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| <b>Clarke v Westchester Indus. Complex LLC</b>                                                                                                                                                                                 |
| 2024 NY Slip Op 35400(U)                                                                                                                                                                                                       |
| March 21, 2024                                                                                                                                                                                                                 |
| Supreme Court, Albany County                                                                                                                                                                                                   |
| Docket Number: Index No. 904466-20                                                                                                                                                                                             |
| Judge: Susan M. Kushner                                                                                                                                                                                                        |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

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**WILBUR CLARKE and GINA CLARKE,**

**Plaintiffs,**

**-against-**

**DECISION and ORDER  
Index No. 904466-20**

**WESTCHESTER INDUSTRIAL COMPLEX LLC, and  
S-L DISTRIBUTION COMPANY, INC.**

**Defendants.**

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**APPEARANCES:**

**FOR PLAINTIFFS:**            **Marschhausen & Fitzpatrick, P.C. (Kevin Fitzpatrick,  
of Counsel)**

**FOR DEFENDANTS:**

**Westchester  
Industrial Complex LLC.**    **Burke, Scolamiero & Hurd, LLP (Andrea P. Demers,  
of Counsel)**

**S-L Distribution  
Company, Inc.**                **Traub Lieberman Straus & Shrewsberry, LLP (Lisa M. Rolle,  
of Counsel)**

In 2017, Plaintiff, Wilbur Clarke, was employed as a tractor trailer driver by DWT Trucking. (NYSCEF #42, Deposition of Plaintiff, p. 12-14). As part of his duties, Clarke made deliveries to an unmanned warehouse in Buchanan, New York owned by Westchester Industrial Complex LLC (Westchester). (NYSCEF #43, p. 12). The deliveries were of potato chips and similar cargo pursuant to a contract between DWT and S-L Distribution Company, Inc. (S-L). Pursuant to a lease agreement with Westchester, S-L leased unmanned warehouse space for storage of the cargo delivered by Plaintiff. (NYSCEF # 45).

At deposition, Plaintiff testified he made such deliveries approximately 4 times per week. (NYSCEF # 42, p. 26). His duties included unloading the trailer and placing the cargo into S-L's suite. (NYSCEF # 42, p. 26-28).

On or about Sunday, July 9, 2017, Plaintiff engaged in such a delivery during daylight hours. (NYSCEF # 20, ¶ 35). He opened the trailer doors and backed the trailer up to the loading dock. Upon exiting the tractor, he manually placed a “dock leveler” to provide a bridge between the dock and the trailer bed. The dock leveler was a **permanent** fixture attached to the loading dock. Plaintiff then entered the warehouse through a side door accessed by coded keypad. Upon entry, he opened Door 75, through which he was to bring the cargo into the warehouse. Plaintiff then obtained a “pallet jack”, owned or supplied by S-L, to move the cargo loaded on pallets from the trailer into S-L’s suite. (NYSCEF # 42, p. 28-41).

Plaintiff maintains that the first few pallets taken out of the trailer were difficult to maneuver because they are rotated to maximize the number that can be placed in the trailer. He testified that on that day, only one pallet was accessible for removal with the pallet jack. As he began to remove the first pallet, Plaintiff stepped with his left foot into an open space created by the difference between the width of the dock leveler and the rear of the trailer and the separation between the trailer and the dock itself. He testified as he felt his foot going down, he instinctively reacted by pushing with his right foot. This caused him to let go of the pallet jack and fall from the dock leveler to the ground, approximately 30 to 36 inches. Plaintiff, who weighed 280 lbs. at the time, landed on his left knee causing him to suffer an injury. (NYSCEF # 42, p. 38-44).

Plaintiff and his wife filed a Summons and Verified Complaint on July 9, 2020<sup>1</sup>. (NYSCEF #1). Westchester answered on March 19, 2021 and included a Cross-Claim seeking apportionment of liability among the defendants. (NYSCEF # 13). The Complaint was amended on January 6, 2021 to add S-L but not e-filed until April 5, 2021. (NYSCEF # 20). S-L filed a Verified Answer to the Amended Complaint with a Cross-Claim on March 31, 2021. (NYSCEF # 17). S-L’s Cross-Claim seeks contractual indemnification from Westchester. Discovery was completed and Plaintiff filed the Note of Issue on October 31, 2023. (NYSCEF # 39).

On December 21, 2023, S-L filed the instant Motion for Summary Judgment seeking to dismiss (1) Plaintiff’s negligence claim, (2) Plaintiff’s wife’s derivative loss of consortium claim, (3) Westchester’s Cross-Claim for apportionment of liability and (4) granting S-L’s Cross-Claim

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<sup>1</sup> Initially, there were 3 Defendants Westchester, Snyder’s-Lance, Inc. and Campbell Soup Company. On March 24, 2021 S-L was added as a party. On April 7, 2023, the action was discontinued against Snyder’s-Lance, Inc. and Campbell Soup Company. (NYSCEF #21).

for contractual indemnification against Westchester. (NYSCEF # 40). S-L contends it is entitled to Summary Judgment because it owed no duty to Plaintiff with respect to the condition of the warehouse's common areas under its' lease with Westchester. Specifically, S-L quotes the following language in the lease agreement:

Common Area Use. Tenant shall have nonexclusive use of the Common Areas... [which] shall mean any and all elevators, stairwells, corridors, lunchrooms, lavatories and lobbies, as well as any and all other public places. The Common Areas shall be subject to Landlord's exclusive control and management... See Exhibit D, paragraph 3.03. (NYSCEF #41, ¶ 21, #45),

and

Landlord shall indemnify and save harmless Tenant and its agents, employees and assigns against and from: (a) any and all claims arising from: (1) the conduct or management of the Demised Premises or Building or of any business therein by Landlord; or (2) any work or thing whatsoever done by Landlord; or (3) any condition created (other than by Tenant for Landlord's or Tenant's account) in or about the Demised Premises during the term of this Lease or during the period of time, if any, prior to the Commencement Date that Tenant may have been given access to the Demised Premises; or (b) any and all claims arising from any negligent or otherwise wrongful act or omission of Landlord or any of its subtenants or licensees or its or their employees, agents or contractors; and (c) all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon. In case any action or proceeding be brought against Tenant by reason of any such claim, Landlord, upon notice from Tenant, shall resist and defend such action or proceeding. See Exhibit D, paragraph 20.03. (NYSCEF #45).

S-L contends that pursuant to these provisions, it has no duty to maintain the common areas, including Loading Dock 75 and because it had no duty to ensure the common areas were safe, free from defects, hazards or traps, it had no duty to Plaintiff. In the absence of such duty, there could be no breach thereof. Accordingly, any conduct or condition that led to Plaintiff's injury was not S-L's responsibility S-L could not and did not cause Plaintiff's injuries.

(NYSCEF # 41, Affirmation of Lisa M. Rolle, Esq. in support of Motion). S-L further contends that both Westchester's Cross-Claim for apportionment of liability must be dismissed for the same reasons, (NYSCEF # 41, ¶ 29-31); as well as Plaintiff's wife's derivative claim for loss of consortium. (NYSCEF # 41, ¶ 32). Finally, S-L contends for these same reasons, its Cross-Claim for contractual indemnification must be granted. (NYSCEF # 41, ¶ 33-9).

Westchester, by an Affirmation of Counsel, opposed the Motion. (NYSCEF #46). It contends S-L failed to demonstrate a *prima facie* lack of negligence on its' part. Westchester argues the lease with S-L consisted of a technical definition of the "Demised Premises" which includes fixtures and equipment. (NYSCEF #46, ¶ 7-8). Westchester maintains the dock leveler was part of the demised premises leased to S-L, which placed some responsibility upon S-L. Westchester further argues that the lease specifically enumerated common areas to include "elevators, stairwells, corridors, lunchrooms, lavatories and lobbies, as well as any and all other public places". (NYSCEF #46, ¶ 13-14, #45, ¶ 3.03). Westchester posits that because the lease agreement did not expressly identify the loading dock as a common area, S-L failed to demonstrate that Westchester was exclusively responsible for that area.

Westchester references a reciprocal provision requiring S-L to indemnify Westchester in the event Westchester is found liable for claims arising from any negligent or otherwise wrongful act or omission of S-L as a tenant. (NYSCEF #46, ¶ 24, #45, ¶ 20.02). Westchester further argues that because the lease required S-L to maintain Public Liability Insurance naming it as an additional insured mandates the Court find S-L is required to protect Westchester from liability arising out of S-L's conduct. (NYSCEF #46, ¶ 27-29).

In Reply, S-L asserts Westchester failed to submit an Affidavit from an individual with personal knowledge of the terms of the lease and the premises. (NYSCEF #48, ¶ 2). Moreover, that Westchester failed to submit admissible proof that the loading dock is not a "common area" and that it did not have "exclusive control" over the loading dock and appurtenant fixtures. (NYSCEF #48, ¶ 7).

S-L also raises the new argument that Westchester failed to raise triable issues of fact to refute that (1) S-L did not direct or control Plaintiff's work and (2) S-L did not create the gap that allegedly caused Plaintiff to fall. Finally, S-L asserts Westchester failed to raise a triable issue of fact that the loading dock where the accident occurred was not a common area under the responsibility of Westchester. For these reasons, S-L maintains it is entitled to Summary Judgment.

Plaintiff, by Affirmation of Counsel, also opposes the Motion, (NYSCEF #47), contending the lease agreement is unclear regarding whether S-L had some control over the loading dock. (NYSCEF #47, ¶ 19-25). Plaintiff contends Loading Dock 75 was immediately proximate to S-L's suite and that he only used that particular loading dock to deliver his cargo

for S-L. Plaintiff supports Westchester's argument that the terms of the lease, together with the requirement that S-L obtain Public Liability Insurance naming Westchester as an additional insured raises a question of fact regarding whether S-L, under the terms of the lease, exercised some control of that Loading Dock. (NYSCEF #47, ¶ 26).

In Reply, S-L, (NYSCEF #49), asks the Court to reject Plaintiff's opposition as untimely. (NYSCEF #49, ¶ 2). The Motion was returnable January 22, 2024 and required opposition papers to be served seven days prior to the return date. The papers were filed on January 19, 2024, only three days before the return date<sup>2</sup>. S-L disputes Plaintiff's argument that the loading dock and dock leveler were under its control. S-L asserts Westchester admitted the dock was a common area when it acknowledged that approximately 10 other tenants used the same dock and loading bay that Plaintiff used when he was injured. S-L argues Plaintiff failed to establish the existence of a triable issue of fact that S-L had some control of the dock area.

Here as well, S-L raises the new argument that Plaintiff fails to demonstrate a triable issue of fact that (1) S-L had control over or directed the Plaintiff's work and (2) S-L had created the gap that allegedly cause Plaintiff to fall. (NYSCEF #49, ¶ 7)

The proponent of a Motion for Summary Judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Reed v. New York State Elec. & Gas Corp.*, 183 AD3d 1207, 1209-10 (Third Dept., 2020), *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). In the absence of such *prima facie* showing, the Court must deny the motion. *Alvarez v. Prospect Hosp.*, at 324. However, once a *prima facie* showing is made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v. Prospect Hosp.*, at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Upon this shift of the burden to Plaintiff, this Court "must view the evidence in the light most favorable to the nonmoving party and accord such party the benefit of every reasonable inference that can be drawn therefrom". *Aretakis v. Cole's Collision*, 165

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<sup>2</sup> Since S-L was able to file a Reply to Plaintiff's untimely opposition papers before the return date of the Motion and S-L failed to demonstrate any prejudice caused by the late service, the Court will overlook the late filing. CPLR § 2004.

AD3d 1458, 1459 (Third Dept., 2018) *citing De Lourdes Torres v. Jones*, 26 NY3d 742, 763 (2016).

The drastic remedy of summary judgment is rarely granted in negligence cases since the very question of whether the defendant's conduct was indeed negligent is a jury question except in the most glaring cases. *See, Johannsdottir v. Kohn*, 90 A.D.2d 842 (2nd Dept., 1982).

Courts are not authorized to try issues in a case, but rather to determine whether there is an issue to be tried. *Esteve v. Abad*, 271 A.D.2d 725, 727 (1st Dept.1947). "Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404 (1957).

A landowner has a duty to exercise reasonable care in maintaining his property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk and the foreseeability of the risk. *Kurshals v Connetquot Cent. School Dist.*, 227 AD2d 593 Second Dept., 1996). If the landowner fails in this duty, liability has been imposed for any foreseeable injuries arising from the unsafe or dangerous condition. *Vazquez v. City of New York*, 192 AD2d 522, 524 (Second Dept., 1993).

A tenant may be held liable for a dangerous or defective condition on the premises it occupies, even where the landlord has explicitly agreed in the lease to maintain the premises and keep it in good repair. *Cohen v. Central Parking Systems*, 303 AD2d 353 (Second Dept., 2003), *citing McNelis v. Doubleday Sports*, 191 A.D.2d 619, 595 N.Y.S.2d 118; *Chadis v. Grand Union Co.*, 158 A.D.2d 443, 550 N.Y.S.2d 908).

A tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair. *Sarisohn v. 341 Commack Road, Inc.*, 89 AD3d 1007 (Second Dept., 2011), *citing Reimold v. Walden Terrace, Inc.*, 85 A.D.3d 1144, 1145, (Second Dept., 2011).

A tenant may be held liable for negligently allowing the leased premises to become dangerous and such potential for liability exists independently of the terms of the lease. *See Giannattasio v. Han Suk Kang*, 57 AD3d 728, 729 (Second Dept., 2008)

In *Sarisohn, supra*, CVS Pharmacy was the tenant seeking summary judgment. Supreme Court granted the motion, however, in reversing, the Appellate Division found that CVS failed to

establish, prima facie, that it did not have actual or constructive knowledge of the defective condition.

In the instant matter, S-L contends it contractually assumed no responsibility for the common areas, that the dock was such a common area and that it was not responsible to maintain the dock. Because another party, Westchester, had the duty to maintain the dock and the fixtures thereon, S-L contents it owed no duty to Plaintiff regarding the dock or fixtures thereon and as a matter of law could not have caused Plaintiff's injury and is therefore not liable in negligence to Plaintiff. S-L properly supported its motion by attorney affirmation with the depositions of Plaintiff, the owner/manager of Westchester's warehouse and its regional director and the lease agreement as supporting evidence. *See Olan v. Farrell Lines*, 64 NY2d 1092 (1985).

In Reply, S-L raises two additional grounds for summary judgment (1) that it did not control or direct Plaintiff's work and (2) that it did not create the gap that allegedly caused Plaintiff to fall. A review of S-L's Motion papers fails to reveal any admissible evidence establishing either of these points. As the burden lies with S-L to establish a prima facie case demonstrating the absence of a triable issue of fact on these issues, Plaintiff's and Westchester's failure to refute these contentions is irrelevant. *See Reed v. New York State Elec. & Gas Corp., supra, Alvarez v. Prospect Hosp., supra*. Moreover, having failed to raise these issues in its Motion for Summary Judgment, it is now improper to do so in reply, thereby depriving the opposing parties of notice and an opportunity to respond to those contentions.

Turning now to the narrow contention raised in S-L's Motion; in Plaintiff's Amended Complaint, it is alleged:

The incident and resulting injuries to plaintiff WILBUR CLARKE were caused through no fault of his own but were caused by reason of the negligence, carelessness and recklessness of defendants WESTCHESTER INDUSTRIAL COMPLEX, LLC, ...,and S-L DISTRIBUTION (hereinafter ...."defendants") in that defendants were careless, reckless and negligent in the ownership, operation, control, maintenance, management and supervision of the aforementioned PREMISES, including the areas at and/or near loading dock 75; in knowing, causing, directing, permitting and/or allowing the PREMISES and loading dock 75 and dock plate to have and/or develop a dangerous, unsafe, hazardous and trap-like condition, and to be, become and remain in such a dangerous, defective, hazardous and unsafe condition; in permitting and allowing dock 75 to exist in a dangerous, hazardous and unsafe condition; in allowing the dock and dock plate to exist in such a manner that it lacks protective barriers causing a trap thereat; in allowing the dock and dock plate to exist in such a manner that when used it created a hole and falling hazard; in allowing the dock to exist in such a manner that it lacks railings or other

protective devices; in permitting and allowing a danger and trap to exist on said PREMISES and dock 75; in negligently and/or improperly maintaining said PREMISES; in causing plaintiff to fall from an elevated height and be precipitated to the ground; in failing to take any and all care, reasonable steps and/or precautions to safeguard those lawfully using said premises; in failing to make adequate and timely inspections so as to prevent the dangerous condition thereat; in failing to make adequate and timely repairs so as to prevent the dangerous condition thereat; in allowing dock 75 to exist in a dangerous, defective and trap-like condition; in permitting and allowing the work being performed at dock 75 of the PREMISES to be performed in a defective, trap-like condition; in negligently and/or improperly allowing work to be performed in proximity to a defective, trap-like condition existing at dock 75 of the PREMISES without adequate safety devices; in allowing the work to be performed without or with a negligently constructed safety railing or other adequate safety device; in causing WILBUR CLARKE to fall from an elevated height between the dock plate and landing and be precipitated to the ground; in failing to take any and all care, reasonable steps and/or precautions to safeguard those lawfully working on or at dock 75 of the PREMISES; in failing to properly warn or apprise, creating and maintaining a hazard, nuisance and trap thereat; and in being generally negligent, careless and reckless in the premises; all in violation of the laws, statutes, ordinances, rules and regulations made and provided therefor. (NYSCEF #20, ¶ 37).

To establish a prima facie case warranting summary judgment, S-L must demonstrate there is no triable issue of fact regarding any of those specific ways Plaintiff contends it was negligent.

The Court finds absent from S-L's Motion is an Affidavit from an individual with personal knowledge of how S-L operated its suite, how S-L delivers cargo to its suite, stores it and removes it for use elsewhere. Notably, missing its' Motion is admissible proof demonstrating S-L did not create a dangerous or defective condition that led to Plaintiff's injuries. Under the terms of the lease and upon the common law, see *Giannattasio, supra*, S-L has not made a prima facie showing that it is free from responsibility to Plaintiff regarding dangers, defects, hazards or traps it created or became aware of in the ordinary course of its' business.

Moreover, the lease agreement does not unambiguously place sole responsibility for Loading Dock 75 and the fixtures thereon upon Westchester. The Court finds it selectively relied on specific provisions of the lease agreement that supported its contention and ignored those that did not. Plaintiff and Westchester pointed out those inconsistent provisions. S-L claimed Loading Dock 75 and fixtures thereon were "common areas" maintained by Westchester

per Paragraph 3.03 of the lease. Plaintiff and Westchester point to Paragraph 1.02, which includes in the definition of Demised Premises, any fixtures and equipment which are attached. Plaintiff and Westchester also point to S-L's requirement in Paragraph 10.04 to obtain Public Liability Insurance naming Westchester as an additional insured protecting it for claims occurring in, upon, or adjacent to, or connected with the demised premises. To the Court, these provisions, raise a question of fact as to whether S-L, under the lease agreement, had some responsibility for the condition of Loading Dock 75 and the fixtures thereon.

Furthermore, S-L has failed to demonstrate it was free from negligence under the common law. Regardless of the lease provisions, S-L had a duty to remove dangerous or defective conditions it had notice of, whether actual or constructive. *See Sarisohn, supra*, and *Giannattasio, supra*. S-L failed to offer evidence it was free of negligence caused by its own actions or omissions or that it lacked notice of any dangerous or defective conditions that may have caused Plaintiff's injuries.

Because S-L failed to demonstrate the absence of triable issues of fact regarding its responsibility under the terms of the lease agreement and failed to demonstrate it was otherwise free of negligence for Plaintiff's injuries, S-L failed to demonstrate Plaintiff's wife's loss of consortium claim should be dismissed. Furthermore, for the same reasons, S-L's motion for summary judgment dismissing Westchester's Cross-Claim for apportionment of liability must also be denied.

The right to contractual indemnification depends on the specific language of the contract. *See Poalcin v. Mall Props., 155 AD3d 900 (Second Dept., 2017)*. The lease contained the following provisions:

20.02. Tenant shall defend, indemnify and save harmless Landlord and its agents, employees, and assigns against and from: (a) any and all claims arising from: (1) the conduct or management of the Demised Premises or of any business therein by Tenant; or (2) any work or thing whatsoever done by Tenant; or (3) any condition created (other than by Landlord for Landlord's or Tenant's account) in or about the Demised Premises during the term of this Lease or during the period of time, if any, prior to the Commencement Date that Tenant may have been given access to the Demised Premises; or (b) any and all claims arising from any negligent or otherwise wrongful act or omission of Tenant or any of its subtenants or licensees or its or their employees, agents or contractors; and (c) all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon. In case any action or proceeding be

brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, shall resist and defend such action or proceeding.

20.03. Landlord shall indemnify and save harmless Tenant and its agents, employees and assigns against and from: (a) any and all claims arising from: (1) the conduct or management of the Demised Premises or Building or of any business therein by Landlord; or (2) any work or thing whatsoever done by Landlord; or (3) any condition created (other than by Tenant for Landlord's or Tenant's account) in or about the Demised Premises during the term of this Lease or during the period of time, if any, prior to the Commencement Date that Tenant may have been given access to the Demised Premises; or (b) any and all claims arising from any negligent or otherwise wrongful act or omission of Landlord or any of its subtenants or licensees or its or their employees, agents or contractors; and (c) all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon. In case any action or proceeding be brought against Tenant by reason of any such claim, Landlord, upon notice from Tenant, shall resist and defend such action or proceeding.

Reading these provisions together, S-L as tenant and Westchester as Landlord agreed to indemnify and hold harmless the other for claims arising out their own conduct. This includes liability for injuries caused by negligence. S-L had the burden in moving for summary judgment to make a prima facie showing that Westchester was negligent and that it was free of negligence. For the reasons set forth herein, S-L has failed to demonstrate that it is free of negligence. S-L's motion for summary judgment for contractual indemnification against Westchester must similarly be denied.

Now therefore it is

ORDERED that the Defendant's Motion for Summary Judgment is denied.

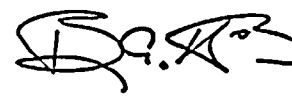
This constitutes the Decision and Order of the Court. The original is being mailed to Defendant. Defendant shall enter and serve Notice of Entry, within twenty (20) days of such entry and file proof of service within 10 days of such service.

DATED: March 21, 2024

ENTER



SUSAN M. KUSHNER, A.J.S.C.



03/22/2024

*Documents considered:*

- (1) Amended Complaint dated January 6, 2021 filed April 5, 2021 (NYSCEF #20)*
- (2) Defendant S-L Distribution Company, LLC's Motion for Summary Judgment with Supporting Papers (NYSCEF #40-45)*
- (3) Defendant Westchester Industrial Complex, LLC's opposition papers filed January 15, 2024. (NYSCEF #46)*
- (4) Plaintiffs' Opposition Papers filed January 18, 2024 (NYSCEF #47)*
- (5) Defendant's Reply to Westchester filed January 19, 2024 (NYSCEF #48)*
- (6) Defendant's Reply to Plaintiff filed January 19, 2024 (NYSCEF #49)*