SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

ALBERT SMITH,

Plaintiff,

-against-

111 CHELSEA LLC. and TACONIC INVESTMENT PARTNERS, LLC, 111 EIGHTH AVENUE, LLC., and INSIGNIA/EDWARD S. GORDON CO,., INC.,

Defendants.

----------x

PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 12290/03
Motion No. 3532-005
3545-006

----------x

111 CHELSEA LLC. and TACONIC INVESTMENT PARTNERS, LLC.,

Third-Party Plaintiffs,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES and HUMAN RESOURCES ADMINISTRATION DATE AND CHECK PROCESSING CENTER,

Third-Party Defendants.

----------x

Index No. A 12290/03

The following papers number 1 to 8 were fully submitted on the 18th day of January, 2012:

	Pages Numbered
Notice of Motion for Leave to Amend Answer and for Summary Judgment by Third-Party Defendant City of New York, with Supporting Papers and Exhibits (dated September 16, 2011)	1
Notice of Cross Motion for Summary Judgment by Defendants 111 Eighth Avenue LLC and Insignia/Edward S. Gordon Co, Inc and Defendants/Third-Party Plaintiffs 111 Chelsea, LLC and Taconic Investment Partners, LLC, with Supporting Papers and Exhibits (dated September 12, 2011)	2
Affirmation in Opposition by Defendants 111 Eighth Avenue LLC and Insignia/Edward S. Gordon Co, Inc and Defendants/Third-Party Plaintiffs 111 Chelsea, LLC and Taconic Investment Partners, LLC, with Supporting Papers and Exhibits	

Upon the foregoing papers, the motion (3532-005), inter alia, for leave to amend their answer and for summary judgment in the third-party action by third-party defendants the City of New York, its Department of Citywide Administrative Services and its Human Resources Administrative Date and Check Processing Center (hereinafter, collectively, the "City"), is granted, in part, and denied, in part, as is the cross motion (3545-006) for summary judgment by defendants 111 Eighth Avenue, LLC (hereinafter "Eight Avenue"), Insignia/Edward S. Gordon Co, Inc, and defendants/third-party plaintiffs 111 Chelsea LLC. and Taconic Investment Partners, LLC (hereinafter, collectively, "Chelsea/Taconic").

In this personal injury action, plaintiff claims that he tripped and fell over a piece of "metal [flashing] under the door sill and above the step" leading from an outdoor equipment room (hereinafter "roof house") located on the roof of the building known as 111 Eighth Avenue, New York, New York on April 3, 2002 (*see* Plaintiff's Verified Bill of Particulars). More specifically,

plaintiff testified at his deposition that as he "stepped out of the roof house... the rear of [his] shoe got caught on a piece of metal which [he] found out later was the rain drip cap [extending] around the foundation... [got his feet caught] and fell" (*see* EBT of Plaintiff, p 23). According to plaintiff, the "piece of metal" or drip cap upon which his shoe got caught was "four inches wide with a half inch bend coming out a little bit... [from] the side of the foundation" which extended "above the step" of the roof house (id. at 26).

Plaintiff acknowledged that he had previously noticed this piece of metal "coming out about an inch" above the top step for several years, but had "never actually gotten [his foot] caught like this" before (id. at 27-28). Although he was aware that many of his coworkers had tripped or fallen over this piece of metal in prior years, plaintiff was unaware of any previous complaints being made to either the building owner or the City (id. at 30-35).

At the time of the accident, plaintiff was employed as an oiler by the City's Human Resources Department, and had worked at the subject location for nearly 20 years, i.e., from 1984 up through the accident date in April 2002 (*see* EBT of Plaintiff, pp 6, 12). It is undisputed that an entry card was required to obtain access to the roof, and that the roof house itself was secured by a double lock (*see* EBT of Plaintiff, pp 15, 18).

At the outset, so much of the City's motion as requests leave to amend its answer in the third-party action to assert the exclusivity of the Workers Compensation Law as a defense is granted. Although previously sought, the City's earlier motion for such relief had been denied without prejudice to renewal upon the completion of discovery (*see* City's Exhibit "H"). It is well settled that a motion for leave to amend an answer may be granted at any time in the absence of either prejudice or surprise (*see Myung Soon Kim v. Hyunchul Chong*, 8 AD3d 456 [2nd Dept 2004]). Neither has been demonstrated in the case at bar. Nevertheless, the remainder of the City's motion, i.e., for summary judgment and dismissal of the third-party complaint, is denied.

In its motion for summary judgment dismissing the third-party complaint, the City contends that Workers Compensation Law §11 prohibits the third-party plaintiffs from claiming against it for

either indemnification or contribution, and that the indemnity provision contained in its lease agreement is unenforceable under General Obligations Law §5-321. In opposition, defendants/third-party plaintiffs Chelsea/Taconic cross-move against the City for summary judgment on their third-party causes of action for contractual and/or common-law indemnification.

It is undisputed that the City had rented portions of the subject building from 1982 up to and including 2004 (*see* Chelsea/Taconic's Exhibits "R", "S", "T"), and that a modification in the lease agreement executed on December 16, 1983, granted the City access to certain roof space, as well (*see* Chelsea/Taconic's Exhibit "S").[1] The City entered into a subsequent lease with the then-owner, defendant Eighth Avenue on or about January 1, 1999 for a term of 5 years and 4 months (*see* City's Exhibit "D", Chelsea/Taconic's Exhibit "T").[2] Third-party plaintiff Chelsea subsequently took over ownership of the building on July 9, 1999, and assumed the City's lease from the prior owner (*see* Chelsea/Taconic's Exhibit "Q"). It is undisputed that at the time of plaintiff's injury, defendant/third-party plaintiff Chelsea was the building's owner and the City's landlord, while Taconic was Chelsea's building manager.

The "Save Harmless" clause of the controlling lease provides, in relevant part, as follows: (City's Exhibit "D", Chelsea/Taconic's Exhibit "T", Article 23, p 28):

> **Landlord and Tenant shall each indemnify and hold harmless the other party from and against any and all liability, fines, suits, claims, demands, expenses and actions of any kind or nature arising by reason of injury to person or property occurring in or around the Demised Premises, the Building, or the real property of which they form a part, occasioned in whole or in part by such indemnifying party's acts or omissions.**

---

[1]The City had entered into a fifteen year lease with the original landlord, a nonparty, on or about March 8, 1982 with respect to a portion of the 6th and 7th floor of the subject building (*see* 111Chelsea/Taconic's Exhibit "R"). This lease was subsequently modified on August 10, 1983, as to matters irrelevant to this case (*see* Chelsea/Taconic's Exhibit "S"), and on December 16, 1983, the City was granted the roof space in a further modification of the lease agreement (id.).

[2]Insofar as it appears, defendant Insignia/Edward S. Gordon Co, Inc. (hereinafter "Insignia") managed the premises for Eighth Avenue.

To the extent relevant, Workers Compensation Law §11 prohibits third-party indemnification or contribution against the employer of an injured worker, except where (1) the employee has sustained a "grave injury," or (2) the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (*see Rodrigues v. N&S Bldg Contrs, Inc*, 5 NY3d 427, 430 [2005]). The motion and cross motion focus upon the latter exception and, in particular, whether the "Save Harmless" provision of the lease agreement is legally enforceable against the City.

In the instant matter, despite the City's contention that the indemnification provision of the subject lease does not *explicitly* impose responsibility upon *it* to indemnify the landlord for workplace injuries to City employees, the Court opines that the provision is sufficiently clear and unambiguous to require the City to assume financial responsibility in the event of an on-the-job injury to one of its employees "occasioned in whole or in part by [its] acts or omissions". Here, the stated purpose of the lease is plainly described as the provision of office space for the use of City employees and, in fact, Article 3 thereof restricts the tenant's " use and occupy [of] the Demised Premises as executive and general offices for a Human Resources Administration Data and Check Processing Center", as well as certain "roof space... for [the housing of] equipment and machinery" (*see* City's Exhibit "D", Chelsea/Taconic's Exhibit "T", Article 3, pp 5-7). Moreover, there is noting in the "Save Harmless" clause indicative of any intention to exclude the City from the indemnification provision (id.).

So long as a written indemnification provision does not purport to "hold harmless" the party at fault and agrees to make whole the indemnitee for losses attributable to the designated type of injury, it is not in violation of Workers Compensation Law §11 (*see Rodrigues v. N&S Bldg Contrs, Inc*, 5 NY3d at 433). Accordingly, the third-party plaintiffs are contractually entitled to seek

indemnification against the City for any judgment obtained against them in the main action to the extent that such judgment is attributable to the City rather than any wrongdoing on the part of Chelsea/Taconic (id.). Similarly, the clause does not purport to indemnify Chelsea/Taconic from its own wrongdoing and therefore, is not violative of General Obligations Law §5-321 (*see Great N Ins Co v. Interior Constr Corp*, 7 NY3d 412 [2006]). However, since the Court concludes that triable issues of fact persist regarding Chelsea/Taconic's liability in this matter (*see infra*), a conditional order of indemnification would be premature at this juncture (*see Jamindar v. Uniondale Union Free School Dist*, 90 AD3d 612, 616 [2nd Dept 2011]).

Turning to that branch of the defendant/third-party plaintiffs' cross motion which seeks dismissal of the complaint against them, Chelsea/Taconic contends that (1) it was an out-of-possession landlord, and (2) the City was the sole entity that occupied and controlled the roof house where plaintiff's injury occurred. Hence, there exists no legal basis upon which they may be held legally responsible for plaintiff's injury.

In order for a landowner to be held liable for an injury resulting from an allegedly defective condition upon property, it must be established that the landowner affirmatively created the condition in question, or had actual or constructive notice of its existence (*see Spindell v. Town of Hempstead*, __AD3d__, 938 NYS2d 325 [2nd Dept 2012]). In order to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the landowner or its employees to discover and remedy it (id.). In contrast, the potential liability of an out-of possession landlord is more limited, as the latter may be held liable only if it has a right of reentry and constructive notice of a significant structural or design defect which violates a specific statutory safety provision that it failed to correct (*see Brignoni v. 601 W 162 Assoc LP*, __AD3d__, 2012 NY Slip Op 1561 [1st Dept]).

In support of its cross motion, Chelsea/Taconic relies upon the deposition testimony of the *City's* senior stationary engineer, Anthony Stumbo, who stated that (1) only the City engineers and oilers had the keys to the doors of the roof house (*see* EBT of Anthony Stumbo, p 27), and (2) it was

his understanding that the operation and maintenance of said facility was the City's sole responsibility (id. at 47). According to the witness, "no one went into the roof house without [first] going to the [City] engineer or oiler" (id. at 52). Moreover, *the building's* chief engineer, Thomas Lambe, testified on behalf of Chelsea/Taconic that while he conducted regular weekly inspections of the roof, he had no knowledge of any prior complaints concerning access to or egress from the roof house (*see* EBT of Thomas Lambe, pp 17-18, 23-25).

Based on the foregoing testimony, which is undisputed, it is the opinion of this Court that the cross movants established their entitlement to judgment on the third-party complaint as a matter of law by demonstrating, prima facie, that notwithstanding any right of reentry, they neither created nor had actual or constructive notice of the purported structural or design defect which is claimed to have caused plaintiff's injury (*see Houck v. Simoes*, 85 AD3d 967 [2nd Dept 2011]).

Nevertheless, plaintiff has submitted an opposing affidavit by Peter Pomeranz, PE, who opines within a reasonable degree of engineering certainty "that the two steps from the floor of the equipment room [i.e., roof house] down to the roof created an unsafe condition" that was a proximate cause of plaintiff's injury (Affidavit of Peter Pomeranz, PE, para 5). Although the engineer's opinion on causation is fundamentally irrelevant, he further opined that the stairs to the roof house were constructed and maintained in an unsafe manner, e.g., that they lacked consistency in both tread width and height and were devoid of any handrail (id. at 6). Accordingly, plaintiff's expert opined that the roof house was constructed in violation of several of the City's Building Code provisions, including §§27-375 and 27-376 (id.). As a result, plaintiff has successfully demonstrated the existence of one or more triable issues as to whether these purported structural defects were significant in nature and causally related to his injuries (*cf. Thompson v. Commack Multiplex Cinemas,* 83 AD3d 929 [2nd Dept 2011]; *Reiff v. Beechwood Browns Rd Bldg Corp,* 54 AD3d 1015 [2nd Dept 2008]; *Powell v. Pasqualino*, 40 AD3d 725 [2nd Dept 2007]).

Furthermore, Chelsea/Taconic asserts that its contractual obligation to make structural repairs as provided in the lease was not triggered, since the City failed to notify it in writing of their

necessity (*see* City's Exhibit "D", Chelsea/Taconic's Exhibit "T", arts. 13, 21). Nonetheless, the Court opines that the provisions in question are inoperative to relieve the cross movants of their legal responsibility for any damages proximately caused by such structural defects (*see* General Obligations Law §5-321; *see also Brignoni v. 601 W 162 Assoc LP*, __AD3d__, 2012 NY Slip Op 1561 [1st Dept]).

However, the cross motion for summary judgment dismissing the complaint as against defendants Eighth Avenue and Insignia is granted, as it is undisputed that neither owned, occupied, controlled or made any special use of the premises on the date of plaintiff's accident (*see Cerrato v. Rapistan Demag Corp*, 84 AD3d 714 [2nd Dept 2011]).

Accordingly, it is

ORDERED that so much of the motion by defendants the City of New York, its Department of Citywide Administrative Services and its Human Resources Administrative Date and Check Processing Center as seeks leave to amend its answer in the third-party action to assert the defense of Workers Compensation is granted; and it is further

ORDERED that an amended answer to the third-party complaint in the form annexed to the moving papers is deemed served; and it is further

ORDERED that the balance of their motion is denied; and it is further

ORDERED that the cross motion for summary judgment by defendants 111 Eighth Avenue LLC, Insignia/Edward S. Gordon Co Inc and defendants/third-party plaintiffs 111 Chelsea LLC. and Taconic Investment Partners, LLC is granted solely with respect to severing and dismissing the complaint and any cross claims as against defendants 111 Eighth Avenue LLC and Insignia/Edward S. Gordon Co., Inc.; and it is further

ORDERED that the balance of the cross motion is denied; and it is further

ORDERED that the Clerk shall enter judgment and mark his records in accordance herewith.

ENTER,

/s/

Hon. Thomas P. Aliotta

J.S.C.

DATED: April 17, 2012