[* 1]

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

ORDER

PRESENT: _____ Justice

PART 8

Angel Mercado and Lily Mercado,

-v-

New Continent Realty LLC et al.,

INDEX NO. 100063/10

MOTION DATE _____

MOTION SEQ. NO. 004

The following papers, numbered 1 to 34, were read on this motion to/for SJ motion

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-16

Answering Affidavits — Exhibits 2 opps | No(s). 17-33

Replying Affidavits _____ | No(s). 34

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION



MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/23/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

ANGEL MERCADO AND LILY MERCADO,
Plaintiffs,
-against-
NEW CONTINENT REALTY LLC,
Defendant.

DECISION & ORDER
Index No. 100063/10

NEW CONTINENT REALTY LLC,
Third-Party Plaintiff,
-against-
BEAUTIFUL MODERN WORLD, INC., AND GEIGER ENGINEERING, P.C.,
Third-Party Defendants.

Third-Party Action



**Joan M. Kenney, J.:**

In this action arising from plaintiff Angel Mercado's (plaintiff) fall down a staircase, third-party defendant Beautiful Modern World, Inc. (Beautiful) moves for summary judgment dismissing the third-party complaint.

Beautiful is a company involved in interior design. Beautiful was hired by defendant/third-party plaintiff New Continent Realty LLC (New Continent) to aid in the renovation of two apartments located at 900 Park Avenue, described as apartments 8A and 9A, to transform the two apartments into a duplex (the duplex) by, among other things, installing a staircase between the two apartments. New Continent is a company owned by nonparties Camille Biderman-Roizen and Jaque Roizen (together, the Roizens), who reside in the premises.

On October 9, 2008, after the renovations were complete, plaintiff, a porter employed in the 900 Park Avenue building, fell down the duplex's stairs while delivering groceries, sustaining injuries. Plaintiff claims that his fall was occasioned by poor

lighting in the staircase, and the lack of any handrail. Plaintiff and his wife, Lily Mercado, bring this action against New Continent, as the owner of the premises, claiming that it breached a duty to plaintiff by creating the allegedly dangerous conditions. Plaintiff has not sued Beautiful.

New Continent brings this third-party action against Beautiful, claiming that Beautiful designed the allegedly defective staircase, and so, is liable for plaintiff's fall. New Continent sues third-party defendant Geiger Engineering, P.C. (Geiger) as the engineer for the renovation project, which is, allegedly, equally liable.

Geiger acted as engineer on the project, pursuant to a written contract (Contract) between it and Beautiful (Contract, Notice of Motion, Ex. H), which provided, among other things, that the scope of Geiger's work would include "[s]tructural consultation and design of the new opening at the concrete slab for the proposed duplex stairs" (*id.*); "[p]reperation and plans for submission to the [New York City Department of Buildings] (DOB)" (*id.*); [f]iling 'ALT TYPE II' application with [DOB] to combine the two (2) apartments into one (1) and obtaining the requisite approvals (*id.*); "[o]nsite inspections during the proposed structural work (as per [DOB] requirements)" (*id.*); and "[o]btaining a sign-off letter from the [DOB] upon work completion." *Id.*

Strangely, no one at any point alleges who designed the staircase. Beautiful argues that it owed no duty of care to plaintiff, because neither of Beautiful's principals are licensed

architects, and that Beautiful had no obligation nor ability to "control, inspect, or assist with the construction of the interior staircase at issue." Reply Aff., ¶ 5. Beautiful insists that it contracted with Geiger so that Geiger could act as the registered engineer, and that Geiger was intended to be the only party to the construction qualified to prepare and file "signed, stamped, DOB-approved structural, electrical, and architectural drawings." *Id.* Beautiful reiterates throughout its papers that its principals never held themselves out as qualified to do any of these things. Exactly what Beautiful did do is never discussed.

Geiger first argues that the motion is premature, as no depositions, especially deposition of Beautiful, have been conducted, which might shed some light on the various responsibilities of the parties. Secondly, addressing the facts, Geiger points to language in the Contract in which it is given responsibility related to the opening of the concrete slab for the "proposed duplex stairs" (Contract, at 1), perhaps indicating that there was already a plan in place for the design of the stairs that did not come from Geiger. Geiger maintains that "Geiger's expertise, as a structural engineer, was solely necessary for the design of the floor slab opening to ensure the structural stability of the slab." Opp. of Geiger, Aff. of Elaine C. Gangel, ¶ 7.

Geiger also directs the court's attention to a letter written by Beautiful to the Roizens, dated February 3, 2004, in which Beautiful relates to the Roizens issues regarding the design and placement of

the staircase (February Letter). Gangel Aff., Ex B. In the February Letter, Beautiful describes Geiger's role as dealing with the structural problems of building the staircase as planned, and the extra cost to the Roizens as a result.

In the February Letter, Beautiful tells the Roizens that

> [w]e have lost a bit of time because of the structural issues [involving the staircase]. We will do our best effort to complete a set of drawings by the week of February 23rd, and issue it to the General Contractors for bidding purposes. By experience, it looks that we will not be able to start demolition before mid to end of March, providing we are in budget of course. Of course we are already talking to contractors and suppliers and showing the preliminary drawings to "warm them up".

*Id.* According to Geiger, this letter provides evidence that Beautiful had a hand in designing, and preparing drawings of, the staircase.

Geiger also points to a letter which it sent to Beautiful in January 28, 2004 (January Letter)(Gangel Aff., Ex C), which was concerned with the structural problems regarding the placement of the concrete slab for the staircase. In the January Letter, Geiger states that "[p]ursuant to you [*sic*] request, we have structurally evaluated the proposed location for the new stairs leading from the 8th to the 9th floor ... . Since no structural drawings of existing building were provided, we base our opinion on your plans & our general knowledge of this type of concrete structure ... ." Again, Geiger points to the insinuation in the January Letter that Beautiful had plans in place for the design of the staircase, which Geiger would be following.

Geiger also challenges Beautiful's claim that Beautiful's principals were not architects, and had no obligations with regard to the design of the staircase, claiming that discovery should take place as to this question. Geiger directs the court to the website of Piero Manara (Manara), a Beautiful principal, which indicates that Manara studied "Interior Architecture" at the L'Ecole Camondo in Paris, where he was a graduate. Gangel Aff., Ex. D.

Geiger chimes in with several letters from Beautiful, in which Beautiful's principals seemingly admit to being the project's architects. In a letter on Beautiful letterhead, located as an exhibit to the affidavit of Amy Lynn Pludwin (Ex. F), Manara writes, to a nonparty, "[f]irst let me introduce myself; my name is Piero Manara and we are the Architects in charge of the renovation of Mr. and Mrs. Roizen [*sic*] apartment." *Id.* In a second letter, Diane Burgio (Burgio), another Beautiful principal, writes, "we are the Architects for Mr. and Mrs. Roizen, Apartments 8A and 9A." *Id.*, Ex. G. This letter goes on to say, "[w]e would like to advise you that we have received approval from the NYC Department of Buildings to commence with work for the above mentioned apartments. We are currently in the process of pulling the required permits." *Id.*

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of

evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

"The elements of common-law negligence are (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury." *Ingrassia v Lividikos*, 54 AD3d 721, 724 (2d Dept 2008). It is this court's obligation to inquire as to the existence of such a duty owed on the part of Beautiful.

Beautiful reiterates, as it itself admits, "*ad nauseam*" (Reply, ¶ 12), that the "crux" of the matter is that its principals never "represented themselves as *Registered Architects*" legally permitted to file appropriate plans with the DOB (*id.*, ¶ 7), and so have no duty to plaintiff. However, assuming that the staircase had design defects, and assuming that these defects contributed to plaintiff's accident, there is a factual question as to who designed the staircase, which is not resolved with mere evidence that Beautiful was not the party responsible to file plans and get approvals from

the DOB. Beautiful has cited no law which would indicate that the receipt of approvals for plans from the DOB is proof that there are no design defects in the plans approved, and this court does not see how the intervention of Geiger in the DOB approval context relieves Beautiful from any responsibility it might have for actually designing the alleged defects. This court rejects Beautiful's argument that it can only be liable if it was the project's registered architect.

Beautiful's reliance on construction site accident cases, such as *Davis v Lenox School* (151 AD2d 230 [1st Dept 1989]) and *Jaroszewicz v Facilities Development Corp.* (115 AD2d 159 [3d Dept 1985]), is misplaced. Plaintiff's accident did not occur on a construction site. Even if construction site cases were applicable, the standard for accidents caused by design defects at a construction site is not a question of control, as Beautiful argues, but of notice. *See Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 685 (2d Dept 2011)(a negligence claim on a construction site stemming from a design defect, as opposed to the means and methods employed at the site, is supported if there is proof that the defendant "either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition [internal quotation marks and citation omitted]). As Beautiful is alleged to have created the design of the staircase, notice is not a necessary element of plaintiff's negligence claim. It follows that questions of fact exist as to whether Beautiful designed the staircase and

whether the design was defective. Geiger's role as licensed engineer will not relieve Beautiful of liability if it is shown that it was Beautiful's plans which were conveyed to Geiger, and, through Geiger, to the DOB. Therefore, Beautiful cannot have summary judgment on the ground that there is no question of fact as to whether it has liability for the design of the staircase. Beautiful secondly argues that there can be no cause of action against it for indemnification, because plaintiff is not claiming that New Continent is vicariously liable for the accident. "Common-law indemnification is predicated on 'vicarious liability without actual fault,' which necessitates that 'a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine.'" *Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 367 (1st Dept 2006), quoting *Trump Village Section 3, Inc. v New York State Housing Finance Agency*, 307 AD2d 891, 895 (1st Dept 2003). Therefore, New Continent may only recover in common-law indemnification against Beautiful if New Continent's liability, if any, is vicarious.

New Continent's alleged liability is based on its status as owner of the duplex, and the obligations attendant thereto. It is well established that "[t]he possessor of real property has a duty under the common law to keep that property reasonably safe." *Milewski v Washington Mutual, Inc.*, 88 AD3d 853, 854 (2d Dept 2011), citing *Basso v Miller*, 40 NY2d 233, 241 (1976). The measure of the property owner's liability is measured by whether that party created

the dangerous condition or had actual or constructive notice of its existence. *See Stryker v D'Agostino Supermarkets Inc.*, 88 AD3d 584, 584 (1st Dept 2011)(defendant's burden on summary judgment is to prove that it "neither created the alleged dangerous condition nor had actual or constructive knowledge thereof"). Therefore, if New Continent has any liability to plaintiffs, it is actual liability in negligence, based on its knowledge of the existence of the alleged defective condition of the staircase, and not liability which is vicarious. As a result, New Continent cannot seek indemnification from Beautiful if plaintiffs prevail against New Continent.

This finding does not call for the dismissal of the entire third-party complaint as against Beautiful, however, as New Continent has also alleged that Beautiful is liable to it in contribution. "Contribution involves an apportionment of responsibility where wrongdoers are *in pari delicto*. Each of the wrongdoers owes a duty to the injured party, and it is a fact question for the jury as to the degree of responsibility each wrongdoer must bear for causing the injury." *Westchester County v Welton Becket Associates*, 102 AD2d 34, 46 (2d Dept 1984), *affd* 66 NY2d 642 (1985). Contribution principles "reflect the important policy that responsibility for damages to an injured person should be borne by those parties responsible for the injury, in proportion to their respective degrees of fault [internal quotation marks and citation omitted]." *Brunetti v Musallam*, 59 AD3d 220, 227 (1st Dept 2009). As such, "contribution can be recovered from a person whose fault contributed to the happening of the

accident" even if the "plaintiff did not sue [that person] directly." *Mixon v TBV, Inc.*, 76 AD3d 144, 156 (2d Dept 2010).

New Continent has pled a cause of action in contribution against Beautiful, whose negligence in this matter has not been adjudicated, and so, the third-party complaint may continue on under this theory, even though indemnification is not available. Discovery, including depositions, should continue.

Accordingly, it is

ORDERED that the motion for summary judgment dismissing the third-party complaint brought by third-party defendant Beautiful Modern World, Inc. is denied; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: July 23, 2012

ENTER:

JOAN M. KENNEY
J.S.C.