SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2**

Justice

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INDEX NO. 152677/2016
MOTION SEQ. NO. 002

DUSTIN HALL,

Plaintiff,

- v -

171 HOLDING CORP. and JIM-GILES CORP.,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motion is **decided as follows.**

In this personal injury action commenced by plaintiff Dustin Hall ("Hall"), defendant 171 Holding Corp. ("Holding") moves, pursuant to CPLR 3212, for summary judgement dismissing plaintiff's claims and the cross-claims of co-defendant Jim-Giles Corp. ("Jim-Giles"), as well as for summary judgment on its cross-claims that Jim-Giles is obligated to defend and indemnify it from plaintiff's action. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **decided as follows.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Hall resides in a multi-story building located on East 9th Street in Manhattan ("the premises"). (Doc. 60 at 2.) The premises were leased from Holding to Jim-Giles in 1994. (Doc. 40 at 3–4.)

On October 14, 2015, plaintiff went onto the roof of the premises through an unlocked door to smoke a cigarette. (*Id.* at 5.) While there, he allegedly tripped over a wire that had been left from earlier construction work. (*Id.*)

On March 30, 2016, plaintiff commenced this personal injury action against Holding and Jim-Giles by filing a summons and complaint. (Doc. 41.) Holding's answer, filed on April 25, 2016 asserted cross-claims against Jim-Giles, alleging that Jim-Giles is obligated to defend and indemnify it from plaintiff's claims. (Doc. 42.) Jim-Giles's answer, filed on June 9, 2016 contained a cross-claim against Holding for indemnification. (Doc. 43 at 7–8.) On June 23, 2016, Holding answered the cross-claim. (Docs. 40 at 3; 44.)

On June 1, 2018, Holding moved, pursuant to CPLR 3212, for summary judgement dismissing the complaint and Jim-Giles's cross-claim, as well as for summary judgment on its cross-claims against Jim-Giles. (Doc. 39.) Plaintiff has not opposed the motion. (Doc. 62 at 1.)

POSITIONS OF THE PARTIES:

With respect to plaintiff's complaint and Jim-Giles's cross-claim, Holding first argues that it is entitled to summary judgment dismissing their claims because it was an out-of-possession landlord when plaintiff's accident occurred. (Doc. 40 at 7–11.) In support of its motion for summary judgment, Holding submits a modification of the 1994 lease executed between it and Jim-Giles in 2013 ("the 2013 lease"). (Doc. 57.) According to Holding, Jim-Giles had a duty under the 2013 lease to repair and maintain the premises, abide by the applicable statutes and ordinances, pay all taxes assessed on the premises, and pay all common expenses. (Doc. 40 at 9.) Additionally, James Tuohy ("Tuohy"), who is the managing agent of the premises and is Jim-Giles's president, testified that the lease entered into in 1994 was a net lease, which

Tuohy understood to mean that Jim-Giles had responsibility for maintaining the premises and undertaking all repairs. (Doc. 52 at 7, 21, 38.) Holding asserts that it was an out-of-possession landlord under either the original 1994 lease or the 2013 lease. (Doc. 40 at 7–11.) It argues that since it was an out-of-possession landlord with no duty to maintain, control, or repair the premises, it is entitled to summary judgment dismissing plaintiff's claims and Jim-Giles's cross-claim. (*Id.* at 10–11.)

With respect to its cross-claims that Jim-Giles is obligated to defend and indemnify it from plaintiff's action, Holding asserts that Jim-Giles is contractually bound to do so pursuant to the 2013 lease, which contains an indemnification clause requiring Jim-Giles to defend and indemnify Holding in any action arising from Jim-Giles's negligence. (*Id.* at 11–12.) Alternatively, should this Court find the lease's indemnification provision void, Holding maintains that it is still entitled to common law indemnification from Jim-Giles based on its out-of-possession landlord status. (*Id.* at 13–15.) Holding also argues that Jim-Giles breached its contractual obligation by failing to obtain insurance coverage for Holding in this action. (*Id.* at 15.)

In opposition, Jim-Giles alleges that Holding failed to establish its prima facie showing of entitlement to summary judgment because relevant legal documents are missing. (Doc. 60 at 3.) For example, the 2013 lease reflects that it modifies not only the original 1994 lease, but also two other modifications to the lease executed in 1995 and 2004. (*Id.*) Because the 1995 and 2004 modifications "together with the original lease form the 'Lease'" (*id.* at 4) as defined by the 2013 lease, Jim-Giles asserts that summary judgment must be denied because Holding failed to proffer those two modifications in its moving papers (*id.* at 3–4).

Furthermore, the 1994 lease between Holding and Jim-Giles defines the "demised premises" as "the real property mentioned and described in Schedule A," which was not included in Holding's initial papers. (*Id.* at 5.) The 1994 lease also required Jim-Giles to give notice to Holding of any work or changes done to the building. (*Id.* at 6.) Therefore, Jim-Giles argues, Holding has not established its out-of-possession landlord status, since Holding did not prove that the roof was part of the premises in the conveyance from Holding to Jim-Giles and because Jim-Giles had to obtain Holding's written approval before commencing any work on the premises. (*Id.* at 5–7.) And, even if Holding were an out-of-possession landlord, Jim-Giles asserts that Holding failed to establish that plaintiff's accident was not caused by a structural or design defect in violation of a specific safety statute, which warrants a denial of summary judgment. (*Id.* at 7–10.)

In opposition to Holding's cross-claims, Jim-Giles argues that there was no requirement in the 1994 lease for Jim-Giles to name Holding as an additional insured in its insurance policy. (*Id.* at 10–13.) Moreover, Holding has not submitted evidence, such as a certificate of insurance or a copy of Jim-Giles's insurance policy, to establish its claim that Jim-Giles did not procure insurance coverage for Holding. (*Id.* at 12.)

Aside from contending that Holding did not satisfy its prima facie entitlement to summary judgment, Jim-Giles maintains that there are issues of fact precluding summary judgment. (*Id.* at 13–14.) In particular, Jim-Giles reiterates that plaintiff's accident could have been caused by structural or design defects, since the 2013 lease references "violations" at the premises. (*Id.*)

In reply, Holding asserts that its prima facie showing of entitlement to summary judgment was established in its moving papers because the original lease and the 2013 lease—

and not the 1995 and 2004 modifications—are the only relevant documents, since those were the lease provisions in effect when plaintiff's accident occurred. (Doc. 62 at 4–5.) Holding also proffers Schedule A, which is a document referenced in the original lease, in its reply papers, and similarly argues that Schedule A was not submitted in the initial papers because it is not indispensable on this summary judgment motion. (*Id.* at 7.) Thus, Schedule A was not necessary to establish that the roof where plaintiff fell was part of the premises maintained by Jim-Giles. (*Id.* at 13.)

In response to Jim-Giles's contention that Holding is not an out-of-possession landlord because Jim-Giles was required to give it notice before commencing any work on the premises, Holding references Tuohy's deposition, wherein he admits that Jim-Giles did not need Holding's permission to perform repairs and renovations, even though Jim-Giles often informed Holding that it was going to do so. (*Id.* at 6.)

With respect to the argument that a factual issue exists because plaintiff's injuries may have been caused by structural or design defects on the premises in violation of a statute, Holding reasserts that Jim-Giles was in complete control of the premises when the accident occurred and that it occurred not because of a structural or design defect, but because Jim-Giles left debris from its construction work on the roof. (*Id.* at 9–10.) Moreover, Jim-Giles did not submit proof of a defect on the premises. (*Id.* at 8–9.) And, with respect to the argument that Holding is liable because of its right to reenter the premises, Holding maintains that it was not empowered to make repairs, but only to reenter and inspect the premises, and thus it did not owe a duty toward plaintiff. (*Id.* at 11–12.)

Finally, with respect to its cross-claims against Jim-Giles for indemnification, Holding again refers to the 2013 lease's indemnification provision. (*Id.* at 17.)

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The movant must produce sufficient evidence to eliminate any issues of material fact. (*Id.*) If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. (*See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006].) If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].)

a. Whether Holding is Entitled to Summary Judgment Dismissing Plaintiff's Complaint and Jim-Giles's Cross-claims.

In determining the liability of out-of-possession landlords for actions based on negligence with respect to conditions on a demised premises, courts have held that such landlords are generally not liable 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." (*DeJesus v Tavares*, 140 AD3d 433, 433 [1st Dept 2016]; *see also Del Rosario v 114 Fifth Ave. Assocs.*, 266 AD2d 162, 163 [1st Dept 1999] (out-of-possession landlord with general right of reentry is not liable for general maintenance defects).) But where "an owner is not completely out-of-possession, it may be held liable as long as it had

adequate notice of and a reasonable opportunity to repair the dangerous condition." (*Ledesma v AMA Grocery, Corp.*, 145 AD3d 477, 477 [1st Dept 2016].)

Here, this Court determines that Holding established its prima facie showing of entitlement to judgment as a matter of law. The president of Jim-Giles, Tuohy, admitted at his deposition that the original lease executed between Holding and Jim-Giles was a net lease (Doc. 52 at 7), and that his understanding of a net lease was that the tenant bears the responsibility of taking care of the premises, which includes making both structural and nonstructural repairs (*id.* at 21). When asked if Jim-Giles needed approval from Holding to commence work on "the building, the stucco, roof and everything," Tuohy replied that Jim-Giles did not need to obtain Holding's permission. (*Id.* at 37.) Importantly, the documents submitted in the moving papers—particularly the original lease and the 2013 lease—demonstrate Holding's status as an out-of-possession landlord when plaintiff was injured. Various provisions in the 1994 lease reflect Jim-Giles's total assumption of the operation of the premises. (Doc. 56 at 2–3, 9–11.) Nothing in the 2013 lease altered the relationship and responsibilities of the parties. (Doc. 57.)

Because Holding was not contractually obligated to make repairs or maintain the premises, the only other way it could be held liable is if it had "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." (*DeJesus*, 140 AD3d at 433.) Although Holding acknowledges its right to reenter the premises (Doc. 62 at 10–11), liability cannot be found on that basis because plaintiff's injury was due to a piece of wire that was left over from prior construction work, not from a significant structural or design defect. At his deposition, plaintiff said as much: "I fell off of—or I tripped off a wire that was there previously from when there was scaffolding on the roof from a year ago." (Doc. 51 at 28.) This Court thus finds that

Holding established its prima facie showing of entitlement to judgment as a matter of law because its moving papers demonstrate that neither basis of liability under *DeJesus* for out-of-possession landlords applies.

Jim-Giles's argument that Holding did not establish its prima facie showing because it did not include the 1995 and 2004 lease modifications in its moving papers is not persuasive. The 1995 modification had a term lasting until 2011 (Doc. 66 at 1), and the 2004 modification had a term lasting until 2014 (Doc. 67 at 2). Both modifications were therefore not in effect in 2015, the year of plaintiff's accident. Insofar as Jim-Giles contends that it had to give notice to Holding before undertaking any work, that contention has no merit. (*See Ferro v Burton*, 45 AD3d 1454, 1455 [4th Dept 2007] ("The fact that defendant may have retained the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord.") (quotations omitted).) Moreover, although Holding did not submit Schedule A, which defined the "demised premises" in the 1994 lease (Doc. 56 at 2), in its moving papers (Doc. 60 at 5–7), Tuohy testified that Jim-Giles was responsible for the roof of the premises and performed "waterproofing" work to the roof (Doc. 52 at 24–25).

Jim-Giles's opposition papers also fail to raise triable issues of fact. It argues that the word "violations" in the 2013 lease raises factual issues because those violations may have constituted significant structural or design defects on which liability would be found against Holding. (Doc. 60 at 13.) However, no evidence was submitted to support this argument. New York courts have repeatedly held that such speculative arguments are insufficient to raise triable issues of fact. (*See, e.g.*, *Schloss v Steinberg*, 100 AD3d 476, 476 [1st Dept 2012] (summary judgment granted where plaintiff's opposition arguments were speculative).) Even if there were

significant structural or design defects in existence at the time of the accident, Jim-Giles has offered no proof that such defects, as opposed to the leftover wire, caused plaintiff's injury.

Summary judgment should therefore be granted in favor of Holding dismissing plaintiff's complaint (Doc. 41), which alleges one cause of action against Holding based on negligence. Likewise, summary judgment dismissing Jim-Giles's cross-claim for indemnification (Doc. 43) should also be granted.

b. Whether Holding is Entitled to Summary Judgment on its Cross-claims Against Jim-Giles.

In its answer, Holding asserted four cross-claims against Jim-Giles for: (1) contribution, (2) common law and contractual indemnification, (3) failure to procure insurance coverage for Holding as required by the lease agreement, and (4) a demand for a judgment that Jim-Giles defend it against plaintiff's claims and pay any costs and attorneys' fees. (Doc. 42 at 6–8.) In its moving papers, Holding specifically requests a judgment against Jim-Giles for costs and fees in the sum of $35,000. (Doc. 40 at 16.)

Two of the cross-claims are moot due to the above findings. Because summary judgment has been granted dismissing plaintiff's complaint as against Holding, there is no need for Jim-Giles to defend Holding against plaintiff's claims. And, because contribution is a doctrine based on the apportionment of liability among tortfeasors, (*see Chase Manhattan Bank v Akin, Gump, Strauss, Hauer & Feld L.L.P.*, 309 AD2d 173, 179 [1st Dept 2003]), that cross-claim is similarly moot, since Holding was an out-of-possession landlord that is not liable for plaintiff's injuries.

With respect to the remaining two cross-claims, Holding furnished no proof on its cross-claim that Jim-Giles failed to procure insurance coverage for its benefit. Summary judgment is therefore denied as to that cross-claim. The indemnification provision in the 1994 lease,

however, established Holding's prima facie showing of entitlement to judgment on its cross-claim for indemnification. (Doc. 56 at 20.) Jim-Giles failed to rebut Holding's prima facie case. Thus, this Court concludes that summary judgment should be granted on Holding's cross-claim for indemnification (*see Mazurek*, 27 AD3d at 228 [burden shifts to party opposing summary judgment motion to raise triable issues of fact through admissible evidence]), but only to the extent that Jim-Giles is required to indemnify Holding for the costs expended in this litigation. However, since Holding did not provide proof that it has spent $35,000 in defending this action (Doc. 40 at 13), the amount to be awarded should be determined by a Special Referee.

In accordance with the foregoing, it is hereby:

ORDERED that defendant 171 Holding Corp.'s motion for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED that defendant 171 Holding Corp.'s motion for summary judgment on its cross-claims against co-defendant Jim-Giles Corp. is granted as to the cross-claim for indemnification, and is otherwise denied as to the other cross-claims; and it is further

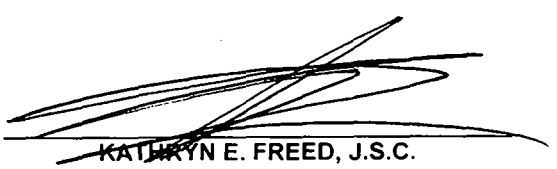
ORDERED that this matter is referred to a Special Referee for the purpose of conducting an inquest as to the amount of indemnification to be awarded to defendant 171 Holding Corp.; and it is further

ORDERED that within 30 days of the entry of this order on the NYSCEF system, defendant 171 Holding Corp. shall serve a copy of this order on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date; and it is further

ORDERED that defendant 171 Holding Corp. is to serve a copy of this order, with notice of entry, on all parties within 30 days after the entry of this order; and it is further

ORDERED that this constitutes the decision and order of this Court.

12/03/2018
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE