

**Harper v Gracie Terrace Apt. Corp.**

2024 NY Slip Op 31881(U)

May 30, 2024

Supreme Court, New York County

Docket Number: Index No. 159826/2021

Judge: Mary V. Rosado

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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. MARY V. ROSADO**

**PART 33M**

*Justice*

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**INDEX NO. 159826/2021**

BÉRNADETTE HARPER,

**MOTION DATE 01/19/2023**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

GRACIE TERRACE APARTMENT CORPORATION,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

GRACIE TERRACE APARTMENT CORPORATION

Third-Party  
Index No. 595533/2022

Third-Party Plaintiff,

-against-

AUTOMATIC INDUSTRIES, INC.

Third-Party Defendant.

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GRACIE TERRACE APARTMENT CORPORATION

Second Third-Party  
Index No. 595237/2023

Second Third-Party Plaintiff,

-against-

SEBCO LAUNDRY SYSTEMS, INC.

Second Third-Party Defendant.

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

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, and after oral argument on November 21, 2023 with Edwin Ossa, Esq. appearing for Defendant Gracie Terrace Apartment Corp. (“Defendant Gracie”), Mindy Ricca, Esq. appearing for Second Third-Party Defendant Sebco Laundry Systems, Inc. (“Sebco”) and Gregory Jackubow, Esq. appearing for Third-Party Defendant Automatic Industries, Inc.

("AII"), AII's motion, pursuant to CPLR 3212, seeking summary judgment in favor of AII and against Defendant Gracie and dismissing Defendant Gracie's Third-Party Complaint (NYSCEF Doc. 22) and for attorneys' fees and sanctions against Defendant Gracie, is granted in part and denied in part.

### **I. Background and Procedural History**

On October 28, 2021 Plaintiff Bernadette Harper ("Plaintiff") commenced the underlying action against Defendant Gracie to recover for personal injuries allegedly sustained on December 3, 2018 when she tripped on plywood sheets in the lobby of Defendant Gracie's property at 605 East 82<sup>nd</sup> Street, New York, NY (the "Premises") (NYSCEF Doc. 21). On July 1, 2022 Defendant Gracie commenced a third-party action against AII to recover under theories of contribution, common law indemnification, contractual indemnification and failure to procure insurance (NYSCEF Doc. 22). Subsequently, on March 15, 2023 Defendant Gracie commenced a second third-party action against Sebco to recover under the same theories (NYSCEF Doc. 38).

On January 19, 2023 AII brought the instant motion seeking dismissal of Defendant Gracie's Third-party Complaint as well as costs and attorneys' fees against Defendant Gracie for failure to diligently respond to AII's request for a discontinuance (NYSCEF Doc. 17).

In support of its motion, AII argues that dismissal of Defendant Gracie's Third-Party Complaint is warranted because AII did not perform any work at the Premises on the day in question and did not own, occupy, control or derive any special use from the Premises (NYSCEF Doc. 20 at 2-3). In opposition, Defendant Gracie alleges that dismissal of the Third-Party Complaint would be premature, as no discovery in this action has yet taken place.

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## II. Discussion

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (*see e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

The First Department has held that “[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Bailey v New York City Transit Auth.* 270 AD2d 156, 157 [1st Dept 2000]). Additionally, “[t]he mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion” (*Singh v New York City Hous. Auth.*, 177 AD3d 475, 476 [1st Dept 2019]). Moreover, the First Department has held that even where no depositions have been taken, summary judgment is not precluded where the opposing party fails to show that discovery might lead to facts that would support their opposition to the motion (*Blacio v Related Constr. LLC*, Lexis 2034 [1st Dept 2024]).

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A party opposing a motion for summary judgment “must submit sufficient evidence, in admissible form, to establish that there is a triable issue...or to explain why a proper tender of proof is not being made” (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Here, in support of its motion, AII attaches, *inter alia*, an invoice showing that AII’s first day working at the building was one week after Plaintiff’s accident (NYSCEF Doc. 26). Additionally, an affidavit of Denise Savino-Erichsen, the President of AII, was submitted alleging that AII had not yet begun work at the Premises on the date of Plaintiff’s accident (NSYCEF Doc. 24).

Conversely, in opposition to AII’s motion Plaintiff provides only an affirmation of Plaintiff’s counsel (NYSCEF Doc. 35) and the unsworn, self-serving hearsay statement of Luciano Carrasquillo, Defendant Gracie’s Resident Manager at the Premises, which states *inter alia* that AII was present at the Premises on the day of Plaintiff’s accident to replace washing machines (NYSCEF Doc. 36). However, it is well settled that an affirmation of counsel “has no probative weight and cannot raise a triable issue,” and an unsworn self-serving hearsay statement is “insufficient as a matter of law to raise triable factual issues, and cannot be considered in opposition to a motion for summary judgment” (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

In light of the foregoing, the Court finds that AII has satisfied its *prima facie* burden of demonstrating its entitlement to judgment. Defendant Gracie has failed to offer evidence in admissible form sufficient to establish an issue of fact requiring a trial. AII’s motion seeking summary judgment in favor of AII and against Defendant Gracie and dismissing Defendant Gracie’s Third-Party Complaint, is granted. However, as the Court does not find the conduct of

Defendant Gracie's counsel to be without merit in law or undertaken primarily to delay this litigation or to harass any party, AII's motion for attorneys' fees and costs is denied.

Accordingly, it is hereby,

ORDERED that Third-Party Defendant Automatic Industries, Inc.'s motion for an Order, pursuant to CPLR 3212, granting summary judgment in favor of AII and against Defendant Gracie Terrace Apartment Corp. and dismissing Defendant Gracie's Third-Party Complaint, is granted; and it is further

ORDERED that Third-Party Defendant Automatic Industries, Inc.'s motion for costs, attorneys' fees and sanctions against Defendant Gracie Terrace Apartment Corporation is denied; and it is further

ORDERED that on or before June 25, 2024, the remaining parties are directed to submit a proposed Preliminary Conference Order to the Court via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov). If the parties are unable to agree to a proposed Preliminary Conference Order, the parties are directed to appear for an in-person preliminary conference with the Court in room 442, 60 Centre Street, on June 26, 2024 at 9:30 a.m.; and it is further

ORDERED that within ten days of entry, counsel for Third-Party Defendant Automatic Industries, Inc. shall serve a copy of this Decision and Order, with notice of entry, on all parties to this case; and it is further

*[The remainder of this page is intentionally left blank]*

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

5/30/2024  
DATE

Mary V Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE