SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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BAKHTIYOR MELIKOV, NICOLOV MELIKOV,

Plaintiffs,

- v -

66 OVERLOOK TERRACE CORP., PATRIOT PLUMBING AND HEATING INC.,OMAR FAKHOURY, TUDOR REALTY SERVICES, CORP.,

Defendants.

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INDEX NO. 153504/2018

MOTION DATE 06/29/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 168, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion to/for JUDGMENT - SUMMARY.

Defendant Omar Fakhoury's motion for summary judgment is granted in part and denied in part.

Background

Plaintiff (and his spouse) bring this Labor Law case arising out of his work at defendant Fakhoury's apartment as part of a renovation of the unit. He claims he was painting in the vestibule area of the apartment while standing on a ladder when the ladder slipped and he claims he fell off the ladder. Fakhoury is a party to a proprietary lease with 66 Overlook Terrace Corp. ("66 Overlook").

With respect to plaintiff's claims against him, Fakhoury asserts that the homeowner's exemption to the Labor Law forecloses plaintiff's ability to pursue these claims against him. Fakhoury also asserts that the negligence claims should be dismissed against him because he did

not supervise or control plaintiff's work in his apartment. He emphasizes that plaintiff was working for White Star Contracting on the day of the accident.

Fakhoury maintains that because plaintiff's direct claims against him should be dismissed, the crossclaims by defendants based upon the common law should therefore be dismissed as well. He also insists that the remaining contractual indemnity claim from 66 Overlook and Tudor Realty Services, Corp. ("Tudor") should be dismissed because it is based on an unenforceable portion of the proprietary lease. Fakhoury claims that the General Obligations Law prohibits a lessor from exempting itself from liability for its own negligence.

In opposition, 66 Overlook and Tudor assert that Fakhoury did not obtain the required approval to perform alterations in his apartment. They claim that Fakhoury knew he had to procure an alteration agreement prior to doing the work. However, 66 Overlook and Tudor admit that they no longer possess Fakhoury's application for the work or the alteration agreement.

Plaintiff also opposes the motion. He claims that Fakhoury was not the owner of the apartment and that, instead, 66 Overlook owned the unit and Fakhoury merely owns shares in the co-op.

Homeowner's Exemption

The central part of this branch of Fakhoury's motion is whether or not the homeowner's exemption to Labor Law applies to the owner of shares in a cooperative. This provision exempts "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law § 240[1]). Labor Law § 241 has a similar provision.

The Court finds that this exemption applies (*see Marquez v 171 Tenants Corp.,* 180 AD3d 414, 415, 114 NYS3d 884 [1st Dept 2020] [finding that tenant-shareholders were entitled

to the homeowner's exemption under the Labor Law]). Plaintiff cited no binding precedent for the proposition that this exemption does not apply because Fakhoury is not an owner under the corporate structure of a cooperative. And there is no dispute that Fakhoury did not supervise or control plaintiff's work. He is thereby entitled to the exemption for work performed in the subject apartment.

To the extent that plaintiff brings common law negligence claims against Fakhoury, the Court also severs and dismisses those claims as there is no dispute that he did not control the means and methods plaintiff's work.

Crossclaims

Because the Court has dismissed plaintiff's claims against Fakhoury, the Court dismisses the common law crossclaims against him.

With respect to the contractual indemnification claims, the Court observes that the parties did not produce a signed alteration agreement. At the deposition of a witness for Tudor (the management company), the witness admitted it was misplaced (NYSCEF Doc. No. 177 at 14-16). That means, on this record[1], the Court can only assess the contractual indemnification claim under the proprietary lease. The Court cannot consider terms of an agreement that Fakhoury did not sign. The applicable provision under the proprietary lease states that:

> "The Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee" (NYSCEF Doc. No. 163 § 11).

[1] The Court observes that other parties made motions on the same day that this motion was marked fully submitted. The Court stresses that this decision is limited to the papers included on this motion sequence number.

Fakhoury maintains that the co-op cannot be indemnified for its own negligence and cites the General Obligations Law for the proposition that this provision of the lease is invalid. The Court denies this branch of Fakhoury's motion. 66 Overlook and Tudor's allegations against Fakhoury (which were originally contained in the third-party complaint) also cite to paragraph 21(a) of the proprietary lease. This section states that:

> "The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld, make in the apartment or building, or on any roof, penthouse, terrace-or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the building" (*id*.).

There is an issue of fact, initially, about whether the work Fakhoury had done in his apartment required an alteration agreement (i.e., the written consent of the lessor). The instant record (and particularly Fakhoury's deposition) suggests that the parties discussed an alteration agreement for the project in which plaintiff was injured. Plaintiff's position, that no alteration agreement was ever executed, means that there is an issue of fact regarding whether he may have violated the above provision.

And the indemnity provision cited above requires a lessee (such as plaintiff) to indemnify the lessor for damages arising from the failure to follow a provision of the proprietary lease. In other words, Fakhoury cannot insist that he is entitled to summary judgment on the ground that there is no alteration agreement when there are issues of fact about whether he was required to have one and where the failure to get such approval may have violated the proprietary lease (and possibly led to damages that 66 Overlook and Tudor may have to pay).

Summary

The Court emphasizes that it makes no findings about the alteration agreement or about whether the proprietary lease violates the General Obligations Law. The Court merely finds that there are issues of fact about plaintiff's failure to comply with the alterations paragraph under the proprietary lease (a basis cited in 66 Overlook's pleading) and whether that failure entitles 66 Overlook to contractual indemnification under the terms of the proprietary lease.

Accordingly, it is hereby

ORDERED that Fakhoury's motion for summary judgment is granted only to the extent that plaintiff's claims against him are severed and dismissed and to the extent that the common law indemnification claims against him are severed and dismissed.

7/5/2023
DATE

ARLENE P. BLUTH, 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