[* 1]

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

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 109416/2009
RUTHERFORD, ANN
VS.
JDLC, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6
	7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant JDLC, Inc. is granted in accordance with the attached memorandum decision.

FILED

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/9/12

JUSTICE DORIS LING-COHAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

----------x

ANN RUTHERFORD,

Plaintiff,

-against-

JDLC, LLC, YAMASAK RESTAURANT CORP. and LE FIGARO CAFÉ, INC.,

Defendants.

----------x

Index No.: 109416/09

Motion Seq. No.: 002

DECISION/ORDER

DORIS LING-COHAN, J.:

BACKGROUND

Defendant JDLC, Inc. (JDLC) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and/or counterclaims asserted as against it, and for summary judgment on its cross claim against co-defendants Yamasak Restaurant Corp. (Yamasak) and Le Figaro Café, Inc. (Figaro), directing said co-defendants to defend and indemnify it in the underlying action based on theories of common-law and contractual indemnification.

The facts of the underlying personal injury action were stated in this court's earlier decision, dated May 26, 2010, and will only be reiterated here as necessary. Such decision denied JDLC's prior motion seeking summary judgment on its cross claim for breach of contract and contractual indemnification from

Yamasak and Figaro.

This case involves a slip and fall at a restaurant owned by Yamasak and Figaro at a premises that they leased from JDLC. At her examination before trial (EBT), plaintiff testified that she saw a shiny substance that was "water or grease" on the stairs as she ascended them after her fall, and that she did not remember there being any structural issues or defects on those stairs. Plaintiff's EBT, at 71, 81. Plaintiff stated that the substance on the stairs was muddy, dirty and grayish in color (*id.* at 81), and that she observed some water on the stairs. *Id.* at 13.

Buck S. Lee (Lee), president of JDLC, was also deposed in this matter. According to Lee, the lease between JDLC and Yamasak requires Yamasak, as the commercial tenant, to make repairs to the premises (Lee EBT, at 9-10), and that the only repairs JDLC ever made were repairs to the roof. *Id.* at 11. Lee further stated that he only visited the building twice a year, and that he never performed any repairs on the staircase where plaintiff fell. *Id.* at 13, 17.

Ross Isaacs (Isaacs), the restaurant manager for Yamasak and Figaro, testified for those defendants. Isaacs stated that the cleaning of the restaurant floors and the restaurant interior was the responsibility of the restaurant's dishwasher. Isaacs EBT, at 18. Further, Isaacs averred that he did not have any knowledge of the particular staircase on which plaintiff

allegedly fell, which leads from the main floor to the restrooms in the basement, ever being cleaned. *Id.* at 18-19. According to Isaacs, he was only aware of those stairs being swept, but never cleaned. *Id.* at 19.

Isaacs outlined the cleaning procedures for the basement and bathrooms as follows: those floors would be mopped and cleaned in the morning prior to opening the restaurant, the kitchen would be cleaned in-between the day and evening shifts, and there were no procedures in place for cleaning the stairs where plaintiff fell. *Id.* at 23. Isaacs further testified that no one had swept or cleaned the stairs on the day that plaintiff fell. *Id.* at 24. Isaacs also witnessed the accident, and averred that plaintiff fell because she was moving at a high rate of speed, she was not holding the handrail, and she lost her footing. *Id.* at 42-43. Isaacs also stated that plaintiff was walking unsteadily as she approached the stairs prior to her fall. *Id.* at 62.

According to the lease between JDLC and Yamasak:

> "Tenant shall, throughout the term of this lease take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto and when needed to preserve them in good working order.
>
> * * *
>
> Owner or its agents shall not be liable for any damage to property of tenant or of others entrusted or to employees of the building, nor for loss of or damage to any property of tenant by theft or otherwise, nor for any injury or damage to persons or property resulting from any cause whatsoever nature, unless caused by or due to the negligence of the owner, its

agents, servants or employees."

Motion, Ex. E.

The Rider to the lease states, in pertinent part:

> "Said-basement space shall be maintained by Tenant, at Tenant's expense, and the use thereof shall be at Tenant's own risk, without liability to landlord for damage to property or injury to person or persons."

Id.

The Rider also states that, if there is any conflict between the provisions of the main lease and the provisions in the Rider, the Rider prevails. *Id.*

In opposition to that portion of JDLC's motion seeking to dismiss the complaint as against it, plaintiff argues that the lease provides that the "Owner shall maintain and repair the public portions of the building, both exterior and interior." Motion, Ex. E. Further, the lease also states:

> "Owner or Owner's agents shall have the right (but shall not be obligated) 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 portions the building on 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."

Id.

Plaintiff asserts that this presents a question of fact as to whether such obligation included the staircase in question.

Moreover, plaintiff contends that an owner cannot escape liability for allowing nonstructural defects to exist in the premises. Also, plaintiff asserts that there were structural defects associated with the staircase, based on the affidavit of an expert. Opp., Ex. D. According to the expert, the following structural defects existed on the staircase where plaintiff fell, which, according to the expert, violate several provisions of the New York City Building Code (Building Code):

1. The top riser is approximately 20% higher than the next riser;

2. There is only one handrail associated with the stairway;

3. The handrail does not overlap the landing; and

4. There is a vertical post on the first step beneath the top landing onto which the sole handrail lies.

Id.

At her deposition, plaintiff testified that there were handrails on both sides of the staircase (Plaintiff's EBT, at 59, 63), that, at the time of her fall, she was holding on to the handrail on her left side (*id.* at 68, 70), that she fell on the fifth or sixth stair from the top of the staircase (*id.* at 67), and that she did not know what caused her to fall, just that her right foot slipped (*id.* at 70).

Further, according to her deposition testimony, plaintiff averred that the lighting on the stairs was dim and badly lit

(Plaintiff's EBT, at 61), and that the staircase was dark (*id.* at 69). Although plaintiff said that she did not know exactly what caused her to fall, she noted that there was debris on the stairs, and that, when she was being assisted back up the stairs after her fall, she looked directly at each step, which is when she noticed that there was water or grease on the stairs. *Id.* at 69- 71. At the time of the accident, the restaurant had been closed for approximately one-half hour.

Lee testified that lighting of the staircase was the responsibility of the tenant. Lee's EBT, at 19.

Isaacs stated that, prior to plaintiff's accident, other people had fallen down the stairs and there were complaints about the steepness of the stairs. Isaacs' EBT, at 64. Further, according to Isaacs, he told the owner of Yamasak and Figaro about the complaints, but the owner said that it was not his responsibility. *Id.*

Plaintiff also argues in her opposition that JDLC's motion is defective in that it fails to attach a copy of the pleadings and plaintiff's deposition transcript and, therefore, must be summarily denied. However, the court notes that the copy filed with the court does contain those documents.

Yamasak and Figaro opposed that portion of JDLC's motion seeking contractual and common-law defense and indemnification from them, arguing that, as stated in this court's previous

motion, such relief must be denied if there is a question of fact as to whether the accident was caused by a defect in the stair, due to the negligence of JDLC or Yamasak and Figaro. Yamasak and Figaro assert that those factual questions remain, even though depositions and discovery have now taken place. Yamasak and Figaro point to plaintiff's bill of particulars, in which she alleges that there was a hole in the stairs (Opp., Ex. B), as well as to the fact that JDLC has failed to rebut plaintiff's expert regarding lighting and handrail defects on the staircase.

In reply to Yamasak and Figaro's opposition, JDLC states that the Rider to the lease specifically states:

> "Tenant has examined and inspected the demised premises. Tenant agrees to accept possession of the demised premises 'AS IS' except as otherwise expressly provided herein. Landlord shall not be responsible for making any improvements, alterations or repairs therein or for spending any other money to prepare the demised premises for tenant's occupancy, except as expressly provided herein. All other improvements and alterations to the demised premises prior to or at any time after the commencement of the term of this lease shall be made at tenant's sole cost and expense, in accordance with the provisions of this lease."

Motion, Ex. E.

JDLC argues that these lease provisions vitiate any argument by co-defendants to place liability for maintenance of those stairs on JDLC.

JDLC has replied to plaintiff's opposition, arguing that plaintiff has failed to raise any questions regarding JDLC's liability. According to JDLC, plaintiff alleges that her fall

was due to a slimy substance on the stairs, and affirmatively states that there were no structural defects on the steps. Therefore, JDCL maintains that, as an out-of-possession landlord, it cannot be held responsible for non-structural maintenance conditions which it did not cause nor of which it had no actual or constructive notice.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That portion of JDLC's motion seeking summary judgment dismissing the complaint as against it is granted.

> "An out-of-possession landlord is not liable for personal injuries sustained on the premises unless the landlord retains control of the property or is contractually obligated to perform maintenance and

> repairs....
> Although a reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for **injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute**, this exception applies only where a specific statutory violation exists and there is a significant structural or design defect. **However, the plaintiff did not allege either a violation of a specific statutory safety provision or the existence of a significant structural or design defect** [emphasis added; internal quotation marks and citations omitted]."

Ingargiola v Waheguru Management, Inc., 5 AD3d 732, 733-734 (2d Dept 2004); *see also Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 (2d Dept 2006); *Nunez v Alfred Bleyer & Co., Inc.*, 304 AD2d 734 (2d Dept 2003).

In the case at bar, plaintiff proffers three arguments for denying that portion of JDLC's motion seeking to dismiss the complaint as against it: (1) JDLC, pursuant to the lease, was required to maintain and repair all public areas of the building, so that the staircase in the restaurant used by the restaurant's patrons is part of the public areas; (2) there were structural and design defects on the staircase, which renders an out-of-possession liable for personal injuries occurring in the demised premises; and (3) the motion is procedurally insufficient, lacking the pleadings and plaintiff's EBT. The court disagrees with each of these propositions.

First, the staircase is clearly within the demised portion of the restaurant, intended for use by the restaurant's patrons

and workers. There is not a scintilla of evidence that the staircase was used by general members of the public accessing the building outside of the restaurant. Hence, this argument is specious, and must fail.

Second, although plaintiff has provided the affidavit of an expert to assert that there were several Building Code violations, none of those violations are alleged to have contributed to plaintiff's accident.

Most of the statutory violations alleged by the expert concern the handrail. Not only did plaintiff testify that she was holding on to the handrail at the time that she fell, but she also never alleged that the handrail was defective, collapsed, or in any way caused her accident. *See Silverman v Blenheim Associates Realty Corp.*, 291 AD2d 214 (1st Dept 2002). Further, although the expert opines a violation in the top step riser being 20% higher than the next step, plaintiff did not fall from the top step, but five or six steps beneath the top step. Therefore, even if this constitutes a statutory violation, it played no part in plaintiff's accident.

As for the lighting on the staircase, plaintiff never alleged that the lighting caused her to fall. In fact, when ascending the stairs immediately after the accident, plaintiff, in the same lighting, was able to observe every detail of each step. Therefore, despite the expert's opinion as to the lighting

being a statutory violation, plaintiff has never alleged that she fell because of dim lighting; plaintiff testified that she fell because of some slippery substance on the stairs and never said that she could not see that substance.

Moreover, pursuant to the terms of the lease quoted above, maintenance and repair of the demised premises, except for structural repairs, was the duty of the tenant, and deposition testimony was adduced indicating that the tenant was responsible for lighting on the stairs.

Most importantly, the "claim that the defendant violated [certain statutory provisions]...was never pleaded in her complaint or bills of particulars and is otherwise without merit." *Chery v Exotic Realty, Inc.*, 34 AD3d 412, 414 (2d Dept 2006).

Although the court believes that JDLC has met its burden of demonstrating that the lease provisions evidence that JDLC had no duty to maintain or repair the area in which the accident occurred (*Meija v Era Realty Co.* (69 AD3d 816 [2d Dept 2010]; *Sparozic v Bovis Lend Lease LMB, Inc.* (50 AD3d 1121 [2d Dept 2008]), even if the court were to rule that JDLC had such a duty, plaintiff would still not be able to prevail.

According to plaintiff, the cause of her accident was some slippery substance on the stairs.

> "Generally, an out-of-possession landlord's liability for injuries caused by defective or dangerous conditions upon

> leased premises hinges on whether the landlord has retained sufficient control over the premises to be held to have constructive notice of the condition [internal quotation marks omitted]."

Massucci v Amoco Oil Company, 292 AD2d 351, 352 (2d Dept 2002).

> "A defendant who moves for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it."

Bloomfield v Jericho Union Free School District, 80 AD3d 637, 638 (2d Dept 2011).

There is no evidence that JDLC in any way caused a slippery substance to be on the staircase, and, even assuming that JDLC had actual or constructive notice of a slippery substance on the stairs, there is no evidence that there was sufficient time for it to remedy the situation prior to plaintiff's fall.

As a consequence of the foregoing, the court is unpersuaded by plaintiff's second argument concerning the alleged Building Code violations or the presence of a hazardous condition of which JDLC had actual or constructive notice.

Third, as mentioned above, the motion papers filed by JDLC contain both the pleadings and plaintiff's EBT and, therefore, plaintiff's third argument for denying JDLC's motion is unavailing.

Based on the foregoing, the complaint is dismissed as against JDLC.

That portion of JDLC's motion seeking indemnification from its co-defendants is denied as moot.

That portion of JDLC's motion seeking summary judgment directing Yamasak and Figaro to defend it in the action is granted.

> "Summary relief is appropriate on a claim for contractual defense where, as here, the lease agreement is unambiguous and clearly sets forth the parties' intention that a lessee provide a defense to the lessor for injuries sustained."

Maldonado v South Bronx Development Corp., 66 AD3d 612, 612 (1st Dept 2009).

Yamasak and Figaro's opposition to this branch of the motion rests on the fact that it is not obligated to provide defense for JDLC for claims arising from JDLC's own negligence. However, since it has been determined that JDLC is not liable for plaintiff's injuries, it is entitled to defense costs from Yamasak and Figaro.

Moreover, it is well-settled law that a contractual duty to defend is broader than a contractual duty to indemnify, and that the duty to defend is triggered whenever the allegations in the complaint even suggest the possibility of liability. As stated in *BP Air Conditioning Corp. v One Beacon Insurance Group* (8 NY3d 708, 714 [2007]),

> "A duty to defend is triggered by the allegations contained in the underlying complaint. The inquiry is whether the allegations fall within the risk of loss undertaken by the insured ... ."

Yamasak and Figaro have admitted that, pursuant to its lease and to protect itself, it purchased general commercial liability insurance in which it named JDLC as an additional insured. As an additional insured, JDLC would be entitled to defense costs, provided that the allegations in the complaint possibly engender liability on the part of JDLC. *Regal Construction Corp. v National Union Fire Insurance Company of Pittsburgh, Pa.*, 15 NY3d 34 (2010).

In the case at bar, the complaint filed by plaintiff presents the possibility that JDLC could be liable to plaintiff for her injuries under circumstances in which Yamasak and Figaro might be responsible. Hence, JDLC is entitled to be defended in the action by Yamasak and Figaro.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the branch of JDLC, LLC's motion for summary judgment seeking to dismiss the complaint as against it is granted and the complaint is severed and dismissed as against it with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the branch of JDLC, LLC's motion seeking an order that its co-defendants are required to defend it is granted; and it is further

ORDERED, that within 45 days of entry of this decision/order, JDLC is directed to submit an accounting of the costs incurred in defending this action, and co-defendants are directed to review such accounting and, should they agree with such costs, satisfy such defense costs incurred by JDLC, within 45 days from receipt of the accounting or provide specific reasons for their disagreement within such time. If the parties are unable to agree on the amount of the defense costs owed, after conferring, in an effort to resolve any disputes[1], a motion may be filed to set such costs with a copy of this decision/order attached, within 120 days of the date of entry; and it is further

ORDERED that the branch of JDLC, LLC's motion seeking an order that its co-defendants are required to indemnify it is denied as moot; and it is further

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

ORDERED that within 30 days of entry of this order, JDLC, LLC shall serve a copy upon all parties with notice of entry.

Dated: 1/9/12

FILED

JAN 13 2012

Doris Ling-Cohan, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

[1] The motion shall indicate the date and time of such conversation.