

Ruggiero v 357-359 Sixth Ave. Assoc., LLC
2022 NY Slip Op 34279(U)
December 1, 2022
Supreme Court, New York County
Docket Number: Index No. 157388/2019
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

FRANK RUGGIERO, AMY RUGGIERO,

Plaintiffs,

- v -

357-359 SIXTH AVE. ASSOCIATES, LLC, LLAMA SAN LLC
D/B/A LLAMA SAN NYC, DONE RIGHT HOOD & FIRE
SAFETY, INC.,

Defendants.

-----X

LLAMA SAN LLC D/B/A LLAMA SAN NYC

Plaintiff,

-against-

DONE RIGHT HOOD & FIRE SAFETY, INC.

Defendant.

-----X

INDEX NO. 157388/2019

MOTION DATE 04/28/2022, 05/20/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

Third-Party
Index No. 595833/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 143, 145, 150, 152, 154, 155, 156, 157, 158, 159, 160, 167, 168, 169, 170, 175, 177, 178, 179, 180, 181, 182, 186, 188, 189

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 146, 147, 148, 149, 151, 153, 161, 162, 163, 164, 165, 166, 171, 172, 173, 174, 176, 183, 184, 185, 187

were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff Frank Ruggiero, a firefighter, commenced this action to recover for injuries sustained while he was responding to a fire on January 11, 2019 at 359 Sixth Avenue, New York, New York. The premises is owned by defendant 357-359 Sixth Avenue Associates, LLC, who leased the first floor of the building to defendant Llama San LLC, which operated a restaurant.

Llama San contracted with defendant Done Right Hood & Fire Safety to inspect and clean the hood and duct systems in its kitchen. The fire at the premises started in the kitchen of Llama San's restaurant on the first floor, in the ceiling above the wood stove.

Plaintiff alleges that he was injured while lifting a couch in the second-floor storage area, which had a low ceiling. In the complaint, plaintiffs bring claims against all three defendants for common law negligence, violation of General Municipal Law Section 205-a, and loss of consortium. In motion #003, defendant Llama San moves for summary judgment seeking (i) dismissal of plaintiff's claims; (ii) dismissal of defendant 357-359 cross-claims; or, alternatively (iii) summary judgment on its common law indemnity claims against defendant 357-359 and defendant Done Right. In motion #004, defendant 357-359 moves for summary judgment seeking (i) dismissal of plaintiff's claims; (ii) dismissal of all cross-claims; or, alternatively (iii) summary judgment on its common law indemnity claims against defendants Llama San and Done Right. The motions are consolidated for disposition.

Motion # 003

Defendant Llama San first argues that plaintiff's claims should be dismissed because even if it did cause the fire and/or violate the fire code, its actions did not directly or indirectly cause plaintiff's injuries, which occurred as a result of lifting a heavy couch in an unrelated area that was not even leased or occupied by Llama San. General Municipal Law Section 205-a creates a cause of action for firefighters who, while in the line of duty, are injured as a result of violations of statutes and regulations (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 76 (2003)). Specifically, it provides that firefighters have a cause of action where the "negligence of any person . . . in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of federal, state . . . or local law directly or indirectly cause the

firefighter's injury or death during the discharge of his or her duties (*Id.*). Similarly, General Obligations Law Section 11-106 was enacted to abolish the common law firefighter's rule barring negligence actions by firefighters injured in the line of duty by giving firefighters (and police officers) a cause of action in negligence for injuries suffered while in the line of duty (*Id.* at 78).

“To establish entitlement to judgment as a matter of law, defendant had to show either that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries (*Id.* at 82).” Here, defendant Llama San argues that its alleged violation of the fire code did not “directly or indirectly” cause plaintiff's injuries because plaintiff was injured while lifting a couch in a different area of the building. However, it is undisputed that the only reason plaintiff was at the premises and allegedly lifting the couch was to check for the presence of fire in the floorboards, a fire which allegedly resulted from defendant Llama San's violations of the fire code and negligence. Thus, plaintiff's claims for common law negligence and under the more liberal causation standard under General Municipal Law Section 205-a cannot be dismissed (*Id.* at 80-81 [discussing the court's broad interpretation of causation under this statute]).

With regard to defendant 357-359's cross-claims, Llama San has demonstrated, and defendant 357-359 does not dispute, that 357-359's cross-claims for contractual indemnification and breach of contract for failure to procure insurance lack merit. However, defendant 357-359 cross-claims for common law indemnity and contribution cannot be dismissed because, as discussed above, defendant Llama San has failed to show that it did not cause plaintiff's injuries. Likewise, defendant Llama San is not entitled to summary judgment on its common law

indemnification claims against the co-defendants as it has failed to show that it is free from negligence (*Pena v. Intergate Manhattan LLC*, 194 A.D.3d 576, 578 [1st Dep't 2021]).

Motion # 004

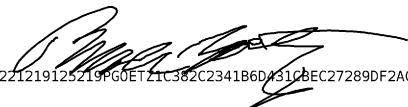
Defendant 357-359 first argues that plaintiff's allegation that he was injured while lifting a couch on the second-floor storage room is not credible and is contradicted by the testimony of its witness and the photographs of the room. However, even if defendant 357-359's testimony contradicted plaintiff's testimony about plaintiff's activities and the alleged accident, it is well-established that issues of credibility cannot be resolved on a motion for summary judgment (*Vega v. Restani Constr. Corp.*, 18 N.Y3d 499, 505 [2012]). Defendant 357-359 also argues that plaintiff's claim under General Municipal Law Section 205-A should be dismissed because the alleged code violations are not applicable to this defendant. However, defendant 357-359 fails to address any of the specific code violations or explain why they are not applicable and thus its motion cannot be granted. Likewise, defendant 357-359 also failed to support its argument that plaintiff's actions were the sole proximate cause of his accident.

With regard to defendant Llama San's cross-claims against defendant 357-359, defendant 357-359 has demonstrated, and Llama San does not dispute, that the cross-claims for contractual indemnification and failure to procure insurance lack merit. However, Llama San's cross-claims for common law indemnity and contribution cannot be dismissed because defendant 357-359 has failed to show that it was not negligent. Likewise, defendant 357-359 is not entitled to dismissal of the cross-claims of defendant Done Right for common law indemnification and contribution. Finally, although defendant Done Right purports to have filed a "cross-motion" for summary judgment (Doc. 167), it has failed to file a "notice of cross-motion" and is also seeking relief

against the non-moving party, and thus its request for relief will not be considered (CPLR 2215).

Accordingly, it is

ORDERED that the motions are granted to the extent that defendant Llama San and defendant 357-359 cross-claims against each other for contractual indemnification and breach of contract are dismissed, and are otherwise denied.


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12/1/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE