SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

Ruth Rodney,

Index No. 23112/2019E

-against-

Hon. LAURA G. DOUGLAS Justice Supreme Court

Justice Supreme Court

840 Westchester Ave, LLC et al
and a Third-Party Action

The following papers numbered 1 to (6) were read on this motions (Seq. Nos. 4+5 V)
for Summary Judgment ~~noticed~~ Submitted on September 19, 2023

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). (1), (2)
Answering Affidavit and Exhibits	No(s). (3), (4)
Replying Affidavit and Exhibits	No(s). (5), (6)

Upon the foregoing papers, it is ordered that ~~this motion is~~ these motions are decided in accordance with the attached memorandum Decision/Order.

Dated: 9-4-24

Hon. LAURA G. DOUGLAS Justice Supreme Court, J.S.C.

CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE

MOTION IS..... ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 23112/2019E

RUTH RODNEY,

Plaintiff,

-against-

840 WESTCHESTER AVE, LLC, 840 WESTCHESTER AVENUE NMA, LLC, 840 WESTCHESTER AVENUE NPPN, LLC, 840 WESTCHESTER AVENUE, NPPS, LLC, 840 WESTCHESTER HOLDINGS. LLC, and KIM CHANG HYUN,

Defendants.

840 WESTCHESTER AVE, LLC, 840 WESTCHESTER AVENUE NMA, LLC, 840 WESTCHESTER AVENUE NPPN, LLC, 840 WESTCHESTER AVENUE, NPPS, LLC, and 840 WESTCHESTER HOLDINGS. LLC,

Third-Party Plaintiffs,

-against-

CHILDREN'S HEALTH FUND, NEW YORK CHILDREN'S HEALTH PROJECT, and MONTEFIORE MEDICAL CENTER,

Third-Party Defendants.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of these motions for summary judgment (seq. nos. 4 & 5):

Papers	**Numbered**
Notice of Motion by Third-Party Defendant Montefiore Medical Center, Affirmation of Lawrence J. Freeze, Esq. dated May 12, 2023 in Support of Motion, and Exhibits ("A" through "O")	**1**
Notice of Motion by Children's Health Fund, Statement of Undisputed Material Facts by Jay S. Campbell, Esq. dated May 15, 2023, Affirmation of Jay S. Campbell, Esq. dated May 15, 2023 in Support of Motion, Memorandum of Law by Jay S. Campbell, Esq. dated May 15, 2023 in Support of Motion, and Exhibits ("A" through "O")	**2**

These motions are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on these motions is as follows:

Third-party defendant Montefiore Medical Center ("Montefiore") seeks summary judgment pursuant to CPLR 3212 dismissing the third-party complaint. Third-party defendant Children's Health Fund ("CHF") also seeks summary judgment dismissing the third-party complaint, as well as all cross-claims asserted against it. Neither Montefiore nor CHF oppose each other's motion. Both motions are granted.

The plaintiff ("Rodney") seeks monetary damages for personal injuries purportedly sustained on March 15, 2017 when she allegedly slipped and fell in a building lobby located at 840 Westchester Avenue in Bronx, New York. CHF leased certain space on the building's second floor. Montefiore occupied that space through a license agreement with CHF. Rodney was on her way to work for Montefiore. The various third-party plaintiffs (collectively, 840 Westchester") owned and/or operated the building. Their third-party claims are for common-law contribution and indemnification, contractual indemnification, and breach of contract.

Montefiore contends that it is entitled to summary judgment because the third-party claims are barred by the Workers' Compensation Law ("WCL"), because there is no contract between 840 Westchester and Montefiore or between CHF and Montefiore which obligates Montefiore to indemnify CHF or 840 Westchester, because Montefiore only occupied space on the second floor and was not required to obtain insurance covering incidents occurring in the building's lobby, and because Montefiore was not responsible for maintaining the lobby where Rodney's accident occurred.

WCL § 11 allows a third-party to seek contribution and/or indemnification from a plaintiff's employer where the plaintiff has sustained a "grave injury" or where the parties have specifically contracted for such indemnification. Montefiore argues that Rodney's injuries, which include injuries to the lumbar spine treated with injections and lumbar surgery, internal derangement of the right knee, and right hip bursitis as described in her bill of particulars, do not meet the statutory criteria for a grave injury. In addition, Montefiore maintains that 840 Westchester were not parties to its license agreement with CHF. In any event, Montefiore contends that the license agreement does not require Montefiore to indemnify either of them or anyone else for injuries sustained in the lobby. Montefiore submits an affidavit dated May 3, 2023 from Christopher Nesterczuk, its Senior Director of Real Estate & Facilities, authenticating the license agreement in effect at the time of Rodney's accident. Montefiore concludes that summary judgment on the indemnification claims is warranted in the absence of either a grave injury or an express agreement by Montefiore to indemnify 840 Westchester.

With respect to the claims for contribution and breach of contract in failing to obtain liability insurance and the related cross-claim by CHF, Montefiore argues that its license agreement required that it carry such insurance only with respect to the licensed premises and the licensee's property. Montefiore notes that there is no question that Rodney's accident occurred in the lobby and not on the second floor and that it was not obligated to maintain or insure the lobby.

In addition to Rodney's deposition testimony that her accident occurred in the lobby of the building where she worked for Montefiore on the second floor, Montefiore also relies on the deposition testimony of Jose Rodriguez ("Rodriguez"), a superintendent employed by 840 Westchester as of the date of Rodney's accident. In pertinent part, Rodriguez testified that he was responsible for maintaining the lobby and that Montefiore had no responsibility for the lobby, including cleaning or maintaining the lobby. Rodriguez was not aware of anyone other than himself or his son ever cleaning or maintaining the lobby floor. Rodriguez explained that each tenant had its own cleaning company that cleaned its specific area, but his job was to clean the building's common areas, which included the lobby.

CHF essentially parrots these same arguments in seeking summary judgment in its favor. CHF adds that the unrefuted evidence reveals that its second floor space was used and occupied exclusively by Montefiore. CHF also relies on the deposition testimony of Karen Redlener ("Redlener"), one of its founders. In pertinent part, Redlener testified that CHF's lease agreement with the building's owner covered only the portion of the building occupied by Montefiore. In addition, she stated that CHF itself

never used the second floor space; it was simply renovated and sublet to Montefiore as part of a CHF community services program. Finally, CHF relies on the deposition testimony of Joan Pierson ("Pierson"), a Human Resources Manager for Montefiore. In pertinent part, Pierson testified that Montefiore would handle maintenance issues within its office space and would notify Rodriguez of any issues existing outside of its office space.

In opposition to Montefiore's motion, 840 Westchester argues that Montefiore's failure to submit a Statement of Material Facts pursuant to Uniform Court Rule 202.8-g or a word count certification under Uniform Court Rule 202.8-b is fatal to its summary judgment motion. Alternatively, 840 Westchester maintains that Montefiore has not satisfied its initial burden of proof. 840 Westchester does not address the grave injury exception, but rather maintains that there was an express agreement to indemnify.

840 Westchester relies on Section 1(B) of the license agreement, which states as follows:

> *"[T]his License Agreement is subject and subordinate to the Sublease and Prime Lease and to the matters to which the Sublease is or shall be subject and subordinate . . . (e) the Licensee [Montefiore] shall, with respect to the Licensed Premises and the Licensee's property, carry the insurance and furnish to Licensor [CHF] and Sub landlord [840 Westchester] the evidence thereof required by the Sublease and this License Agreement to be carried and furnished by Licensee [Montefiore] and shall name Licensor [CHF] and Sublandlord [840 Westchester] and any other party designated by Sublandlord as additional insureds on its commercial general liability insurance. And the waiver of subrogation provisions of the Sublease shall apply between Sublandlord and the Licensee. . ."*

In addition, 840 Westchester notes that Section 4 of the License Agreement requires that any conflict between the License Agreement and the Prime Lease and/or Sublease be resolved in favor of the Prime Lease and/or Sublease. In turn, Section 22.2 of the Lease requires any assignment or sublease to follow the terms of the Lease. Given these terms, 840 Westchester contends that Montefiore essentially agreed to the Lease provisions when it entered into the License Agreement, including the Lease's indemnification and insurance provisions set forth in Sections 12.9 and 39.10. 840 Westchester

concludes that this reading obligates Montefiore to defend and indemnify them.

Finally, 840 Westchester relies on Section 12.10 of the Lease, which states, in pertinent part, as follows:

> *"[T]enant hereby agrees that to the greatest extent permitted by law, Landlord shall not be liable for injury to . . . Tenant's employees, agents or contractors, whether said damages or injury is caused by or results from . . . water or rain . . . or from any other cause whether said damages or injury results from conditions arising upon the Premises or upon other portions of the building of which the Premises are a part, or from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is inaccessible to Tenant . . . This exculpation shall not relieve Landlord from liability resulting from its willful acts, except to the extent covered by Tenant's insurance."*

840 Westchester concludes that Montefiore assumed responsibility for any personal injuries sustained "on or about the Premises."

840 Westchester makes essentially the same arguments in opposing CHF's motion, since CHF is directly obligated to the Lease provisions highlighted by 840 Westchester. It also notes CHF's responsibilities as to maintenance and repair under Section 11.2 of the Lease as follows:

> *"[T]enant, during the Term of this Lease or any extension thereof, shall be responsible for all structural and non-structural repairs, replacements and maintenance to the Premises, including glass windows and doors, all mechanical and electrical equipment and all plumbing, including drains and drain lines, and shall be responsible for maintaining the Premises in a neat and sanitary condition."*

In addition, Section 8.3 of the Lease provides as follows:

> *"[T]enant shall at its own cost and expense utilize a cleaning service for the Premises"*

and Section 11.1 states as follows:

> *"[L]andlord shall make all structural repairs to the exterior of the Premises . . . Tenant is responsible for all repairs and maintenance*

to the HVAC and sprinkler system solely servicing the Premises"

840 Westchester argues that these provisions render CHF contractually at fault for Rodney's accident and, therefore, not entitled to summary judgment dismissing the third-party action.

To obtain summary judgment, Montefiore and CHF must demonstrate that there are no material issues of fact in dispute and that they are entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, an adversary must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]).

Initially, the Court notes that the failure to submit a statement of undisputed material facts or a word count certification is not automatically fatal to the motion (*see* 22 NYCRR 202.8-g[e] and *Taveras v. Incorporated Village of Freeport*, 225 AD3d 822 [2nd Dept 2024]). Here, in significant part because all parties have had the opportunity to fully brief the motion, the Court will entertain Montefiore's motion on its merits.

Here, it is uncontroverted that Rodney claims to have slipped and fallen on a wet lobby floor. While 840 Westchester may be correct in arguing that Montefiore and CHF are under an obligation to indemnify and procure insurance for 840 Westchester notwithstanding their License Agreement, said obligations are limited to the demised premises, which clearly do not include the lobby. As noted by both CHF and Montefiore, Section 1.1(a) of the Lease defined the term "Premises" as "a certain portion of the second floor of the building . . . consisting of approximately 11,807 rentable square feet." This is consistent with Redlener's testimony. There is no provision in the Lease which included the lobby as part of the demised premises. Clearly then, the Lease provisions relied upon by 840 Westchester are unavailing, since they apply only to the second floor space.

The argument that Montefiore and/or CHF are required to indemnify because Rodney's injuries occurred "in and about the Premises" is unavailing (*see Corrado v. 80 Broad, LLC*, 101 AD3d 631 [1st Dept 2012]). The evidence reveals that the building housed four commercial tenants at the time of Rodney's accident. It is an unreasonable reading to include the lobby of a commercial building shared by several commercial tenants, a common area as described by Rodriguez, as being in and about premises defined as being located two floors away (*see Merino v. Larstrand Corporation*, 221 AD3d 508, 509 [1st

Dept 2023] ("The . . . cross-claims for contractual indemnification . . . were properly dismissed because the lease did not require indemnification for claims arising in a common area controlled by the [building owner] and shared with other tenants for ingress and egress.")). There is no provision under which it could be said that CHF and/or Montefiore agreed to indemnify 840 Westchester for injuries arising from the condition of the common areas, including the lobby, an area over which 840 Westchester had exclusive control (*see Maggio v. Eye Care Professionals of Western New York, LLP*, 118 AD3d 1317 [4th Dept 2014]). This is consistent with the Lease's obligation that CHF hire a cleaning company to clean the "Premises", that is, the second floor demised space. There is no similar mention of CHF's duty to arrange for cleaning of common areas of the building (*see Perez v. City of New York*, 18 AD3d 358 [1st Dept 2005]).

Under these circumstances, Rodney's accident as alleged did not trigger the indemnification provisions under the Lease, since there is no contractual language evincing an "unmistakable intent" by either Montefiore or CHF to provide indemnification for the fault of another in maintaining the lobby (*see Tafolla v. Aldrich Management Co., LLC,* 136 AD3d 1019 [2nd Dept 2016] and *Maggio v. Eye Care Professionals of Western New York, LLP*, 118 AD3d 1317 [4th Dept 2014]). Nor is there any evidence that either Montefiore or CHF caused or created the slippery condition that Rodney alleges existed in the lobby (*see Fraher v. JNPJC Brusco Associates*, 286 AD2d 289 [1st Dept 2001])

Moreover, 840 Westchester's arguments regarding the existence of an express agreement to indemnify and procure insurance fail because both the contractual language and the deposition testimony make clear that 840 Westchester exercised exclusive maintenance and control of the lobby, a common area as defined by Rodriguez. Rodriguez unequivocally testified that he, an employee of 840 Westchester, was solely responsible for providing all cleaning services to the lobby. The same testimony establishes that neither Montefiore nor CHF breached a duty, either to Rodney or to 840 Westchester, as a contributing party that caused or exacerbated the injuries for which contribution is sought (*see Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corporation*, 71 NY2d 599 [Ct App 1988] and *Tafolla v. Aldrich Management Co., LLC,* 136 AD3d 1019 [2nd Dept 2016]).

Both Montefiore and CHF also established their *prima facie* entitlement to judgment as a matter of law dismissing the claims for common law indemnification by submitting proof that they had no duty to maintain the building's lobby and, therefore, that Rodney's injuries were not precipitated by their negligence (*see Tafolla v. Aldrich Management Co., LLC,* 136 AD3d 1019 [2nd Dept 2016] and *Konsky*

v. Escada Hair Salon, Inc., 113 AD3d 656 [2nd Dept 2014]).

With respect to the claim against CHF for breach of contract in failing to procure liability insurance naming 840 Westchester, CHF has demonstrated that it did obtain such insurance by submitting its general liability policy naming the landlord as listed in the Lease – "Slane Properties, LLC" (*see* Campbell Aff., Exh. "O"). 840 Westchester has not rebutted the existence of this policy. In any event, 840 Westchester may not avail itself of coverage as an additional insured under CHF's policy since CHF did not have special or exclusive use of the building's lobby, which was equally available to all tenants in the commercial building (*see 625 Ground Lessor LLC v. Continental Casualty Company*, 131 AD3d 898, 899 [1st Dept 2015] ("The motion court correctly determined that the accident in which an individual was injured in the lobby of a building while en route to her employment with a tenant that leased space on the seventh through eleventh floors occurred outside the leased premises, and therefore that the landlord was not entitled to coverage as an additional insured under the employer's commercial general liability policy.").

Montefiore and CHF have demonstrated that they had no duty, contractual or otherwise, with respect to the lobby, since it was not part of, or in or about, the demised premises. 840 Westchester has failed to raise any material issues of fact as to whether Montefiore and/or CHF were responsible for the condition of the lobby. There is also no issue raised as to whether they created the hazardous condition that allegedly caused Rodney's injuries. For these reasons, the claims against CHF and Montefiore must be dismissed.

Accordingly, it is hereby

ORDERED that the third-party complaint is dismissed in its entirety; and it is further

ORDERED that any cross-claims asserted herein against Montefiore Medical Center and/or Children's Health Fund are dismissed in their entireties; and it is further

ORDERED that the Clerk of the Court make all entries necessary to effectuate the terms of this Order, including entry of judgment(s) of dismissal.

The foregoing constitutes the Decision/Order of this Court.

DATED: September 4, 2024
Bronx, New York

HON. LAURA G. DOUGLAS
J.S.C.