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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Index Number : 404121/2005
BRICK, MARGARET R.
vs.
3859 TENTH AVENUE
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT CAL # 22

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). 2-5

Replying Affidavits _____ | No(s). 6

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

RECEIVED
SEP 21 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
SEP 21 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/20/12
SEP 20 2012

_____, J.S.C.
BARBARA JAFFE
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 5

MARGARET R. BRICK, as Administratrix of the Estate of THOMAS C. BRICK, Deceased, and MARGARET R. BRICK, Individually,

Plaintiffs,

-against-

3859 TENTH AVENUE CORP., ARBIB & RABBA REALTY CO., LE FRANK MANAGEMENT CORP., BARTA TRADING CORP., THE CITY OF NEW YORK, EL PARAISO CORP. and BIANCIA DIAZ,

Defendants.

BARTA TRADING CORP.

Third-Party Plaintiff,

-against-

EL PARAISO CORP., AND BIANCIA DIAZ,

Third-Party Defendants.

THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

SCOTT TECHNOLOGIES, INC. and SCOTT HEALTH AND SAFETY, A DIVISION OF SCOTT TECHNOLOGIES, INC.,

Third-Party Defendants.

Index No. 404121/05

Argued: 4/24/12
Motion Seq. Nos.: 009, 010, 011

DECISION AND ORDER

Third-Party Index No. 590196/06

Third-Party Index No. 590358/07

----------x

LE FRANK MANAGEMENT CORP., 1071 HOME CORP., and JOSH NEUSTEIN,

Plaintiffs,

-against-

BARTA TRADING CORP., EL PARAISO CORP. and BIANCIA DIAZ,

Defendants.

----------x

Index No. 101309/05

Argued: 4/24/12
Motion Seq. No.: 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For Brick plaintiff:
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For defendants El Paraiso/Diaz:
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125 Broad Street
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212-471-8500

For defendants 3859 Tenth Ave/Le Frank:
Phillip Tumbarello, Esq.
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
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For third-party defendants Scott Technologies/Scott Health and Safety
Arnold Katz, Esq.
Calinoff & Katz
245 Fifth Avenue, Suite 1003
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212-826-8800

The following motions are consolidated for disposition: motion sequence numbers 009, 010 and 011 under Index Number 404121/05 (main action); and motion sequence number 002 under Index Number 101309/05 (Le Frank action). At oral argument, I advised the parties that Herzfeld & Rubin, P.C., appearing for El Paraiso and Diaz, had hosted a fundraising event for my campaign for Surrogate's Court, and I asked them to confer and inform me if anyone sought

my recusal. The parties conferred and reported that there was no request for my recusal.

By order dated December 15, 2006, these actions and several related actions were consolidated. The court's records reflect that the related New York Supreme Court actions under Index Nos. 113940/05, 114474/05, and the related New York County Civil Court action under Index No. CV-035357-05/NY, were disposed. The parties represent that in February 2008, the related action under Index No. 114820/06 went to mandatory inter-insurance arbitration and no damages were awarded absent evidence of liability. (Roher Aff., motion seq. 009 in main action, ¶ 6, Exh. B).

I. BACKGROUND

These lawsuits arise from a fire on December 16, 2003 at a two-story building located at 3859 Tenth Avenue in New York City (premises), and the resulting death of Thomas Brick, a New York City firefighter. Defendant 3859 Tenth Avenue Corp. (3859 Tenth Ave) owned the premises (Tumbarello Aff., Exh. L), and defendant Le Frank Management Corp. (Le Frank) managed it. (Frankel Tr., Tumbarello Aff., Exh. R, at 12, 19). Pursuant to a lease dated June 16, 1992, defendant Barta Trading Corp. (Barta) operated a furniture storage warehouse on the second floor (Barta lease). (Tumbarello Aff.., Exh. I). Pursuant to a lease dated December 15, 1998, defendants El Paraiso and its owner, Diaz, operated a delicatessen/grocery on the first floor (El Paraiso lease). (*Id.*, Exh. J). Although the El Paraiso lease names "L. Milagros Meat & Grocery Corp." as "Tenant" (Tumbarello Aff., Exh. J), it is undisputed that El Paraiso operated the delicatessen/grocery on the first floor. (12/8/11 Roher Aff., ¶ 3; Diaz Aff., ¶¶ 3-4). By stipulation dated June 13, 2007, the parties discontinued the main action, including all claims and cross claims, against defendant Arbib & Rabba Realty Co. (*Id.*, Exh. B).

The main action is for wrongful death. The amended complaint asserts seven causes of action: common-law negligence; statutory negligence pursuant to New York's General Municipal Law (GML) § 205-a , for violations of the Administrative Code of the City of New York; wrongful death and pecuniary loss; failure of equipment provided to Thomas Brick by City; and based upon violations of the Occupational Safety and Health Act, the rules and regulations of the National Institute of Occupational Safety and Health, and Labor Law § 241(6). Defendants' answers assert cross claims for indemnification and contribution.

City commenced a third-party action against Scott Technologies, Inc., the manufacturer of the equipment that allegedly failed, and Scott Health and Safety, A Division of Scott Technologies, Inc., the company hired to inspect, maintain, and repair the equipment (together, Scott Entities). The five-count third-party complaint asserts causes of action for common-law and contractual indemnification, contribution, and breach of express and implied warranties. In their answer, the Scott Entities assert contribution claims against City and defendants in the main action.

Barta commenced a two-count third-party action against its co-tenants, El Paraiso and Diaz, asserting causes of action for negligence, indemnification and contribution. 3859 Tenth Ave and Le Frank filed a cross complaint against El Paraiso and Diaz, seeking contribution, and common-law and contractual indemnification.

The two-count amended complaint in the Le Frank action asserts causes of action for negligence. Defendants' answers assert claims for negligence, indemnification and contribution.

In a decision and order on the parties' motions to dismiss a related action, another judge of this court observed that "[t]he Fire that is the basis for this action was determined to have been

caused by a Barta employee carelessly extinguishing a cigarette in Barta's space." (*United Natl. Specialty Ins. Co. v Barta Trading Corp.*, Sup Ct, NY County, Apr. 17, 2008, Rakower, J., Index No. 114474/05, at 2).

By notices of motion dated December 8, 2011, El Paraiso and Diaz now move, in motion sequence number 009 in the main action and 002 in the Le Frank action, for an order dismissing all claims and cross claims asserted against them. By notice of motion dated December 9, 2011, 3859 Tenth Ave and Le Frank move, in motion sequence number 010 in the main action, for an order granting summary judgment dismissing all claims and cross claims asserted against them, and for an order granting common-law indemnity against all co-defendants. By notice of motion dated February 3, 2012, the Scott Entities move, in motion sequence number 011 in the main action, for an order granting summary judgment dismissing all claims and cross claim asserted against them.

II. EL PARAISO AND DIAZ'S MOTION IN THE MAIN ACTION

A. Contentions

El Paraiso and Diaz claim that the findings of the New York City Fire Marshal and other experts eliminate any possibility that the fire started on the first floor, where they operated the delicatessen/grocery. They submit the Fire Incident Report and deposition testimony of Deputy Chief Fire Marshal John Lynn (Lynn), a 25-year veteran of the New York City Fire Department. Lynn supervised the investigation and, according to these defendants, relied upon interviews of more than 100 people, including firefighters, building tenants, and neighbors. El Paraiso and Diaz also submit: Diaz's affidavit; deposition testimony of Captain Kevin Harrison of the New York City Fire Department (Harrison); the affidavit of James Bernitt (Bernitt), their engineer

expert, and Bernitt's November 13, 2007 report (Bernitt Report); the affidavit and fire expert report of Roger Iapicco (Iapicco), an investigator who worked with Bernitt; the report of Edward Peknic (Peknic), of FI Consultants, Ltd., Barta's fire expert; and the report of fire expert Jack Hyde (Hyde), prepared on behalf of 3859 Tenth Ave and Le Frank.

Lynn's Fire Incident Report provides, in pertinent part, as follows:

ORIGIN AND EXTENSION

> Examination showed that the fire originated in the interior of the premises, on the second floor, in the Southeast quadrant in combustible material (stacked upholstered chairs/sofas). Fire extended to the ceiling, adjacent walls, contents, to the person of Firefighter Thomas Brick, and throughout the entire second floor. Fire further extended through the roof (rear). Fire also extended to and through the floor in the area of origin, to the first floor ceiling, South and East walls, and the area contents. Fire also extended, via auto exposure, to the shaft windows of apartments 3A, 3E, 4A, 4E, 5A, & 5E of 449 West 206 Street. Fire was thereto confined and extinguished.

(Roher Aff., Exh. I). Immediately above this paragraph, in a section of the Fire Incident Report entitled "Description (Specify if Accidental)," Lynn states, "NFA - Probably careless discard of smoking materials." (*Id*). "NFA" stands for "[n]ot fully ascertained." (Lynn Tr., Roher Aff., Exh. K, at 30). On the second page of the Fire Incident Report Lynn states, in pertinent part, that:

> [a] thorough forensic examination of the fire scene determined the fire originated in an area containing an unusually heavy fire load - upholstered chairs and sofas stacked to the ceiling. This resulted in a fire that advanced geometrically within a location that did not have any type of protective system such as alarm or sprinkler. Additionally, the investigation determined that, as a result of a recent stock delivery, the warehouse was at it's [*sic*] maximum capacity.

...

> The investigation eliminated possibilities and brought attention to others. Fire Marshals uncovered a recurring theme that drew focus on a pattern of smoking activity by employees and management/ owners within the fire building and other associated locations.
>
> Based on the results of the Physical Examination of the fire scene and the investigation into the facts and circumstances it has been determined that in all probability the fire was caused as a result of the careless discard of smoking materials - cigarette/match.

(Roher Aff., Exh. I).

At his deposition, Lynn testified that the fire could not have been caused by a heating unit mounted on the first-floor ceiling, by electric wires running to and from the ceiling-mounted heating unit and ceiling-mounted fan, by improper installation or faulty use of circuit breakers on the first floor, or by construction that may have been performed on the first floor, and he observed that there was no evidence that the fire started on the first floor or was caused by electrical sources, including a walk-in freezer located below the area of origin of the fire. (Lynn Tr., at 97-99, 103). He also determined that the walk-in freezer was not a source of the fire, because "[t]here was limited fire damage; it was all surface burning from the drop down" (*id.* at 85-86, 104), and noted that nothing in his Fire Incident Report constituted a basis for concluding that "the fire was started in anything happening on the first floor." (*Id.* at 99).

In his affidavit, Diaz states that "[t]here were employees of Barta on the second floor approximately 15 to 20 minutes prior to when we were notified of the smoke coming from the 2nd floor." (Roher Aff., Exh. M, ¶ 6).

Harrison testified that, when he arrived at the scene of the fire, it appeared that the fire was located on the second floor, based on smoke he saw coming out of the windows. (Harrison

Tr., Roher Aff., Exh. O, at 143-144).

In his report, Bernitt stated that, although "the wiring under the [burned] area was found to be in poor condition, the rust-through portions examined at the scene did not appear to have edges of molten metal, an indication of high heat due to an electrical fault," adding that, "[w]hile there was certainly electrical activity, it could have equally been caused by the heat of the fire." (Roher Aff., Exh. Q, at 2). Bernitt examined the area on the first floor immediately below the burned-out second floor, where there was wiring, and stated that "[t]he installation was clearly against electrical code in a variety of respects," and that "no clear indication of high temperature areas in the cabling [was] found at the scene," but that "[t]he evidence [was] inconclusive with regards to electrical causality." (*Id.* at 2). He concluded, "within a reasonable degree of engineering certainty, that there was electrical activity in the large feeder cable from the store panel. However, it is not conclusive that this was the cause of the fire," that "[t]he materials supplied by Herzfeld and Rubin, P.C. indicates that other investigators (Fire Marshals, CFI's, etc.) feel strongly that the fire originated above in the furniture warehouse by other causes (careless smoking)," and that, "[g]iven the lack of direct conclusive evidence to implicate an electrical cause, it is felt that these opinions should be deferred to." (*Id.* at 3).

In his affidavit, Iapicco states that he found no "basis to dispute the conclusion of [Lynn] that the fire originated above in the furniture warehouse on the second floor," concluding that the evidence established that a Barta employee caused the fire, when he "carelessly handled [a] lit and burning cigarette." (Roher Aff., Exh. T, ¶ 3 and at 19).

In his report, Peknic concludes that the fire was "caused by heat generated from electric fault activity within a circuit powering a heater." (Roher Aff., Exh. R). He specifies:

> Interrupting fire travel back to the area of origin: metal jacketed Bx cable exhibiting damage from fault activity found in the area of origin: damage to the copper conductors inside the cable with characteristics of fault activity: no individual circuit breaker controlling each heating unit *an hypothesis can be made that an electric fault occurred in the large Bx cable above the walk-in freezer under the 2nd floor igniting the surrounding combustible material.*

(*Id.* [emphasis in original]).

Hyde acknowledges in his report that the wiring of the first-floor heaters was improper, but concludes that a Barta employee, a known cigarette smoker, "makes the presence and use of smoking material in the area of origin reasonably possible," and that, "[c]oupled with the evidence that eliminates every other reasonably possible ignition source, the presence and careless disposal of smoking materials becomes reasonably probable." (Roher Aff., Exh. S, at 26).

El Paraiso and Diaz also submit an "Investigative Report" from the Fire Department of the City of New York, which includes dozens of firefighter interviews. (Roher Aff., Exh. P). According to El Paraiso and Diaz, this evidence eliminates the possibility that the fire could have started on the first floor, in El Paraiso and Diaz's delicatessen/grocery.

B. Analysis

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case," and the "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

An "investigating fire marshal's deposition testimony" and report may constitute *prima facie* evidence of a party's entitlement to summary judgment. (*Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [1st Dept 2008]). Here, although Lynn characterizes the cause of the fire as not fully ascertained and suggests its probable cause (Roher Aff., Exh. I), he also opines that the fire started on the second floor. Bernitt also finds the evidence inconclusive as to "electrical causality" (Roher Aff., Exh. Q, at 2), and Peknic suggests an electrical cause above the walk-in freezer under the second floor. (*Id.*, Exh. R). Although Hyde concludes that smoking materials were likely a cause, he also acknowledges the improper wiring. (*Id.*, Exh. T, at 26).

The expert opinions thus conflict, thereby failing to establish a *prima facie* showing. (*See Friedman v BHL Realty Corp.*, 83 AD3d 510, 510 [1st Dept 2011] ["plaintiff's expert offered opinions that conflict with those of defendant's experts, thereby precluding summary judgment"]; *Bradley v Soundview Healthcenter*, 4 AD3d 194, 194 [1st Dept 2004] ["(c)onflicting expert affidavits raise issues of fact and credibility that cannot be resolved on a motion for summary judgment"]). Consequently, El Paraiso and Diaz fail to "demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Although El Paraiso and Diaz rely on the April 17, 2008 decision (*see supra* at 5), Margaret Brick was not a party in that action, and in any event, that court's observation constitutes neither a finding of fact nor a binding conclusion.

III. 3859 TENTH AVE AND LE FRANK'S MOTION TO DISMISS IN THE MAIN ACTION

A. Contentions

Plaintiffs assert causes under section 205-a of the GML (second cause of action) and for common-law negligence (first cause of action). 3859 Tenth Avenue and Le Frank (Tenth

Avenue defendants) argue that they are out-of-possession landlords who did not violate the Administrative Code or any other law, and that, therefore, they cannot be held liable under GML § 205-a . And that even if they were not out-of-possession landlords, they neither created any structural defect nor had actual or constructive notice of any defect before the fire. They also observe that the certificate of occupancy was valid, that there were no statutory violations, that there is no causal connection between any alleged violations and plaintiffs' injuries, and that they are entitled to common-law indemnification from all co-defendants.

B. Analysis

Generally, owners are not liable for injuries when they part with possession and control of their leased premises, although they may be held liable if they retain control or the right to enter, or contract to repair or maintain the property. (*Worth Distribs. v Latham*, 59 NY2d 231 [1983]; *Lowe-Barrett v City of New York*, 28 AD3d 721, 722 [2d Dept 2006]; *Rosas v 397 Broadway Corp.*, 19 AD3d 574, 574 [2d Dept 2005]).

Here, the Barta lease defines "Owner" as "3859 Tenth Ave. Corp c/o Le Frank Mgmt Corp," and provides, in pertinent part, as follows:

> Owner or Owner's agents shall have the right . . . to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

(Tumbarello Aff., Exh. I, ¶ 13). Thus, Tenth Avenue defendants may be held liable for plaintiffs'

injuries, having retained the right to enter, repair and maintain the property. Moreover, factual issues exist as to causation (*supra* at 10), and plaintiffs allege various statutory violations, including Administrative Code §§ 27-118, 27-217, 27-127, 27-128, 27-345, 27-361, 27-246, 27-246(a), 27-455, and 27-954, and several provisions of the New York City Fire Prevention Code (NYC Fire Code), that, if proved, substantiate plaintiffs' claim. Consequently, Tenth Avenue defendants have failed to show, *prima facie*, that they cannot be held liable as out-of-possession landlords.

Tenth Avenue defendants also argue that sections 27-127 and 27-128 are "non-specific statutory code violations" that cannot support a claim under GML § 205-a (1) which provides that firefighters have a right of action where the "negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state [or local] governments" "directly or indirectly" causes the firefighter's injury during the discharge of his duties. To establish a claim under section 205-a, a plaintiff must "[1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the firefighter was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 79 [2003]).

Several provisions of the Administrative Code and the NYC Fire Code cited by the parties have been repealed, but were in effect at the time of the fire. For instance, sections 27-127, 27-128, 27-217, and 26-223 were repealed in 2008, but in effect on December 16, 2003. Pursuant to Administrative Code § 27-127:

> All buildings and all parts thereof shall be maintained in a safe

> condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.

Section 27-128 provided that "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities."

"The prevailing weight of authority establishes that Building Code (Administrative Code of City of NY) §§ 27-127 and 27-128 are proper statutory predicates for liability under General Municipal Law § 205-a." (*Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [1st Dept 2006]). In *Giuffrida*, the plaintiff's claim under GML § 205-a relied on alleged violations of Administrative Code §§ 27-127 and 27-128 was dismissed on defendant's motion for summary judgment. On appeal, the Court of Appeals reversed that decision and reinstated the complaint, thereby implicitly upholding these sections as statutory predicates. (100 NY2d at 80 n 4). Therefore, that portion of Tenth Avenue defendants' motion seeking dismissal of plaintiffs' claim under GML § 205-a based on Administrative Code §§ 27-127 and 27-128 as statutory predicates is without legal basis.

According to Tenth Avenue defendants, there was no illegal conversion of the premises to warrant a new certificate of occupancy and fire suppression system, and they deny having violated Administrative Code § 27-361 or the NYC Fire Code.

The parties do not dispute that a change of use at the premises would require Tenth Avenue defendants to obtain a new certificate of occupancy. (Tumbarello Aff., ¶ 71; Rebholz Aff., ¶ 11; Walden Aff., ¶ 12). The current Building Code, known as the "1968 building code of the city of New York" (1968 Code), replaced and superseded the former Building Code of 1938

(1938 Code). (Administrative Code § 27-101, 27-105; *see also* "Preface" to 1968 Code, as amended on Oct. 1, 2004). Section 27-111 of the 1968 Code permits the continuation of "[t]he lawful occupancy and use of any building, including the use of any service equipment therein, existing on the effective date of this code or thereafter constructed or installed in accordance with prior code requirements, . . . unless a retroactive change is specifically required by the provisions of this code." Section 27-118(a) provides that, "if the alteration of a building or space therein results in a change in the occupancy group classification of the building under the provisions of subchapter three, then the entire building shall be made to comply with the requirements of this code." In addition, section 26-223 permits the continued "lawful occupancy and use of any building existing on [December 6, 1968] . . . unless a change is specifically required by the provisions of the building code; and any changes of occupancy or use of any building existing on such date shall be subject to the provisions of the building code . . . ." Consistent with these provisions, section 27-112 permits "[c]hanges in the occupancy or use of any building," subject to section 27-217, which, in turn, provides that:

> [n]o change shall be made in the occupancy or use of an existing building which is inconsistent with the last issued certificate of occupancy for such building, or which would bring it under some special provision of this code or other applicable law or regulation, unless a new certificate of occupancy is issued by the commissioner certifying that such building or part thereof conform to all of the applicable provisions of this code and all other applicable laws and regulations for the proposed new occupancy or use.

Here, the certificate of occupancy was issued in 1947 and makes the following designations: "Occupancy classification" is identified as "Commercial"; permissible "use" on the second floor is identified as "manufacturing"; and "construction classification" is identified as

"Class 3 Non-Fireproof." (Tumbarello Aff., Exh. K). The Barta lease requires that Barta "use and occupy demised premises for Furniture Storage." (Tumbarello Aff., Exh. I, ¶ 2).

Article 4 of the 1938 Code, "Classification by Occupancy," defined "commercial buildings" as "structures or parts of structures which are not public buildings or residence buildings, including among others . . . factory buildings . . . [and] warehouses." (1938 Code § C26-235.0 [c][1]). The "commercial" occupancy classification in the 1947 certificate of occupancy no longer exists and it is now subsumed under the industrial occupancy group. (*infra* at 17). However, even assuming that "furniture storage" may be construed as a "warehouse" under the "commercial" *occupancy* classification of the 1947 certificate of occupancy, in order to fall under the 1938 Code, Tenth Avenue defendants must also show that "[n]o change [was] made in the . . . *use* of an existing building which is inconsistent with the last issued certificate of occupancy for such building." (Administrative Code § 27-217 [emphasis added]). To this end, the "definitions" section of the 1938 Code does not define "manufacturing" or "furniture storage." (1938 Code, art. 2). Moreover, while Tenth Avenue defendants' architect/expert attempts to classify "storage spaces" as "'Commercial Building' uses" (Walden Aff., ¶ 9), the "commercial buildings" definition in the 1938 Code refers to the way in which "all structures shall be classified, with respect to *occupancy*" (1938 Code § C26-235.0 [emphasis added]), not use.

"The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction." (McKinney's Cons Laws of NY, Book 1, § 94; *see also Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998] ["(a)s the

clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"]). The court must construe statutes using "the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." (*Majewski*, 91 NY2d at 583).

In Merriam-Webster's Dictionary, "manufacture" is defined as "to make into a product suitable for use," or "to make from raw materials by hand or by machinery." It defines "storage" as "a space or a place for storing," or "the safekeeping of goods in a depository (as a warehouse)." Consistent with this definition, the Administrative Code currently provides that "[b]uildings and spaces shall be classified in the storage occupancy group when they are used primarily for storing goods." (Administrative Code § 27-245). Thus, manufacturing suggests an act, whereas storage suggests stasis. Consequently, Tenth Avenue defendants fail to show, *prima facie*, that "furniture storage," while possibly a permitted occupancy, is a permitted "manufacturing" use under a "commercial" occupancy classification, consistent with the 1938 Code.

The 1968 Code now provides that "[b]uildings and spaces shall be classified in the industrial occupancy group when they are used for fabricating, assembling, *manufacturing*, or processing products, materials, or energy . . . ." (Administrate Code § 27-249 [emphasis added]). The industrial occupancy group consists of subgroups D-1 and D-2, depending on the product manufactured (Administrative Code §§ 27-249, 27-237 at Table 3-1, 27-250, and 27-251), whereas furniture storage falls within occupancy group B-1 (*id.*, § 27-246). Specifically, in

section 27-246, occupancy group B-1 is defined as including "buildings and spaces used for storing any flammable or combustible materials that is [sic] likely to permit the development and propagation of fire with moderate rapidity." Under section 27-246(a), a typical occupancy for group B-1 includes "[w]arehouses" and "storerooms," with "[t]ypical material contents" including "furniture . . . upholstery and mattresses . . . ." Thus, when the *use* of the second floor of the premises changed from manufacturing to furniture storage, the *occupancy* classification changed from "commercial" (or, under the 1968 Code, "industrial" occupancy group D-1 or D-2) to "storage" occupancy group B-1.

This change in use and occupancy triggered the 1968 Code, specifically, sections 27-245 and 27-455 of the Administrative Code. Section 27-245 provides that, "[w]hen the goods stored are highly combustible, flammable, or potentially explosive, the building or space shall meet the requirements for high hazard occupancies when the latter are more restrictive than the corresponding requirements for the storage classification." Section 27-455(a) requires that "[a]utomatic sprinkler protection . . . be provided as required for occupancy group B-1 or B-2." For these reasons, Tenth Avenue defendants fail to show, *prima facie*, that the 1938 Code applies, and that the 1947 certificate of occupancy was valid. Nor have they shown, *prima facie*, that they complied with these statutory requirements for the use and occupancy of the second floor of the premises in connection with plaintiffs' cause of action under GML § 205-a. Consequently, Tenth Avenue defendants' motion for an order granting summary dismissal of this portion of the second cause of action, based upon the 1947 certificate of occupancy and the lack of a statutory predicate, is without a legal basis.

Tenth Avenue defendants next maintain that Administrative Code § 27-361 does not

constitute a proper statutory predicate under GML § 205-a absent an applicable building code and because the fire sketch shows unobstructed means of egress on the second floor. In support, they rely on the "Fire Scene Sketch" prepared by the Bureau of Fire Investigation, dated October 20, 2005 (10/20/05 Fire Sketch). (Cannavo Aff., Exh. D).

Under the 1938 building code relied on by Tenth Avenue defendants, only two legal means of egress are contemplated: stairways and fire escapes. However, the 1938 Code has not been shown to apply here, based on the change in use from manufacturing to furniture storage. (*Supra* at 17). In any event, based on the 10/20/05 Fire Sketch, it is not clear whether the means of egress, as defined under both the 1938 and 1968 Codes, were obstructed or unobstructed, thereby creating an issue of fact.

Moreover, Administrative Code § 27-361provides that "[a]ll exits and access facilities shall be located so that they are clearly visible, or their locations clearly indicated, and they shall be kept readily accessible and unobstructed at all times." If anything, the 10/20/05 Sketch shows mattresses and box springs stacked in the portion of the building facing Tenth Avenue, and chairs, sofas, dressers, and various other items stored throughout the premises. In addition, in opposition, plaintiffs submit photographs depicting windows facing Tenth Avenue (Cannavo Aff., Exh. N), along with the deposition testimony of firefighter Steven Naso (Naso). (*Id.*, Exh. M). According to Naso, windows are used as exits if a firefighter "gets jammed up" during a fire, and mattresses and box springs were stacked from floor to ceiling, at least 10 feet high, blocking access to the windows facing Tenth Avenue. (*Id.*, Exh. M, at 14, 157). Firefighter Robert Knabbe also testified that windows are used as ventilation points and exits by firefighters. (*Id.*, Exh. L, at 46). Thus, at a minimum, under both the 1938 and 1968 Codes, a question of fact

exists as to whether the means of egress at the premises were obstructed. Accordingly, Tenth Avenue defendants' motion for summary judgment dismissing the portion of plaintiffs' second cause of action that relies on Administrative Code § 27-361 as the statutory predicate is without factual basis.

Tenth Avenue defendants deny that they violated the NYC Fire Code in effect at the time of the fire. Specifically, section 27-4008 provided that "[i]t shall be unlawful to smoke or carry a lighted cigar, cigarette, pipe or match within any room or enclosed place, . . . or in any part of any premises in which an explosive or highly combustible or flammable material is manufactured, stored or kept for use or sale." The Code does not define "highly combustible" or "flammable," but Tenth Avenue defendants maintain that the word "highly" modifies both "combustible" and "flammable" in support of their assertion that mattresses are not "highly flammable." (12/8/11 Walden Aff., ¶¶ 25-28; 3/20/12 Walden Reply Aff., ¶ 15; 3/20/12 Tumbarello Reply Aff., ¶¶ 69-76).

The hazards listed in section 27-4008 are classified according to their gravity, beginning with "explosive." The parties, including Tenth Avenue defendants and their expert, James Walden (Walden), reviewed for guidance the 1968 Code, as incorporated in the Administrative Code. (Walden Aff., ¶ 24). Section 27-246 of the Administrative Code categorizes "furniture" and "upholstery and mattresses" as "flammable or combustible." If the word "highly" applies to both "combustible" and "flammable," it would render one of these terms redundant, in contravention of the rules of statutory construction and interpretation. (*See* McKinney's Cons Laws of NY, Book 1, Statutes § 144 [providing that statutes "will not be construed as to render them ineffective"]; *see also Allen v Stevens*, 161 NY 122, 145 [1899] ["it is a just rule, always to

be observed, that the court shall assume that every provision of the statute was intended to serve some useful purpose"]). Consequently, the word "flammable" is not modified by the word "highly," and thus, there exists a factual issue as to whether the furniture stored at the premises by Barta falls within the statutory smoking prohibition.

The record here also contains evidence that the fire may have been caused by the "careless discard of smoking materials" in an area that contained mattresses (Fire Incident Report, Roher Aff., Exh. I), and City submits the affidavit of Thomas Jensen (Jensen), Chief of Fire Prevention for the New York City Fire Department, who states that "[t]here is no question that stored mattresses are properly characterized as 'highly combustible'" under section 27-4008 of the NYC Fire Code. (Gerber Aff., Exh. D, ¶ 9). Thus, at a minimum, the conflicting affidavits of Walden and Jensen raise a factual issue as to whether the mattresses are "highly combustible," "flammable," or "highly flammable" under the NYC Fire Code. *McGee v Adams Paper & Twine Co.*, 26 AD2d 186 (1st Dept 1966), *affd* 20 NY2d 921 (1967), cited by Tenth Avenue defendants, is distinguishable on its facts and pre-dates the 1968 Code.

In any event, plaintiffs also cite NYC Fire Code § 47-4272 as a violation in support of the claim under GML § section 205-a. Section 47-4272 provides that "[i]t shall be unlawful for any person to throw away any lighted match, cigar or cigarette within any building or structure . . . unless it be to deposit the same in a suitable container of metal or other noncombustible material provided for the reception thereof." This provision is not limited to areas that contain "highly combustible or flammable" material, and Tenth Avenue defendants do not respond to plaintiffs' arguments concerning this provision. For these reasons, a question of fact exists as to whether this provision of the NYC Fire Code was violated.

Tenth Avenue defendants contend that they cannot be held liable, because they neither created the alleged defect nor had actual or constructive notice of it. They rely on *Lusenskas v Axelrod*, where a firefighter was injured while fighting a fire at a building owned and managed by the defendants, when a self-closing door hinge on apartment 8B, where the fire originated, did not close, allowing the uncontrolled spread of the fire to the corridor. The plaintiff commenced an action under GML § 205-a, claiming that the defendants' failure to equip and maintain the self-closing door hinge violated the Administrative Code. The defendants testified that tenants in the building complex removed pins which engaged the spring on the hinges, defeating the self-closing feature, and that they knew that pin removal by tenants was a longstanding condition in the building. The jury found that the plaintiff had not shown that the defendants had actual or constructive notice of the condition of the door of apartment 8B, and the trial court dismissed the complaint.

On appeal, the court held that "it is not necessary that the plaintiff prove such notice as he would be required to demonstrate in order to recover under a theory of common-law negligence, viz., actual or constructive notice of the particular defect on the premises causing injury." (183 AD2d 244, 248 [1st Dept 1992]). Rather, notice of the violation "may be inferred," and it held that "[t]he statute requires only that the circumstances surrounding the violation . . . indicate that the violation was, in the words of the statute, 'a result of any neglect, omission, willful or culpable negligence' on the defendant's part." (*Id.*) Significantly and notwithstanding the jury's finding that the defendants did not have "actual or constructive notice of the condition of the door in Apartment 8B" (*id.* at 246), the verdict was set aside as there was "ample evidence to indicate that defendants were fully cognizant of the hazard represented by the removal of pins

from the self-closing hinges," given the extent and duration of the problem in the building. (*Id.* at 249).

Here too, Tenth Avenue defendants cannot seriously dispute that they had knowledge of the change in use from "manufacturing" in the 1947 certificate of occupancy, to "furniture storage" in the 1992 Barta lease, naming Tenth Avenue defendants. Thus, if anything, *Lusenskas* supports the conclusion that Tenth Avenue defendants could have inferred notice of Barta's use of the premises in violation of the certificate of occupancy and, as a result, in violation of the Administrative Code. Whether Tenth Avenue defendants could have inferred violations of Administrative Code §§ 27-127 and 27-128, as well as other sections of the Administrative Code and the NYC Fire Code, present factual issues. Thus, Tenth Avenue defendants fail to show, *prima facie*, that they did not create, or have actual or constructive notice of, the defect.

To the extent that Tenth Avenue defendants' denial of receipt of notice is directed to plaintiffs' common-law negligence cause of action, it is fatally conclusory (Tenth Avenue defendants' Opening Brief, at 10), and their argument that plaintiffs fail to make a *prima facie* showing of negligence or proximate cause (Tenth Avenue defendants' Reply Brief, at 22) is insufficient as it "simply point[s] to alleged deficiencies in the plaintiff's proof" (*Daries v Haym Solomon Home for the Aged*, 4 AD3d 447, 448 [2d Dept 2004]). Nor is it plaintiffs' "burden in opposing the motion[] for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law." (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]). Furthermore, an owner's retention of the "right to reenter the premises is sufficient to charge it with constructive notice," and "[i]ts failure to act to remedy the defect as it

could have done under the lease [may be] the basis for its liability under the various provisions of the New York City Administrative Code." (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 566-567 [1987]). And, causation remains a factual issue for trial. (*Supra* at 10). Thus, Tenth Avenue defendants have failed to establish, *prima facie*, that they are entitled to summary judgment on plaintiffs' common-law negligence cause of action.

Tenth Avenue defendants argue that there is no reasonable or practical connection between the alleged violations and Thomas Brick's death. "'[D]irect cause' . . . has traditionally been understood to mean [a] cause that directly produces an event and without which the event would not have occurred," whereas "'indirect causation' involves a somewhat less than direct and unimpeded sequence of events resulting in injury." (*Giuffrida*, 100 NY2d at 80). "'[I]ndirect cause' is simply a factor that—though not a primary cause—plays a part in producing the result." (*Id.*) In addressing claims under section 205-a, "courts . . . have accorded the causation element of the statute a broad application." (*Id.*) "[A] 'plaintiff is not required to show the same degree of proximate cause as is required in a common-law negligence action,'" but rather, "the substantial case law that has developed on the subject holds that a plaintiff need only establish a 'practical or reasonable connection' between the statutory or regulatory violation and the claimed injury." (*Id.* at 81).

Here, the statutes that serve as the alleged predicates of plaintiffs' claim require that Tenth Avenue defendants maintain the premises in a safe condition (Administrative Code §§ 27-127, 27-128), to obtain a new certificate of occupancy upon changing the occupancy or use of the premises (*id.*, §§ 26-223, 27-217), to meet the requirements for fire hazard occupancies, including providing automatic sprinkler protection (*id.*, §§ 27-245, 27-455), to provide

unobstructed means of egress (*id.*, § 27-361), and to comply with provisions of the NYC Fire Code concerning smoking prohibitions (NYC Fire Code §§ 27-4008, 27-4272). According to the Fire Department's "Investigative Report" (*supra*), the contents on the second floor of the premises created a "heavy fire load" (Cannavo Aff., Exh. D, App. A, Section 2), and among the "basic causes" of the fire are the building owner's failure "to install a sprinkler system as required by law," and "[t]he fire occupancy was operating illegally," in that "the owner allowed a change of use without obtaining a new certificate of occupancy." (*Id.*, Exh. C, at 23). This evidence, together with the testimony and affidavits of the various firefighters and fire experts, at a minimum, raises an issue of fact as to whether these alleged violations directly or indirectly caused Thomas Brick's death "by failing to prevent the fire or by exacerbating it." (*Giuffrida*, 100 NY2d at 82).

El Paraiso and Diaz suggest a "further basis for denial of [Tenth Avenue defendants'] motion": their violation of Administrative Code §§ 27-116 and 27-117. (Roher Opp. Aff., ¶¶ 34-46). These provisions are not alleged in plaintiffs' amended complaint or bill of particulars. In any event, Tenth Avenue defendants' motion is denied notwithstanding any other basis suggested by El Paraiso and Diaz, and thus, those sections need not be addressed.

Tenth Avenue defendants also allege that "the sole proximate cause of the fire" was smoking by a Barta employee which constituted a superseding and intervening cause of Thomas Brick's death. (Tumbarello Aff., ¶ 119; Tenth Avenue defendants' Mem. of Law, at 14). As a preliminary matter, in an action under GML § 205-a, the "'plaintiff is not required to show the same degree of proximate cause as is required in a common-law negligence action.'" (*Giuffrida*, 100 NY2d at 81; *see also Lusenskas*, 183 AD2d at 248 ["intervening illegal acts are no defense

to statutory liability"]). In any event, as discussed above, factual issues exist as to causation, and Tenth Avenue defendants' "contentions as to the superceding [sic] or intervening cause by a third party, are not sufficiently persuasive to preclude triable issues of fact as to these matters." (*Thomas v Wu & Sons, Inc.*, 184 AD2d 440, 440-441 [1st Dept 1992]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980] ["(b)ecause questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve"]).

Tenth Avenue defendants also claim that they are entitled to common-law indemnity from all co-defendants. To establish common-law indemnification, Tenth Avenue defendants must prove "'not only that they were not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury.'" (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009], quoting *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2d Dept 2006]). "[T]he owner or contractor seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought." (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). Thus, if the party seeking indemnification is "held liable at least partially because of its own negligence," common-law indemnity is not a viable remedy and "contribution against other culpable tort-feasers is the only available remedy." (*Glaser v Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]; *see also Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003] ["'(s)ince the predicate of common-law indemnity is vicarious liability without actual fault on the

part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'"]).

As discussed above, no determination has been made concerning Tenth Avenue defendants' or their co-defendants' negligence, if any, in participating in the events that caused Thomas Brick's death and plaintiffs' damages. Therefore, this portion of Tenth Avenue defendants' motion for summary judgment is denied.

For the foregoing reasons, Tenth Avenue defendants' motion for summary judgment is denied in its entirety.

IV. THE SCOTT ENTITIES' MOTION IN THE MAIN ACTION

A. Contentions

The note of issue was filed on October 12, 2011. The Scott entities moved, by notice of motion dated February 3, 2012, for an order granting them summary judgment dismissing all claims asserted against them. In opposition, plaintiffs and City argue that the Scott entities' motion is untimely because it was filed more than 60 days after the filing of the note of issue.

B. Analysis

CPLR 3212(a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue." As published in the New York County Supreme Court, Civil Branch, Rules of the Justices, this court's Part Rules require that summary judgment motions be filed "within 60 days after the filing of the note of issue."

As the note of issue was filed on October 12, 2011, the Scott entities' summary judgment

motion should have been filed by December 12, 2011, but was not filed until February 3, 2012, over 50 days late, and they claim that they "did not know this Court imposed a 60 day deadline as opposed to the 120 day deadline provided by the CPLR." (Sullivan Reply Aff., ¶ 6). The proffered cause for their delay does not establish "good cause." (*Brill v City of New York*, 2 NY3d 648, 652 [2004] ["(n)o excuse at all, or a perfunctory excuse, cannot be 'good cause'"]; *see also Giudice v Green 292 Madison, LLC*, 50 AD3d 506, 506 [1st Dept 2008] [defendant's "failure to appreciate that its motion was due within 45 days after the filing of the note of issue 'is no more satisfactory than a perfunctory claim of law office failure'"]). Accordingly, the Scott entities' motion is untimely.

V. EL PARAISO AND DIAZ'S MOTION IN THE LE FRANK ACTION

A. Contentions

The note of issue in the Le Frank action was filed on April 1, 2011. El Paraiso and Diaz moved, by notice of motion dated December 8, 2011, for an order dismissing all claims asserted against them. In opposition, plaintiffs in the Le Frank action argue that the motion is untimely because it was filed more than 60 days after the filing of the note of issue.

B. Analysis

As the note of issue was filed on April 1, 2011, the El Paraiso and Diaz's summary judgment motion should have been filed by June 1, 2011. Their motion was not filed until December 8, 2011, over six months late.

El Paraiso and Diaz argue that the court's compliance conference orders contemplated a summary judgment deadline only after the parties agreed on additional disclosure and completion of discovery in the main action. Specifically, they rely upon a so-ordered stipulation in the main

action, dated September 12, 2011, which refers to additional discovery and provides that the "time for plaintiff to file note of issue is extended to October 20, 2011." (Roher Aff., Exh. E). However, the stipulation reflects the index number for the main action, not the index number for the Le Frank action, and it addresses the Scott entities' "motion to permit a second inspection." (*Id.*) The Scott entities are not parties to the Le Frank action. Moreover, El Paraiso and Diaz fail to explain how they could have agreed, in September of 2011, to filing the note of issue the following month, when the note of issue had already been filed five months earlier.

El Paraiso and Diaz next allege that they had good cause for filing a late summary judgment motion, as significant discovery was exchanged after plaintiffs filed the note of issue in the Le Frank action. However, they fail to show that this discovery relates to the Le Frank action; rather, it appears that it relates to the main action generally or the third-party products liability claims against the Scott entities in the main action. (Roher Aff., Exhs. E, F, G, H). Accordingly, El Paraiso and Diaz fail to show good cause for their untimely summary judgment motion. (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648; *Giudice v Green 292 Madison, LLC*, 50 AD3d 506).

In any event, El Paraiso and Diaz concede that the substance of their arguments on this motion "is identical to its motion in the [main action]." (Roher Aff., ¶¶ 9, 28). As El Paraiso and Diaz's motion in the main action (motion sequence number 009 under Index Number 404121/05) is denied, the instant motion would likewise be denied if it were timely.

VI. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants El Paraiso Corp. and Biancia Diaz's motion for summary

judgment (motion sequence number 009 under Index Number 404121/05) is denied; and it is further

ORDERED, that defendants 3859 Tenth Avenue Corp. and Le Frank Management Corp.'s motion for summary judgment (motion sequence number 010 under Index Number 404121/05) is denied; and it is further

ORDERED, that third-party defendants Scott Technologies, Inc. and Scott Health and Safety, A Division of Scott Technologies, Inc.'s motion for summary judgment (motion sequence number 011 under Index Number 404121/05) is denied; and it is further

ORDERED, that defendants El Paraiso Corp. and Biancia Diaz's motion for summary judgment (motion sequence number 002 under Index Number 101309/05) is denied; and it is further

ORDERED, that the actions shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 20, 2012
New York, New York

SEP 20 2012

FILED

SEP 21 2012

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COUNTY CLERK'S OFFICE