

**Jean-Baptiste v 153 Manhattan Ave. Hous. Dev.  
Fund Corp.**

2012 NY Slip Op 31860(U)

June 29, 2012

Sup Ct, New York County

Docket Number: 103042/07

Judge: Paul Wooten

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

FRANCOISE JEAN-BAPTISTE,  
Plaintiff,

- against -

153 MANHATTAN AVENUE HOUSING DEVELOPMENT  
FUND CORP.,  
Defendants.

153 MANHATTAN AVENUE HOUSING DEVELOPMENT  
FUND CORP.,

Third-party Plaintiff,  
- against -

L'EXQUISITUS, INC. d/b/a L'EXQUISITUS,  
Third-party Defendants.

INDEX NO. 103042/07

MOTION SEQ. NO. 004

**FILED**

RECEIVED

JUL 17 2012

JUL 16 2012

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

The following papers numbered 1 to 6 were read on this motion for summary judgment by third-party defendant.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4</u>
Replying Affidavits (Reply Memo) _____	<u>5, 6</u>

Cross-Motion:  Yes  No

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

In motion sequence 004, third-party defendant L'Exquisitus, Inc. d/b/a L'Exquisitus (L'Exquisitus) moves for summary judgment dismissing the third-party claims of defendant/third-party plaintiff 153 Manhattan Avenue Housing Development Fund Corp. (defendant), and for a declaration that any contractual indemnification owed to defendant is limited to those amounts not covered by insurance. In motion sequence 005, defendant moves for summary judgment dismissing the complaint and for summary judgment on its third-party complaint for contractual indemnification.

## BACKGROUND

This is a trip and fall action. The complaint alleges that on October 30, 2006, at approximately 11:00 a.m., plaintiff suffered serious injuries as a result of falling down a ladder or staircase leading from the kitchen owned by L'Exquisitus to the basement. At that time, plaintiff was employed by L'Exquisitus, which leases space at 153 Manhattan Avenue, New York, New York (premises) from defendant. Plaintiff subsequently brought this action against defendant for negligence and violations of Labor Law § 240(1). Defendant thereafter brought a third-party action against L'Exquisitus based upon indemnification.

In motion sequence 004 L'Exquisitus moves for summary judgment dismissing the third-party complaint. First, L'Exquisitus states that plaintiff's direct suit against L'Exquisitus was discontinued due to a worker's compensation bar. It asserts that it and defendant had entered into a lease which contained the following provision: "Tenant [L'Exquisitus] shall indemnify and save harmless owner [defendant] against and from all liabilities, obligations, damages .. for which owner shall not be reimbursed by insurance, including reasonable attorney's fees paid, suffered or incurred as a result of any breach by Tenant ... ." L'Exquisitus claims that defendant is insured by a United National primary policy with limits of \$1 million per occurrence.

L'Exquisitus argues that defendant is precluded from suing for common law indemnification because plaintiff did not suffer a "grave injury" as defined by section 11 of the Workers Compensation Law. According to L'Exquisitus plaintiff suffered a serious injury in 2006 as a result of the accident, but that she has basically recovered, although still suffering from a mild hemiparesis on her left side and some mild cognitive defects. L'Exquisitus contends that although she is presently unemployed, plaintiff, based on medical reports and her deposition testimony has had other factors preventing her from steady employment, such as her age and language problems. Even assuming that plaintiff is unemployable, L'Exquisitus states that there is no evidence that brain injury is the sole cause of that condition. L'Exquisitus

claims that the alleged lack of a basis for grave injury prevents defendant from a recovery based on common law indemnification. Further, L'Exquisitus argues that, based on the allegedly unambiguous terms of the subject lease, any contractual indemnification owed by defendant is limited to those amounts not covered by defendant's insurance policy.

In opposition, defendant claims that L'Exquisitus' motion must be denied because L'Exquisitus failed to meet its burden of proof to establish that plaintiff did not suffer a grave injury as defined by the Worker's Compensation Law. Defendant also claims that it would be premature to dismiss its claim for contractual indemnification as the duty to indemnify does not arise until the party seeking indemnification makes payment to a third-party, which has not occurred here.

In opposition, plaintiff maintains that the portion of L'Exquisitus' motion regarding common-law indemnification should be denied because it is clear that plaintiff has suffered a "grave injury" within the meaning of Worker's Compensation Law § 11. Specifically, plaintiff asserts that she suffered a brain injury as a result of her fall which required surgery and an extended hospital stay and she can no longer work "in any capacity," and thus is deemed to have suffered a "permanent total disability."

In reply, L'Exquisitus asserts that plaintiff, like defendant, fails to meet her burden in opposing its motion to demonstrate by admissible medical evidence that she suffered a "grave injury" as defined by Worker's Compensation Law § 11.

Defendant moves for summary judgment in motion sequence 005, dismissing the complaint, and in support asserts that plaintiff has failed to specify a cause of action for negligence, whereas to date she has not provided an explanation as to where and how the accident happened and the reason for its occurrence. According to defendant, plaintiff cannot bring a claim under the Labor Law because she has failed to plead a specific statutory or code violation for which defendant can be held liable. Defendant contends that the Labor Law does

not apply to the allegations made in the complaint. Finally, as an out-of-possession owner, defendant claims that it owes no duty of due care to plaintiff with respect to the ladder or stairs at the premises. Defendant also moves for summary judgment on its third-party complaint, contending that L'Exquisitus is bound to indemnify defendant pursuant to the lease.

Plaintiff opposes defendant's motion, claiming that the motion is untimely. There was a court order requiring motions for summary judgment to be made no later than August 21, 2011, and this motion was made on September 8, 2011. Plaintiff requests that defendant's motion be denied on this procedural ground.

Plaintiff also opposes the motion because defendant has failed to prove as a matter of law that it is not liable for plaintiff's injuries. Plaintiff argues that her accident was the result of a defective and hazardous condition involving the staircase leading to the basement of the premises and the surrounding area. While the complaint alleges that a defective ladder was the source of the accident, plaintiff's papers assert that a makeshift metal staircase in place at the time that the space was under some construction was the actual defect. She states that the occurrence and the details of the accident have been clearly confirmed by people who have testified, such as Guito Lavoile, the owner of L'Exquisitus and plaintiff's former employer, although there were no eyewitnesses to the accident. Plaintiff contends that not only was the area in question a hazardous location, but it was in violation of several sections of the New York City Building Code (NYCBC).

Plaintiff proffers that defendant, in its capacity as owner of the premises as well as the lessor, had a duty to maintain a safe premises. Although defendant is an out-of-possession owner, it allegedly retained a right to enter the premises to make repairs, pursuant to the lease.

Plaintiff asserts that defendant was bound to a constructive notice of certain defects on the premises where it was authorized to enter. Plaintiff maintains that there are issues of material fact that must be determined by a trier of fact, such as whether defendant has a duty to protect

her from the kinds of hazards she encountered, and whether the hazard alleged by plaintiff caused her accident.

Despite allegedly having permanent brain and head injuries, plaintiff maintains that she has presented a clear case for negligence, relying on circumstantial but strong and reasonable evidence. The opposition papers include deposition testimony, photographs of the staircase, and an affidavit from an expert witness-engineer, Nicholas Bellizzi, which describes, the condition of the staircase, declaring it a dangerous site in violation of sections 27- 375 (c), 27-375(d)(3), 27-375(e)(1) and 27-375(f) of NYCBC. Plaintiff avers that there is sufficient proof as to the circumstances which led to this accident, which prevents dismissal of her complaint. Plaintiff asserts that, due to the nature of her injuries, she should be subject to a lesser burden of proof, where negligence can be reasonably inferred.

In reply, defendant contends that plaintiff's description of the accident remains largely speculative. Defendant maintains that the NYCBC violations relate to a previously unpled theory of liability which arises from a bill of particulars improperly amended by plaintiff, made after the filing of her note of issue and without court approval. Defendant claims that the expert affidavit is written by one who had not been physically present at the premises, and who had relied entirely on photographs. Additionally, defendant also asserts that plaintiff failed to disclose Bellizzi as an expert until the service of her opposition papers, despite defendant's previous demand of the disclosure and identification of experts. According to defendant this is a sufficient reason for the Court to reject the affidavit. Even if this Court does not reject the affidavit, defendant regards it as inadequate and unresponsive. Defendant argues that plaintiff has failed to identify the accident in a way that would not preclude a finding of a causal connection between a statutory violation and the occurrence of the accident.

Regarding plaintiff's opposition which maintains that defendant's motion is untimely, defendant asserts that plaintiff misinterpreted the court order calling for a deadline for summary

judgment motions, and that the actual deadline was September 13, 2011. Therefore, defendant claims that its motion is timely.

L'Exquistius opposes the portion of defendant's motion regarding contractual indemnification, arguing that defendant has acted inconsistently by seeking judgment on this claim, yet calling L'Exquistius' motion for a declaration of its claim premature. Since both parties are seeking a judgment favorable to their positions, L'Exquistius states that its interpretation of the lease is more accurate. L'Exquistius seeks a declaration that it does not have to indemnify defendant for any liability which is reimbursed or otherwise covered by defendant's insurer.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth*

*Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

### DISCUSSION

Defendant seeks dismissal of the complaint on the ground that plaintiff cannot demonstrate a cause of action in negligence. Apparently, as a result of her injuries, plaintiff's perception of the events leading up to the accident are not clearly defined. The complaint alleges a defective ladder and violation of the Labor Law. The pertinent Labor Law statute, section 240(1), would not be applicable to the instant case because in order to fall under the purview of section 240(1) of the Labor Law, the task in which an injured employee was engaged must have been performed during the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure (*see Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [1st Dept 2009]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]). Plaintiff did not work for a contractor. Here, plaintiff was employed as a dishwasher by the restaurateur who owns L'Exquisitius.

Plaintiff's opposition papers do not raise the Labor Law violation, but raise entirely new matters, specifically violations of the NYCBC. This is an issue not alleged in her complaint, and as a result is improper because plaintiff has not sought leave to amend or supplement the complaint at any prior time. Moreover, plaintiff introduced this issue in an improperly amended bill of particulars.

As for general negligence, plaintiff concedes that she lacks full personal knowledge of the accident, but maintains that she has presented a valid cause of action. "To establish a prima facie case of negligence based wholly on circumstantial evidence, '[i]t is enough that



[plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred” (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d at 744 [1986], quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]).

For the first time, plaintiff alleges a defective staircase and in support submits deposition testimony from Rosmie Aubourg, plaintiff’s daughter, Tomas Pinilla, a superintendent employed by defendant, and Lavoile. Aubourg testified that she had told L’Exquisitius’s manager not to send plaintiff into the basement because it was “too dangerous” and that she had seen the stairs and that they were not safe. Aubourg further stated that the stairs were metal and “very narrow.” Pinilla testified that the staircase from the ground floor to the basement was very narrow and difficult for anyone to go down. He asserted that one had to squat down in order to get to the stairs because the ceiling was too close to the floor. Lavoile stated that, at the time of the accident, there was no handrail at the top of the stairs, and that one would have to bend over while getting onto the stairs as there was such a low ceiling.

While this evidence would possibly confirm an unsafe condition on the staircase capable of causing an accident, plaintiff must also connect the causation of the accident with defendant’s conduct.

“It is well settled that ‘[a] landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant’s expense, and liability is based on a significant structural or design defect that is contrary to a specific safety provision’” (*Howard v Alexandra Restaurant*, 84 AD3d 498, 498 [1st Dept 2011], quoting *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]).

Plaintiff refers to Provision 13 of the subject lease, entitled Access to Premises, which provides, in part, the following:

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 portion of the building or which owner may elect to perform, in the demised 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.

Here, the lease gives defendant the right and authority to reenter, inspect and repair the premises. While not expressly an obligation, the provision allows this access to defendant as an out-of possession owner. The last factor requires a showing of liability based on a significant defect contrary to a specific safety provision. The affidavit from Bellizzi is the primary evidence, with specific claims of code violations pertaining to a defective condition on the premises. However, as defendant argues, plaintiff's failure to disclose the expert opinion when requested is prejudicial, particularly when the affidavit is the most significant proof of negligence brought against defendant. In addition, plaintiff has not shown that Bellizzi was actually present at the premises to conduct an investigation, and his analysis is based on observations of unauthenticated photographs.

The Court finds that the affidavit from Bellizzi is insufficient to establish that defendant was responsible for a significant structural or design defect that specifically violated a safety code or standard. Outside of the Bellizzi affidavit, plaintiff has failed to show that defendant's conduct was connected to violations of safety provisions which gave rise to this accident. Accordingly, defendant is entitled to summary judgment dismissing the complaint.

The Court now turns to L'Exquisitus' motion for summary judgment. The third-party action is essentially one of indemnification. Both parties move for a determination as to the extent of L'Exquisitus' liability to defendant based on the lease. "[A] cause of action based on a contract of indemnification does not arise until liability is incurred by way of actual payment" (*Travelers Indemn. Co. v LLJV Dev. Corp.*, 227 AD2d 151, 154 [1st Dept 1996]). However, a conditional judgment may be entered when indemnification is based upon an express contract

to indemnify against loss and the party seeking indemnification is free from any negligence (see *Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 300 [1st Dept 2007], citing *Ortiz v Fifth Ave. Building Assoc.*, 251 AD2d 200 [1st Dept 1998]).

"It is well settled that a contractual provision that is 'clear ... on its face must be enforced according to the plain meaning of its terms'" (*D.B. Zwirn Special Opportunities Fund, L.P. v SCC Acquisitions, Inc.*, 74 AD3d 530, 532 [1st Dept 2010], quoting *Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 140 [1st Dept 2008]). The lease clearly states the terms of L'Exquisitus' liability for indemnifying defendant. Now that defendant has been absolved of negligence, due to plaintiff's failure to provide a prima facie case of negligence, defendant is primarily interested in the reimbursement of costs and fees related to the litigation of this action. Relying on cases like *Diaz v Lexington Exclusive Corp.* (59 AD3d 341 [1st Dept 2009]), L'Exquisitus argues that it is entitled to a declaration as to the conditional nature of what it owes defendant. *Diaz*, through the interpretation of a contract clause, allowed for a landlord's reimbursement under any insurance policy in order for the tenant to be relieved of its contractual duty to indemnify.

This Court agrees with L'Exquisitus and shall grant judgment as to its interpretation of the lease provision. L'Exquisitus is only obligated to pay defendant those costs not covered by defendant's insurance policy.

Accordingly, it is

ORDERED that the portion of defendant/third-party plaintiff 153 Manhattan Avenue Housing Development Corporation's motion for summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the portion of defendant/third-party plaintiff 153 Manhattan Avenue Housing Development Corporation's motion for summary judgment on its contractual

indemnification claim is denied; and it is further,

ORDERED that third-party defendant L'Exquisitus Inc., d/b/a L'Exquisitus' motion for summary judgment is granted to the extent of granting its declaration that it is obligated to indemnify defendant/third-party plaintiff 153 Manhattan Avenue Housing Development Corporation only for those costs not covered by defendant/third-party plaintiff's insurance policy or policies; and it is further,

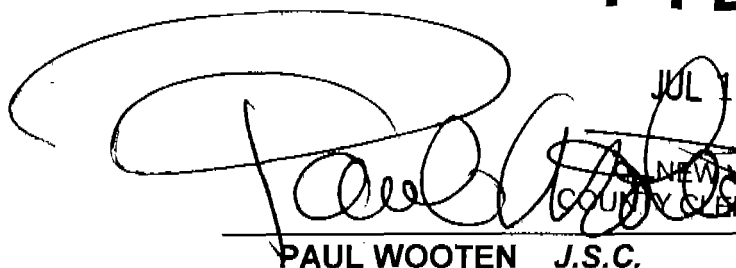
ORDERED that defendant/third-party plaintiff 153 Manhattan Avenue Housing Development Corporation is directed to serve a copy of this order, with Notice of Entry, upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**FILED**

JUL 17 2012

NEW YORK  
COUNTY CLERK'S OFFICE



PAUL WOOTEN J.S.C.

Dated: 6-29-12

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE