

Focacci v One E. Riv. Place Realty Co., L.L.C.

2025 NY Slip Op 32783(U)

July 30, 2025

Supreme Court, New York County

Docket Number: Index No. 157599/2016

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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CLAUDIA FOCACCI,

Plaintiff,

- v -

ONE EAST RIVER PLACE REALTY COMPANY, L.L.C., SOLOW MANAGEMENT CORP., EAST RIVER POOL CLUB, INC., AND IOWA SPORTS MANAGEMENT, INC.,

Defendant.

-----X

ONE EAST RIVER PLACE REALTY COMPANY, L.L.C., SOLOW MANAGEMENT CORP., EAST RIVER POOL CLUB, INC.

Plaintiff,

-against-

HAYNEEDLE, INC.,

Defendant.

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INDEX NO. 157599/2016
MOTION DATE 01/03/2025
MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

Third-Party
Index No. 596047/2017

The following e-filed documents, listed by NYSCEF document number (Motion 008) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 213, 216, 217, 218, 221, 222, 231, 233

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, and after a final submission date of May 27, 2025, Defendants/Third-Party Plaintiffs One East River Place Realty Company, L.L.C. ("One East River Place"), Solow Management Corp., ("Solow") and East River Pool Club, Inc.'s ("East River Pool Club") (collectively "Moving Defendants") motion for summary judgment dismissing Plaintiff Claudia Focacci's ("Plaintiff") Complaint and all crossclaims asserted against them is denied.

I. Background

Plaintiff lived at 525 E. 72nd Street (the "Building") (NYSCEF Doc. 156 at 118). The Building is owned by Defendant One East River Place. Solow manages the Building on behalf of One East

River Place. East River Pool Club is a health club consisting of the sundeck, a pool, and a gym in the Building (NYSCEF Doc. 160 at 18). Iowa Sports Management Inc. (“Iowa Sports”) manages East River Pool Club, including the sundeck (NYSCEF Doc. 159 at 26; NYSCEF Doc. 160 at 18).

On May 26, 2014, Plaintiff was visiting the sundeck of the Building (NYSCEF Doc. 156 at 119). Solow was hosting a Memorial Day event on the 50th floor sundeck for tenants (NYSCEF Doc. 159 at 35-36). Plaintiff sat at a table with an open umbrella, felt a gust of wind, and was hit in the head with the umbrella pole that became dislodged from the table ((NYSCEF Doc. 157 at 215; 218; 225; NYSCEF Doc. 163 at 62-63). Plaintiff alleges a traumatic brain injury resulting from this incident. According to Plaintiff’s mother, an employee allegedly told her the umbrella was not screwed properly (NYSCEF Doc. 163 at 84). The manager of the East River Pool Club on the date of the accident, Ms. Dujarric, testified she would conduct a walkthrough of the sundeck several times a day and check that umbrellas were fastened properly (NYSCEF Doc. 162 at 26). Now, the Moving Defendants seek summary judgment dismissing Plaintiff’s Complaint and all crossclaims asserted against them. Plaintiff and Iowa Sports oppose the motion.

II. Discussion

The Moving Defendants’ motion is denied. “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]).

In motion sequence 007 this Court denied Iowa Sports' motion for summary judgment dismissing Plaintiff's Complaint. The Court found triable issues of fact as to whether Iowa Sports created or exacerbated a dangerous condition by installing unfastened umbrellas on the 50th floor sundeck despite the sundeck experiencing intermittent gusts of wind.

Moving Defendants, who owned and managed the Building and health club, were under a non-delegable duty to ensure the premises remained clear of any dangerous conditions or defects, and therefore may be held vicariously liable for the negligence of Iowa Sports (*Logiudice v Silverstein Properties, Inc.*, 48 AD3d 286,286-87 [1st Dept 2008]). Therefore, because Iowa Sports was not entitled to summary judgment dismissing Plaintiff's Complaint, neither are Moving Defendants, who may be held vicariously liable for the acts and omissions of Iowa Sports (*see Pesante v Vertical Industrial Development Corp.*, 29 NY3d 983, 983-84 [2017]; *Tobola v 123 Washington, LLC*, 15 AD3d 456, 457 [1st Dept 2021]).

Moreover, One East River Place's managing agent, Solow, purchased the umbrella at issue. According to Iowa Sports' expert, the umbrella should have never been purchased for the sundeck because the sundeck was subject to wind gusts which exceeded the maximum wind speed the umbrellas were manufactured to withstand (NYSCEF Doc. 168). The purchased umbrella, delivered to Solow, contained a wind disclaimer. A jury could find the disclaimer provided actual or constructive notice of the danger of placing the umbrellas on the sundeck. Notice issues are compounded by evidence that Moving Defendants were hosting the event on the sundeck and were present at the site of Plaintiff's accident. Thus, there are issues of fact not only as to whether

Moving Defendants are vicariously negligent, but also whether they may be held primarily negligent.

Moving Defendants' argument that it was not foreseeable that the umbrella could be blown by a gust of wind is unavailing. Questions of proximate cause and foreseeability are generally issues of fact for the jury (*see generally Crandall v Equinox Holdings, Inc.*, 231 AD3d 472, 474 [1st Dept 2024]; *Gonzalez v City of New York*, 133 AD3d 65, 67 [1st Dept 2015]). Moreover, Moving Defendants' foreseeability argument is undercut by the warning label on the base where the umbrellas were affixed, which explicitly warned Moving Defendants' employees and agents that umbrellas should not be opened in windy conditions. Iowa Sports' expert, Leonard P. Parkin, P.E., opined that in the location of Plaintiff's accident, there could be "expected wind gust speeds [which] exceed the maximum wind speed of 25 mph specified by [the umbrella manufacturer] for the installation and use of their umbrellas" (NYSCEF Doc. 168 at ¶¶ 6-7).

Moving Defendants' motion to dismiss the crossclaims asserted against it is denied.¹ Although Moving Defendants request summary judgment on their contractual indemnification crossclaim asserted against Iowa Sports, they did not request this relief in their notice of motion (NYSCEF Doc. 183). Therefore, the Court need not entertain this relief (*see Fifth Partners LLC v Foley*, 227 AD3d 543 [1st Dept 2024]; *Onofre v 243 Riverside Drive Corp.*, 232 AD3d 443, 443-444 [1st Dept 2024]). If this Court were to consider Moving Defendants' request, it would be denied. The indemnification agreement requires Iowa Sports to indemnify the Moving Defendants for:

"all claims...arising or alleged to arise from any act or omission, negligence, or willful misconduct [of Iowa Sports] or its employees or agents resulting from any

¹ A review of the pleadings shows that there are no crossclaims asserted against Moving Defendants (*see* NYSCEF Doc. 187). There is a counterclaim asserted against Moving Defendants by Third-Party Defendant Hayneedle seeking common law contribution and indemnification, however Moving Defendants have not shown entitlement to summary judgment dismissing this counterclaim (NYSCEF Doc. 190).

injury to any person or damage to any property of any person occurring during the term of this agreement, on the premises of [Iowa Sports'] operations or in common areas in or around the premises or on any other ways and means into or out of the premises" (NYSCEF Doc. 200 at Art. XIV).

There has yet to be any finding of negligence against Iowa Sports, and there remain issues of fact as to which parties were negligent, making contractual indemnification premature (*Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588 [1st Dept 2018]; *Maldonado v South Bronx Dev. Corp.*, 66 AD3d 612, 613 [1st Dept 2009]). "An indemnification clause does not apply to the mere assertion of claims" (*Healy v 169 E. 69th Street Corp.*, 189 AD3d 680, 681 [1st Dept 2020] quoting *JPMorgan Chase Bank, N.A. v Luxor Capital, LLC*, 101 AD3d 575, 575-76 [1st Dept 2012]). Therefore, the motion for summary judgment on the issue of contractual indemnification is denied (*see also Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447, 448 [1st Dept 2008]).

Accordingly, it is hereby,

ORDERED that Defendants/Third-Party Plaintiffs One East River Place Realty Company, L.L.C. Solow Management Corp., and East River Pool Club, Inc.'s motion for summary judgment is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

7/30/2025
DATE

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

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE