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

PRESENT: DEBRA A. JAMES PART 59
Justice

QING SUI LI,

Plaintiffs,

-v-

37-65 LLC,

Defendants.

37-65 LLC,

Third Party Plaintiff,

-v-

T&W RESTAURANT, INC., d/b/a SHUN LEE WEST,
Third Party Defendant.

Index No.: 108598/07

Motion Date: 05/11/12

Motion Seq. No.: 002

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Motion sequence numbers 002 and 003 are consolidated for disposition.

The defendant and third-party plaintiff 37-65 LLC (landlord) moves (motion sequence number 002) pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and for an order granting summary judgment on its third-party complaint against T&W Restaurant, Inc. d/b/a Shun Lee West (tenant), for

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

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ REFERENCE

contractual indemnification, breach of contract, and attorney's fees.

The third-party defendant tenant moves (motion sequence number 003), pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and the landlord's third-party complaint.

This is an action to recover damages for personal injuries, a broken wrist with surgery, suffered by the plaintiff Qing Sui Li (plaintiff), in a slip and fall accident on a staircase, while the plaintiff was working as an employee in the third-party defendant tenant's restaurant. The subject staircase is a spiral staircase, used to access the employee locker room. The plaintiff claims that the staircase was greasy, and that the steps were worn smooth. The lease for the property in question contains two indemnification clauses, and requires the tenant to maintain general liability insurance naming the landlord as an additional insured.

In support of its motion to dismiss the complaint, the landlord argues that it is not responsible for the transient condition, and that the stairs are not structural. In support of its motion for summary judgment on its third-party complaint, the landlord argues that the lease requires the tenant to clean, repair and maintain the stairs. The landlord also argues that the lease provides that the landlord shall not be liable for

injury to persons unless caused by the landlord's negligence, and that the tenant must maintain insurance in favor of the landlord, and indemnify the landlord.

In support of its motion for summary judgment dismissing the complaint, the tenant argues that it neither created the defective condition, nor had actual or constructive notice of its existence. In addition the tenant argues that the Administrative Code of the City of New York § 27-375 (h) requirement that treads be built or surfaced with non-skid materials, is not applicable to the subject spiral staircase, since it did not serve as a required exit stair from the building. In support of its motion for summary judgment on its third-party claim against the landlord, the tenant argues that there is a conflict between the indemnification provision in the body of the lease, and the indemnification provision in the lease rider, and that the lease rider is unenforceable because it violates General Obligations Law § 5-321 by requiring the tenant to indemnify the landlord for all claims, including those occasioned by the landlord's negligence. In addition, the tenant argues that the lease's insurance procurement clause cannot be used to shield the landlord from liability for its own negligence when the injury is to the tenant's employee.

In opposition to both summary judgment motions, the plaintiff argues that the diamond plate stair treads were

completely worn smooth, and that grease on the stairs was a recurring condition. The plaintiff submits an affidavit from a licensed professional engineer alleging that spiral stairs are structural in nature and prohibited by New York City Building Construction Code § 27-375 (e) (3), since the stairs must be used as a means of egress from the locker room.

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (Vega v Restani Constr. Corp., 18 NY3d 499, 505 [2012]).

> "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (Smith v Costco Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008] [citations omitted]).

The court will first dispose of the landlord's motion to dismiss the complaint. Liability of an owner or possessor of land is measured by "the single standard of reasonable care under the circumstances" (Quinlan v Cecchini, 41 NY2d 686, 687 [1977]; Basso v Miller, 40 NY2d 233, 241 [1976]). Owners and lessees both have a duty to maintain their property in a reasonably safe condition (Tagle v Jakob, 97 NY2d 165, 168 [2001]). However, a

> landlord is generally not liable for negligence with respect to the condition of property after the transfer

> of possession and control to a tenant unless the landlord: (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (Vasquez v The Rector, 40 AD3d 265, 266 [1st Dept 2007]).

In the instant case, although the landlord had a contractual right to reenter, inspect and make needed repairs, liability is not based on a significant structural or design defect that is contrary to a specific statutory safety provision.

Administrative Code of the City of New York §§ 27-127 (general requirement to maintain buildings and their parts in a safe condition) and 27-128 (owner responsibility for safe maintenance of a building and its facilities) were both repealed effective July 1, 2008, four years after the subject slip and fall on August 16, 2004. Therefore, the landlord was required by statute to safely maintain the building. However, a general requirement to safely maintain the building is not a sufficiently specific statutory safety provision able to support a claim against the landlord.

Contrary to the plaintiff's contention, the subject staircase did not qualify as "interior stairs" within the meaning of Administrative Code of the City of New York § 27-232, and as governed by Administrative Code of the City of New York § 27-375, because it did not serve as a required exit from the building (Schwartz v Hersh, 50 AD3d 1011, 1012 [2d Dept 2008]; Dooley v

Vornado Realty Trust, 39 AD3d 460 [2d Dept 2007]). In addition the NYC Administrative Code 27-375 requirements as to the interior finish of interior stair enclosures, riser height, handrails, landing requirements, etc., do not apply because the spiral stairs from where plaintiff fell did not serve as an "exit," but rather as a means of walking from one locker room to another locker room. Liability may only attach as a result of a defective design or construction. In this case stair treads that are worn smooth, and are greasy, reflect a lack of maintenance, rather than defective design or construction.

Contrary to the plaintiff's assertion, the Building Code permits spiral stairs. Administrative Code § 27-375 [l] specifically provides that "[s]piral stairs may serve as access stairs between two floors or levels in accordance with the provisions of paragraph two of subdivision i of this section. Such stairs may not serve as required exits..."

Therefore, the landlord is entitled to summary judgment as an out-of-possession landlord since the lease imposes no obligation on the landlord to make repairs or maintain the premises. Although the landlord retained a right to reenter, inspect and make repairs, there is no triable issue of fact as to whether the allegedly defective condition of the spiral staircase involved a significant structural or design defect contrary to specific statutory safety provision (Garcia-Rosales v 370 Seventh

Ave. Assoc., LLC, 88 AD3d 464 [1st Dept 2011]; Babich v R.G.T. Rest. Corp., 75 AD3d 439 [1st Dept 2010]). The landlord's motion for summary judgment dismissing the complaint must be granted.

Turning to the controversy between the landlord and the tenant, GOL§ 5-321 provides:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

Contrary to the tenant's assertion, General Obligations Law § 5-321 does not preclude indemnification of a landlord for its own negligence where the lease was negotiated at arm's length by two sophisticated parties who "use insurance to allocate the risk of liability to third parties between themselves" (Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 419 [2006]). Where, as here, a landlord and a tenant enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity (Hogeland v Sibley, Lindsay & Curr Co., 42 NY2d 153 [1977]).

While General Obligations Law § 5-322.1 bars construction entities from contracting away any active negligence, the anti-indemnity section that applies to the commercial landlord-tenant

relationship, General Obligations Law § 5-321 is interpreted as permitting an owner to insure away their negligence to the tenant's insurer when, as here, the lease contains both indemnity and insurance procurement. Indemnification provisions have been enforced, despite negligence on the part of the party being indemnified, where, as here, the provision stated that they applied to "'any and all claims, suits, loss, cost and liability'" (Matter of New York City Asbestos Litig., 41 AD3d 299, 301 [1st Dept 2007] quoting Levine v Shell Oil Co., 28 NY2d 205, 210 [1971]).

Furthermore, where, as here, there is a broad indemnity agreement, the indemnitee is entitled to costs, including counsel fees incurred in the defense of the primary action even if the primary action is dismissed (Quinonez v Manhattan Ford, Lincoln-Mercury, Inc., 62 AD3d 495, 497 [1st Dept 2009]).

> Where, as here, the net lease agreement obligates the tenant to make all repairs, both structural and nonstructural, and undertake full maintenance of the premises, and where the landlord (should have been) named as an additional insured on the tenant's policy protecting against the type of risk and injury at issue here, the tenant's insurer has a duty to defend the landlord in the action (Mennis v Commet 380, Inc., 54 AD3d 641 [1st Dept 2008]).

The landlord's motion for summary judgment on its claim for breach of contract for the failure to procure insurance must be granted. Since the tenant does not does not address whether or not it procured the required insurance, the landlord is entitled to summary judgment on that claim (Gary v Flair Beverage Corp.,

60 AD3d 413, 415 [1st Dept 2009]).

Accordingly it is

ORDERED that defendant 37-65 LLC 's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and

It appearing to the court that the defendant third-party plaintiff 37-65 LLC is entitled to judgment against third-party defendant T&W Restaurant, Inc. on liability and that the only triable issues of fact arising on third-party plaintiff's motion for summary judgment relate to the amount of counsel fees to which third-party plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability; and it is further

ORDERED that the portion of the third-party plaintiff's action that seeks the recovery of attorney's fees is severed and the issue of the amount of reasonable attorney's fees third-party plaintiff may recover against the third-party defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the third-party plaintiff shall, within 30 days from the date of this order, serve a copy of this

order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This is the decision and order of the court.

Dated: October 11, 2012 ENTER:

DEBRA A. JAMES J.S.C.

FILED

OCT 16 2012

NEW YORK
COUNTY CLERK'S OFFICE