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| <b>Robles-Martinez v Partnership 92 W., L.P.</b>                                                                                                                                                                               |
| 2023 NY Slip Op 35222(U)                                                                                                                                                                                                       |
| August 1, 2023                                                                                                                                                                                                                 |
| Supreme Court, Bronx County                                                                                                                                                                                                    |
| Docket Number: Index No. 300908/2017E                                                                                                                                                                                          |
| Judge: Andrew Cohen                                                                                                                                                                                                            |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 4**

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**JOSHUA ROBLES-MARTINEZ,****Plaintiff,****DECISION AND ORDER****Index No. 300908/2017E****-against-****PARTNERSHIP 92 WEST, L.P. and  
COLUMBUS GOURMET FOOD,****Defendants.**

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**COLUMBUS GOURMET FOOD****Third-Party Plaintiff,****-against-****FISCHER FOODS OF NEW YORK, INC.****Third-Party Defendant.**

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The following papers numbered \_\_\_\_, on motion sequence #006 and #007, were considered for summary judgment:

**PAPERS****NUMBERED**

|                                                                              |            |
|------------------------------------------------------------------------------|------------|
| Notice of Motion, annexed Exhibits and Affidavits and Memorandum of Law..... | 1, 2       |
| Answering Affidavits and Exhibits and Memorandum of Law.....                 | 3, 4, 5, 6 |
| Reply Affirmation.....                                                       | 7          |

Upon the foregoing papers, it is ordered that Defendant Partnership 92 West, L.P.'s motion for summary judgment (#006) is denied and Third-Party Defendant Fischer Foods of New York, Inc.'s motion for summary judgment (#007) is denied.

Plaintiff, Joshua Robles Martinez, commenced this action on April 8, 2017, alleging that while making a delivery to Defendant Columbus Gourmet (hereinafter "Columbus"), one of the steel doors covering the staircase leading to the cellar fell on top of his head as he was proceeding down the stairs

(Pl.'s Complaint). Issue was joined by service of an Answer on behalf of owner of the building, Defendant Partnership 92 West (hereinafter "Partnership"). Defendant Columbus, as tenant, commenced a third-party action against Plaintiff's employer Fischer Foods of New York, Inc. (hereinafter "Fischer Foods"), seeking common law indemnification and contribution from Fischer Foods, claiming Plaintiff sustained a "grave injury" as defined by Workers Compensation Law § 11.

#### **Motion #006**

Defendant Partnership moves for summary judgment, pursuant to CPLR 3212, seeking dismissal of the Complaint as against them or, alternatively, an order of contractual indemnification against co-defendant/tenant, Columbus. A party moving for summary judgment must make prima facie showing of entitlement to a judgment as a matter of law, by providing sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

Defendant Partnership argue because they are an out-of-possession landlord they are not liable for Plaintiff's alleged injuries. Specifically, they argue that the steel doors fell because the safety bar was not in use, making the co-defendant/tenant liable (*Rivera EBT*, p. 23).

In opposition, Plaintiff, inter alia, submits an affidavit of a certified safety consultant, who inspected and reported that the exterior of the store stuck out, which prevented the steel door of the cellar from fully opening beyond 88.2°, "which is near the tipping point of the door's fulcrum" (Pl.'s Ex. 5, p. 12). The expert reported that heavy traffic, light brushing of a person, or wind alone could have caused the cellar doors to close (*Id.* at p. 15). Additionally, it was reported that hooks attached to the building to keep the cellar doors open was not present, no safety bar was present, no adequate signs, and no handrails were present (*Id.* at 25). Plaintiff argues that the construction of the front façade which prevented the cellar doors from opening completely created a dangerous condition, and the construction of the façade was either done by Defendant Partnership or with the approval of Partnership, as per the Lease Agreement (Def. Columbus Ex. H, p. 4). Hence, Plaintiff argues that even if Defendant Partnership was an out-of-possession landlord, it had notice of the structural defect.

Similarly, tenant/co-defendant Columbus argues in opposition of the summary judgment motion, contending that Defendant Partnership was contractually obligated to maintain and make structural repairs to the property and the cellar doors, pursuant to the terms of the Lease Agreement (Def. Columbus Ex. H, p. 5 ¶ 46). Furthermore, it submits deposition testimony from Mr. Singh, the owner of Columbus Gourmet, and Mr. Rodriguez and Mr. Corporan, employees of third-party defendant Fischer Foods, who

all state that a safety bar was located between the two (2) cellar doors and that the cellar doors and the structure of the building was never changed since Columbus opened for business in 1995 (Def. Opp. pp. 5-8).

An out-of-possession landlord, with a limited right to reenter, could be held liable for negligence based on a significant structural or design defect that is contrary to a specific statutory safety provision (*Drotar v 60 Sweet Thing, Inc.*, 106 AD3d 426 [1st Dept 2013] citing *Johnson v Urena Serv. Ctr.*, 227 AD2d 325 [1st Dept 1996]). Here, the condition alleged to serve for Defendant Partnership's liability involves the cellar doors and how they were modified and maintained (Pl.'s Opp. p. 2).

Here, the court denies Defendant Partnership's summary judgment motion on the grounds that it finds material issues of fact as to what caused the cellar doors to fall. Based on the record, the court cannot determine whether the cellar doors fell due to the front façade of the building or because of the lack of a safety bar. Furthermore, the court finds that the expert report submitted by Plaintiff failed to claim that a specific statutory violation existed in relation to the cellar doors or alleged structural defect.

Regarding the portion of Defendant Partnership's summary judgment motion for contractual indemnification, the court denies such relief. An intent to indemnify can be clearly implied from the language of the clause (*Wood v Lefrak SBN Ltd. Partnership*, 111 AD3d 532 [1st Dept 2013]). The indemnification clause in the Lease Agreement between Partnership and Columbus states,

"Tenant covenants and agrees to indemnify and save Landlord harmless from and against all claims arising during the term of this Lease for damages, injuries to goods, wares, merchandise and property and/or from any personal injury or loss of life in, upon or about the demised premises or on the sidewalks adjoining the demised premises, except such claims as may be the result of the negligence of Landlord, its agents, employees or contractors, or the failure of the Landlord to perform any of its obligations under this Lease."  
(Def. Partnership Ex. L, p. 3, ¶ 44).

However, the court finds that material issues of fact exist as to what caused the alleged incident to occur and under the Lease Agreement, it also states under the "repair clause",

"Repair: Notwithstanding anything to the contrary herein contained in the printed form of this Lease, it is agreed and understood that the Landlord shall be responsible for structural bearing repairs only. If said structural bearing repairs are caused by the negligence of the Tenant or its servants, invitees, licensees, agents or employees, than said structurally bearing repairs shall additionally be the Tenant's responsibilities." (Def. Partnership Ex L, p. 5 ¶ 46).

As material issues of fact exist as to what caused the cellar doors to fall, and who is responsible for repairing such defects, Defendant Partnership's summary judgment motion based on indemnification is denied.

#### **Motion #007**

Third-party defendant, Fischer Foods, moves for summary judgment pursuant to CPLR 3212, dismissing the third-party complaint in its entirety, on the grounds that Plaintiff did not sustain a "grave injury" as defined by Workers Compensation Law § 11. The term "grave injury" within the meaning of workers' compensation statute permitting a third-party action against an employer for indemnity if claimant sustains grave injury, includes an acquired injury to the brain caused by an external physical force resulting in permanent total disability, meaning, the injured worker is no longer employable in any capacity" (*Alulema v ZEV Elec. Corp.*, 168 AD2d 469 [1st Dept 2019] citing *Rubeis v Aqua Club, Inc.*, 3 NY3d 408 [2004]).

Third-party defendant Fischer Foods established prima facie through the reports of experts, who have concurred that the Plaintiff is employable, although there may be limits on the work he could do (Def. Fishcer Foods, Ex. A-C). Neuropsychologist Dr. DiBenedetto conducted an independent evaluation on March 20, 2019, and concluded that Plaintiff's,

"Overall neurocognitive profile is within expected or normal ability limits based on a premorbid level of intelligence and cognitive ability within a range from low average to average. There was no evidence of significant deficit within or across any cognitive domain." (Ex. A, p. 7).

"In sum, there is no objective evidence in these findings to support a claim of cognitive deficits or psychological symptomatology secondary to TBI." (*Id.*)

Vocational rehabilitation expert, Joseph Pessalano, conducted an interview with Plaintiff on February 5, 2019 and concluded that:

"He [Plaintiff] can perform the essential functions of occupational titles classified as sedentary, light and in some instances medium according to Department of Labor Exertional Guidelines. He can perform the essential functions of all job titles in my original report with little or no additional training (including returning to his previous occupation as a meter reader)." (Ex. C, p. 6).

In opposition, Plaintiff and third-party Plaintiff Columbus argue that the “traumatic brain injury” satisfies the legal requirement of a total disability from employment in any capacity (Pl.’s Opp. ¶¶ 4-5, 10). In support of the argument, Plaintiff submits, *inter alia*, the report of a vocational expert (Ex. 14). The vocational expert concludes that Plaintiff has an “insufficient vocational capacity to perform work requiring even Sedentary Physical capability” and due to Plaintiff’s severe limitations and vocational capacity, “he is precluded from accessing the labor market” (*Id.* at pp. 36, 39).

The parties’ differing expert opinions raise a triable issue of fact as to whether Plaintiff’s alleged brain injury resulted in a “grave injury” under Workers Compensation Law § 11, rendering him unemployable at any capacity (*see Rubeis*, 3 NY3d 408). Therefore, the court denies third-party Defendant’s motion for summary judgment.

Accordingly, it is hereby

ORDERED, that defendant PARTNERSHIP 92 WEST, L.P.’s motion for summary judgment dismissing plaintiff’s complaint against them is denied; and it is further

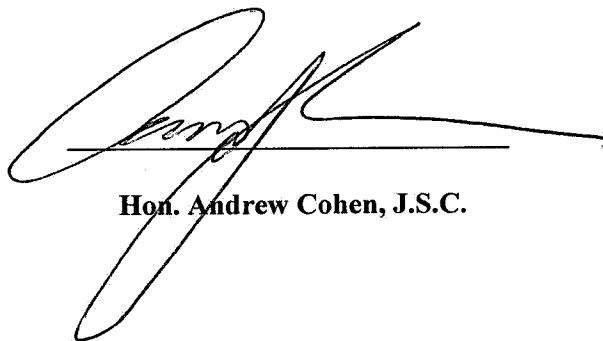
ORDERED, that defendant PARTNERSHIP 92 WEST, L.P.’s motion seeking contractual indemnification is denied; and it is further

ORDERED, that third-party defendant FISCHER FOODS OF NEW YORK, INC.’s motion for summary judgment dismissing plaintiff’s complaint is denied; and it is further

ORDERED, that defendant PARTNERSHIP 92 WEST, L.P. and third-party defendant FISCHER FOODS OF NEW YORK, INC. shall serve a copy of this order with notice of entry within 45 days.

This constitutes the decision and order of this court.

Dated: August 1, 2023



Hon. Andrew Cohen, J.S.C.