. Docs. 90-91.

In an affirmation in partial opposition, BPUS argues, inter alia, that FTF's motion must be denied because RIC's attorney did not admit that Suite 404 was solely liable for the accident.

Doc. 101 at par. 13. It further asserts that FTF's motion must be denied given that discovery must be conducted to ascertain who was responsible for the incident. *Id.*

In an affirmation in further support of its motion and in opposition to RIC's cross motion, FTF argues that its motion must be granted since RIC's attorney clearly admitted that Suite 404 was responsible for the occurrence. Doc. 117. FTF further asserts that RIC is not entitled to an award of sanctions. *Id.*

In reply to BPUS' affirmation in opposition, FTF argues that its motion is not premature, and that no further discovery is needed given the admission by RIC's counsel that Suite 404 was liable for the plaintiff's injuries. Doc. 119. It further contends that this Court should treat its motion as one for summary judgment. *Id.*

In reply to FTF's affirmation in opposition to its cross motion, RIC argues, *inter alia*, that the statement by RIC's attorney that Suite 404 was liable does not eliminate the possibility that FTF was also liable for the occurrence. Doc. 121.

In an affirmation in partial opposition to FTF's motion, TBRO argues that an admission of fault by Suite 404 would not absolve FTF of potential negligence. Doc. 125.

In reply to TBRO's affirmation, FTF argues, *inter alia*, that even if a FTF employee opened the window, causing glass to fall to the street below, such would not render meaningless the admission by RIC's attorney that Suite 404 was liable for the accident. Doc. 129.

### LEGAL CONCLUSIONS

When deciding a motion to dismiss pursuant to CPLR 3211, the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192,

199 [1st Dept 2013] [quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Here, FTF seeks to dismiss the third-party complaints against it based solely on what it asserts is a judicial admission by RIC's attorney, made in an affirmation in support of RIC's default motion against Suite 404, i.e., that Suite 404 was liable for the alleged accident. Contrary to FTF's contention, however, "the legal argument made by [RIC's attorney] in support of a prior motion does not constitute a judicial admission (*see Lipco Elec. Corp. v ASG Consulting Corp.*, 117 AD3d 688, 689 [2d Dept 2014]; *Naughton v City of New York*, 94 AD3d 1, 12 [1<sup>st</sup> Dept 2012]; *Rahman v Smith*, 40 AD3d 613, 614-615 [2d Dept 2007])" (*Borawski v Abulafia*, 140 AD3d 817, 817 [2d Dept 2016]). This is because a judicial admission, which is binding on a party, must be based on a statement of fact (*Rahman v Smith*, 40 AD3d at 614-615). As RIC's attorney asserts, he could not have attested to any facts relating to the alleged incident since he had personal knowledge about the occurrence.

Although the statement of RIC's counsel that Suite 404 was liable may constitute an informal judicial admission, which is "evidence of the fact or facts admitted" (*Rosales v Rivera*, 176 AD3d 753 [2d Dept 2019]), FTF's attorney does not raise this argument. In *Rosales*, a case involving a motor vehicle collision, the Appellate Division held that defendants Maria Espinal and Mario Espinal were entitled to summary judgment dismissing the complaint against them where plaintiff's counsel, unlike here, conceded in a prior motion that the acts of codefendants Angel Rivera and Teresa Beltre were the *sole proximate cause* of the accident. Thus, even assuming, arguendo, that this Court were to consider the statement of RIC's attorney as evidence, it would not entitle FTF to dismissal of the third-party complaints since counsel did not claim that Suite 404 was solely liable for plaintiff's accident.

Further, since the order granting RIC’s default motion against Suite 404 noted that the amount of damages to be awarded against Suite 404 would be determined at the time of trial, it is evident that further proceedings are necessary to determine the liability, if any, of the remaining defendants and third-party defendants, as well as the possible damages to be awarded against those entities. Thus, FTF’s motion must be denied on this ground as well.

Finally, this Court denies RIC’s cross motion on the ground that FTF’s filing of its motion to dismiss did not rise to the level of frivolous conduct warranting sanctions pursuant to 22 NYCRR 130-1.1.

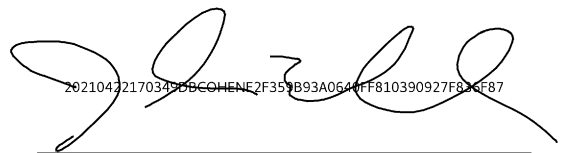
The remainder of the parties’ contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion by third-party defendant/second third-party defendant FT Hardwood Floors & Construction, Inc. seeking to dismiss the third-party complaint and the second third-party complaint is denied; and it is further

ORDERED that the cross motion by plaintiff Rochdale Insurance Company, as assignee of Shakawat Bhuiyan, assignor, seeking sanctions against FT Hardwood Floors & Construction, Inc. pursuant to 22 NYCRR 130-1.1, is denied.

4/22/2021  
DATE



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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE