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

PRESENT: HON. PAUL WOOTEN Justice PART 7

JOSE GOMEZ and EVELYN GOMEZ,

Plaintiff,

-against-

BRODSKY ORGANIZATION, INC., BRODSKY ORGANIZATION LLC, 12 EAST 86TH STREET LLC, and DEAN AND DELUCA MADISON AVENUE, INC.,

Defendants.

INDEX NO. 104142/08

MOTION SEQ. NO. 004

The following papers were read on this motion for summary judgment and cross-motion.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☒ Yes ☐ No

This is an action for personal injuries alleged sustained by Jose Gomez (plaintiff) and Evelyn Gomez derivatively, on November 28, 2005 on a defective staircase located inside the Dean & Deluca grocery store located at 12 East 86th Street, New York, New York a/k/a 1150 Madison Avenue, New York, New York (the premises). Defendants Brodsky Organization LLC s/h/a Brodsky Organization, Inc. (Brodsky) and 12 East 86th Street LLC (12 East 86th) move, pursuant to CPLR 3212, for an order: (1) granting them summary judgment dismissing the complaint and all cross claims against them; or in the alternative, (2) granting 12 East 86th summary judgment on its claim for contractual indemnification against defendants Dean & Deluca Madison Avenue, Inc. (Dean & Deluca Madison) and Dean & Deluca, Inc. (Dean & Deluca). Plaintiff cross-moves to supplement the bill of particulars (BP) to allege additional

violations of statutes, codes, and standards.

BACKGROUND

12 East 86th is the owner of the premises. Pursuant to a lease dated September 12, 2002, 12 East 86th leased "a portion of the ground floor and a portion of the basement of the Building as shown on Exhibit 'B'" to Dean & Deluca Madison (Lechleitner Affirm., Exh. H, ¶ 1.02). Dean & Deluca Madison runs a grocery store within the demised premises.

Plaintiff testified that he was working at Dean & Deluca at the time of the accident (Plaintiff EBT, at 24-25). According to plaintiff, his accident took place on stairs that were located in the middle of the store near the manager's office that led to the basement (*id.* at 30-31). Plaintiff was going down the stairs to speak with his supervisor, Geraldo (*id.* at 33). Plaintiff stated that he attempted to take a step down the stairs and slipped; the stair that he slipped on "felt deep" (*id.* at 88-89). Plaintiff was unable to maintain his hold on the handrail because it was too big (*id.* at 89-94). Plaintiff struck his head on a low ceiling directly above the ninth tread of the stairway, and then fell to the bottom of the stairway (*id.* at 94-96). Plaintiff allegedly suffered a subdural hematoma, subarachnoid brain hemorrhage, traumatic epilepsy, grand mal seizure, and cognitive deficits as a result of his accident.

Wilce Robles (Robles) testified that he was the property manager for the residential and commercial portions of the building and maintained an office in the basement (Robles EBT, at 11, 14, 21). The building staff was not responsible for maintenance of the commercial space (*id.* at 38-40). Pursuant to a lease, Dean & Deluca Madison took possession of a portion of the ground floor and a portion of the basement (*id.* at 47). With the exception of water lines running through its space, Dean & Deluca Madison was responsible for all repairs within its demised premises (*id.* at 134). Robles did not access the basement office by way of the staircase where plaintiff fell (*id.* at 14-15).

Nelson Mendez (Mendez), the superintendent of the building, testified that he was not

required to make inspections of the commercial space of the building (*id.* at 9, 10, 27, 31, 32). The stairs leading between the ground floor and basement were part of Dean & Deluca Madison's space (*id.* at 36-37). According to Mendez, he had walked down the subject staircase in order to check on leaks which were brought to the building's attention by Dean & Deluca Madison (*id.* at 35-37). However, Mendez never received any calls from Dean & Deluca Madison about the stairs themselves (*id.* at 36). The building was only required to make repairs in the Dean & Deluca space if there was a leak coming into the store from the residential portions of the building (*id.* at 60). When Mendez used the staircase, he noticed that the stairs were steep, and that he had to duck his head so as not to hit the overhang (*id.* at 43, 44).

Margaret O'Connor (O'Connor) testified that she was the co-director of management for the building, employed by Urban Associates LLC (O'Connor EBT, at 6, 18). According to O'Connor, Brodsky was not the owner or manager of the building; the building was owned by 12 East 86th (*id.* at 8-9, 14-15). She testified that she never instructed the building staff to perform inspections of the space leased by Dean & Deluca Madison (*id.* at 53).

William Lettier (Lettier) testified that he was employed by Dean & Deluca as a retail manager (Lettier EBT, at 8). Lettier had used the subject staircase prior to the date of plaintiff's accident (*id.* at 16). He had used the staircase on a bi-weekly basis (*id.*). When he used the staircase, he did not find it difficult to hold on to the handrail (*id.*). Lettier also testified that the stairs were not too steep (*id.*). Lettier did not notice that any portion of the ceiling over the stairs was hanging low (*id.* at 17).

Plaintiff commenced this action on March 20, 2008, asserting four causes of action, seeking recovery for common-law negligence, loss of services, companionship, and consortium, compensatory damages, and punitive damages. In its answer, 12 East 86th admitted that it owned the subject premises (Answer, ¶ 6).

On March 19, 2009, Justice Stallman granted a motion by defendants Robert K.

Futterman & Associates, LLC and Ariel Schuster for summary judgment dismissing all claims and cross claims other than plaintiff's claims as against them. Plaintiff subsequently discontinued the action as against Robert K. Futterman & Associates, LLC and Schuster in a stipulation of discontinuance filed on March 30, 2009. In a stipulation of discontinuance/order dated April 16, 2009, plaintiff discontinued the action as against defendants Leslie Rudd, Leslie Rudd Investment Company, Beth Pritchard, Dean & Deluca Brands, Inc., Dean & Deluca of New York, Inc., and Dean & Deluca. In a subsequent order dated April 17, 2009, the caption was amended to eliminate named defendants other than Brodsky, 12 East 86th, and Dean & Deluca Madison.

On June 29, 2012, the court denied a motion (sequence number 003) by Dean & Deluca for summary judgment as moot in light of the stipulation of discontinuance/order dated April 16, 2009 and Justice Stallman's order dated April 17, 2009. Discovery in this matter is complete and the Note of Issue has been filed.

DISCUSSION

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]). The 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]).

A. Brodsky

To establish a claim of negligence, the plaintiff must establish the following elements: (1) the existence of a duty on the defendant's part as to the plaintiff; (2) breach of this duty; and (3) injury to the plaintiff as a result thereof (*see Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 59 [1st Dept 2006]; *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept 1996], *affd* 89 NY2d 824 [1996]). "Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property" (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519 [1st Dept 2011]; *see also Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv dismissed and denied in part* 73 NY2d 783 [1988]). "The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property" (*Balsam*, 139 AD2d at 296-297).

Defendants argue that Brodsky did not own, manage, control, operate or derive a special use from the subject premises at the time of the accident. To support their position, defendants submit an affidavit from Daniel Brodsky, a managing member of Brodsky (Brodsky Aff., ¶ 2). According to Brodsky, 12 East 86th and Urban Associates, LLC were the sole owner

and managing agent of the premises, respectively (*id.*, ¶ 3). Brodsky did not own, operate, control or have any other interest in the premises (*id.*, ¶ 4). Thus, defendants have made a prima facie showing that Brodsky did not owe plaintiff a duty of care.

Plaintiff argues that there are issues of fact as to whether Brodsky was the managing agent of the building and as to whether Brodsky had a direct or indirect ownership interest in the building. Plaintiff points out that: (1) the corporate offices of 12 East 86th and Brodsky are located in the same building; (2) Daniel Brodsky executed the lease on behalf of 12 East 86th; (3) the articles of organization of Urban Associates, LLC reveal that Nathan Brodsky was the organizer and manager of that entity, and its offices are located at the same address as Brodsky; (4) from 1993 through 2006, Brodsky spent approximately $460,000 on the subject building; (5) the building's property manager testified that he did not remember whether Urban Associates, LLC existed at the time of the accident, but he took orders directly from Nathan Brodsky; and (6) the building's co-director of management testified that Nathan Brodsky was the ultimate authority for the owner.[1]

However, plaintiff has failed to raise an issue of fact as to whether Brodsky owned, controlled or made a special use of the property. Even if Brodsky were the managing agent, it still could not be liable because it did not have complete and exclusive control over the demised space (*see Howard v Alexandra Rest.*, 84 AD3d 498, 499 [1st Dept 2011] [managing agent could not be liable absent complete and exclusive control of the demised space]; *Gardner v 1111 Corp.*, 286 App Div 110, 112 [1st Dept 1955], *affd* 1 NY2d 758 [1956] [managing agent not in complete and exclusive control is not liable for mere nonfeasance]). Moreover, plaintiff does not argue that Brodsky entirely displaced 12 East 86th's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Accordingly, Brodsky is

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[1] Plaintiff requested permission to submit a surreply at oral argument, which was denied by the court (Oral Argument Tr., at 15).

entitled to summary judgment dismissing the complaint and all cross claims as against it.

B. 12 East 86th

12 East 86th argues that it cannot be liable to plaintiff because it is an out-of-possession landlord and did not have any notice of any significant structural defects.

Plaintiff contends that12 East 86th had a contractual duty to perform structural repairs, and that the building's superintendent had actual notice of the inappropriate steepness of the staircase and the substandard headroom clearance. Plaintiff asserts that there is an issue of fact as to whether the entire stairway was demised to Dean & Deluca Madison. Plaintiff further argues that 12 East 86th retained the right to reenter the premises, and that significant structural defects existed in violation of the 1922 Building Code and 1968 Building Code.

Dean & Deluca Madison contends that 12 East 86th was not an out-of-possession landlord because it maintained an office and maintenance staff within the subject premises. In addition, Dean & Deluca Madison maintains that 12 East 86th reserved the right to reenter the premises pursuant to the lease, and that the allegedly defective conditions of the stairs, handrail, and ceiling are all structural in nature.

> "It is well settled that an out-of-possession landlord . . . is generally not liable for negligence with respect to the condition of the demised premises unless it '(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'" (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008], quoting *Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]).

"An out-of-possession landlord with a right of reentry may be held liable where it has constructive notice of a significant structural or design defect in violation of a specific statutory safety provision" (*Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [1st Dept 2011] [internal quotation marks and citation omitted]).

Contrary to Dean & Deluca Madison's and plaintiff's contentions, 12 East 86th was an

out-of-possession landlord with respect to the space leased to Dean & Deluca Madison. Pursuant to the lease, 12 East 86th leased "a portion of the ground floor and a portion of the basement of the Building as shown on Exhibit 'B'" to Dean & Deluca Madison (Lechleitner Affirm., Exh. H, ¶ 1.02). 12 East 86th's office was not located within the demised premises (Robles EBT, at 14-15). The building's superintendent testified that the staircase was part of Dean & Deluca Madison's space, and that 12 East 86th's employees only entered the space to make repairs if there were leaks coming from the residential portions of the building (Mendez EBT, at 36-37, 60).

Here, paragraph 15.01 of the lease states that "Tenant shall take good care of the Demised Premises. Tenant, at its expense, shall promptly make (x) all non-structural repairs in and about the Demised Premises . . . " (Lechleitner Affirm., Exh. H). Paragraph 15.02 of the lease states that:

> "Landlord, at its expense, shall keep and maintain the Building and its fixtures, appurtenances, systems (except as otherwise expressly set forth in this Lease) and facilities serving the Demised Premises, in working order, condition and repair and shall make all structural repairs, except for those repairs for which Tenant is responsible pursuant to any other provision of this Lease" (*id.*).

Therefore, the lease does not impose an obligation on 12 East 86th to repair or maintain the demised premises. Thus, 12 East 86th may only be liable for the condition of the demised premises based upon a right of reentry and a "significant structural or design defect that is contrary to a specific statutory safety provision" (*Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept 1996], *lv denied* 88 NY2d 814 [1996]).

Paragraph 19.03 of the lease provides as follows:

> "Landlord or Landlord's agent shall have the right upon reasonable advance request (except in emergency under clause (ii) hereof) to enter and/or pass through the Demised Premises or any part thereof, at reasonable times during reasonable hours, (i) to examine the Demised Premises . . . , and (ii) for the purpose of making such repairs or changes in or to the Demised Premises or in or its facilities . . . ."

(Lechleitner Affirm., Exh. H). Since the lease gave 12 East 86th the right to reenter the demised

premises, the issue is whether a significant structural or design defect existed that was contrary to a specific statutory safety provision.

In opposition to defendants' motion, plaintiff alleges violations of section 153 of the 1922 Building Code, sections 27-127, 27-128, and 27-375(f) of the 1968 Building Code, and 2008 Building Code, Chapter 10 Means of Egress section BC 1002. Plaintiff also cross-move to supplement the BP to allege violations of these statutes, codes, and standards.

Brodsky and 12 East 86th argue, in opposition to plaintiff's cross-motion, that: (1) plaintiff has not offered an excuse for failing to seek amendment prior to filing the note of issue, and (2) they would be severely prejudiced in facing additional allegations of statutory violations on the eve of trial and after their motion for summary judgment had already been filed.[2]

"'It is well settled that leave to amend or supplement pleadings should be freely granted . . . unless prejudice and surprise directly result from the delay in seeking the amendment'" (*Spiegel v Gingrich*, 74 AD3d 425, 426 [1st Dept 2010], quoting *Adams v Jamaica Hosp.*, 258 AD2d 604, 605 [2d Dept 1999]; *see also* CPLR 3025[b]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]). "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011] [internal quotation marks and citation omitted]). Pursuant to CPLR 3043(b), "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial."

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[2] Dean & Deluca Madison adopts the arguments made by Brodsky and 12 East 86th in opposition to the cross-motion.

Plaintiff's cross-motion to supplement the BP is granted. Plaintiff's original BP alleges violations of, among other things, New York City Building Code §§ C26-604.8 (a), (b), (d), (e), and (f), C26-604.9, C26-605.1, and Administrative Code § 27-375 (e) (2) (Verified BP, ¶ 14). Plaintiff's supplemental BP, citing additional statutory violations, does not include additional factual allegations or new theories of liability, and defendants have failed to demonstrate that they will be surprised or prejudiced by the additional allegations of statutory violations (*see Scherrer v Time Equities, Inc.*, 27 AD3d 208, 209 [1st Dept 2006] [supplemental bill of particulars, which cited additional statutory violations, should not have been struck because it merely amplified and elaborated on the theory in the original bill of particulars and raised no new theory of liability]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000] [plaintiff's service, without leave of court, of a supplemental bill of particulars identifying an Industrial Code provision was proper, since the allegations of Code violations merely amplified and elaborated upon the facts and theories set forth in the original bill of particulars and set forth no new theories of liability]).

Plaintiff's expert, Elise Dann (Dann), R.A., C.L.A., a registered architect who inspected the premises, alleges that defendants violated section 153, entitled "Interior stairs," of the 1922 Building Code (Dann Aff., ¶ 44).[3] Dann avers that the subject stairway fell within the definition of "interior stairs" because it was "required" as an exit from the subject cellar/subcellar "floor area" (*id.*, ¶ 39). Dann states that the 1922 Building Code requires that every required exit shall lead to a street, but does not state that it must lead directly to a street (*id.*, ¶ 41). According to Dann, "[t]he subject stairway leads to a street through the Dean & Deluca Madison Avenue, Inc. first floor with a travel distance of approximately 29 feet from the upper landing of the subject stairway to 'an open exterior space'" (*id.*, ¶ 43). Dann asserts that the stairway violated section

[3] Dann states that the building was constructed in 1923, and thus was required to comply with the 1922 Building Code (Dann Aff., ¶ 10).

153 (3), (4), and (6) of the 1922 Building Code in that: (1) it failed to meet the required width of 44 inches; (2) it provided inconsistent riser heights and tread depths; and (3) it failed to provide a handrail on both sides of the stairway (*id.*, ¶ 44). In addition, Dann states, based upon the condition and dimensions of the materials used, that the upper section and middle sections of the handrail were completed after the adoption of the 1968 Building Code (*id.*). He maintains that the handrail failed to comply with section 27-375(f) of the 1968 Building Code with respect to minimum finger clearance of one and a half inches at all points (*id.*). Dann also states that the stairway failed to provide and maintain a safe means of egress from the cellar, as required by sections 27-127 and 27-128 of the 1968 Building Code (*id.*, ¶ 46).

The applicability of the Building Code is an issue of law for the Court to decide (*see Buchholz v Trump 767 Fifth Ave.*, 4 AD3d 178, 179 [1st Dept 2004], *affd* 5 NY3d 1 [2005]). "Interior stairs" is not defined in the 1922 Building Code.[4] "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature" (*Matter of New York County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012] [internal quotation marks and citation omitted]). The Court of Appeals has held that when the language of a statute is clear and unambiguous, the statute should be construed so as to give effect to the plain meaning of the words (*People ex rel. Harris v Sullivan*, 74 NY2d 305, 309 [1989]). However, courts may be required to engage in statutory construction where there exists "doubt, obscurity, or ambiguity" as to the statute's correct interpretation (*2525 E. Ave. v Town of Brighton*, 33 Misc

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[4] Plaintiff alleges violations of section 153(3), 153(4), and 153(6) of the 1922 Building Code. Section 153(3) states that "[n]o stair or stairway required by this article as an exit shall have an unobstructed width of less than 44 inches throughout its length, except that hand-rails may project not more 3 ½ inches into such width." Section 15 (4) provides that "the treads and risers of stairs shall be so proportioned that the product of the tread, exclusive of nosing, and the riser, in inches, shall be not less than 70 nor more than 75, but risers shall not exceed 7 ¾ inches in height, and treads, exclusive of nosing, shall be not less than 9 ½ inches. Treads, other than winding treads, and risers, shall be of uniform width and height in any one flight." Section 153(6) states that "[s]tairs shall have walls or well secured balustrades or guards on both sides, and shall have hand-rails on both sides."

2d 1029, 1032 [Sup Ct, Monroe County 1962], *affd* 17 AD2d 908 [4th Dept 1962]).

A subsequent act in pari materia, or relating to the same subject matter, may be considered as an aid in the construction of an earlier statute or section (*see Nelson v Hanna*, 67 AD2d 820 [4th Dept 1979]; *Rozler v Franger*, 61 AD2d 46, 54 [4th Dept 1978], *affd* 46 NY2d 760 [1978]; McKinney's Statutes §§ 223, 75 [a]). However, it is not considered decisive (*id.*).

In *Maksuti v Best Italian Pizza* (27 AD3d 300 [1st Dept 2006], *lv denied* 7 NY3d 715 [2006]), the First Department held that:

> "the motion court, absent a definition of interior stairs in the 1916 Code, properly considered the definition thereof in the current Code, i.e., '[a] stair within a building, that serves as a required exit.' These stairs, which were located under a trap door and ran between the first floor and basement from within the premises, did not serve as a required 'exit,' i.e., as a required 'means of egress from the interior of a building to an open exterior space' and therefore are not interior stairs within the meaning of the current Code . . . Absent other interpretive aids, we find that the stairs in question are not interior stairs within the meaning of the 1916 Code, and absent allegations of other statutory violations, no issues of fact are raised as to whether defendant, an out-of-possession landlord, had constructive notice of the violation of any specific statutory provision" (*id.* at 300-301 [citations omitted]).

Therefore, the Court must consider how "interior stairs" was defined in subsequent versions of the Building Code.

Section 27-375 of the 1968 Building Code (Administrative Code § 27-375), entitled "Interior stairs," provides in subdivision (f) that interior stair "[h]andrails shall provide a finger clearance of one and one-half inches" (Administrative Code § 27-375 [f]). "Interior stair[s]" are defined as "stair[s] within a building, that serve[ ] as a required exit" (Administrative Code § 27-232). "Exit" is defined as "[a] means of egress from the interior of a building to an open exterior space . . ." (*id.*). Thus, the stairs at issue do not qualify as "interior stairs" under section 27-375 of the 1968 Building Code or the current code[5] (*see Cusumano v City of New York*, 15 NY3d

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[5] Although plaintiff relies on the definition of "means of egress" in the 2008 Building Code, this definition does not change the fact that "interior stairs" are defined as "stair[s] within a building, that serve[ ] as a required exit" and that an "exit" is defined as "[a] means of egress *from the interior of a building to an open exterior space* . . ." (Administrative Code § 27-232 [emphasis added]).

319, 324 [2010] ["the stairs from where plaintiff fell did not serve as an 'exit' as defined by the Administrative Code, but rather as a means of walking from the first floor to the basement"] [citation omitted]; *Katz v Blank Rome Tenzer Greenblatt*, 100 AD3d 407 [1st Dept 2012] [winding stairs from dining room to basement were not "interior stairs" since they "did not serve as a required exit, i.e., as a required means of egress from the interior of a building to an open exterior space"] [citation omitted]; *Gibbs v 3220 Netherland Owners Corp.*, 99 AD3d 621 [1st Dept 2012] [stairs leading from first floor to lobby were not "exit" stairs within the meaning of the 1968 Building Code]; *see also Union Bank & Trust Co. of Los Angeles v Hattie Carnegie, Inc.*, 1 AD2d 199, 200 [1st Dept 1956] [stairs which led from fitting room to main salon of business establishment were not "required exit stairs" under Administrative Code § C26-292.0]). Therefore, "[a]bsent other interpretive aids, [the Court finds] that the stairs in question are not interior stairs within the meaning of the [1922] Code" (*Maksuti*, 27 AD3d at 301).

In support of their contention that sections 27-127 and 27-128 of the 1968 Building Code[6] (former Administrative Code §§ 27-127, 27-128) are sufficient predicates for liability against an out-of-possession landlord, plaintiff cites *Kraus v Caliche Realty Estates* (289 AD2d 9 [1st Dept 2001]). However, more recent cases hold that sections 27-127 and 27-128 are general safety provisions that cannot serve as a basis for liability against an out-of-possession landlord for a structural defect (*Kittay v Moskowitz*, 95 AD3d 451, 452 [1st Dept 2012]; *Ram v 64th St.-Third Ave. Assoc., LLC*, 61 AD3d 596, 597 [1st Dept 2009]; *O'Connell v L.B. Realty Co.*, 50 AD3d 752, 753 [2d Dept 2008]; *Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [1st Dept 2005]).

Since plaintiff has failed to raise an issue of fact as to whether there was a significant

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[6] Section 27-127 of the 1968 Building Code provides, in relevant part, that "[a]ll buildings and all parts thereof shall be maintained in a safe condition." Section 27-128 of the 1968 Building Code states that "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities."

structural or design defect that violated a specific safety provision, the complaint and all cross-claims must be dismissed as against 12 East 86th. As noted by the First Department in *Devlin v Blaggards III Rest. Corp.* (80 AD3d 497, 498 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]), "[t]hat conclusion is not affected by whether or not [the out-of-possession owner] had knowledge of the condition prior to the accident. . . ."

Accordingly, the Court need not consider the branch of 12 East 86th's motion seeking contractual indemnification because 12 East 86th requested this relief in the alternative (Defendants' Notice of Motion, at 1; Lechleitner Affirm., ¶ 4). In any event, given that the complaint has been dismissed as against 12 East 86th, the issue of indemnification is academic (*see Reyes*, 50 AD3d at 498 ["in light of our dismissal of the complaint as against (the out-of-possession landlord), the question of indemnification is academic"]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 004) of defendants Brodsky Organization LLC s/h/a Brodsky Organization, Inc. and 12 East 86th Street LLC for summary judgment is granted and the complaint and all cross-claims are hereby severed and dismissed as against defendants Brodsky Organization LLC s/h/a Brodsky Organization, Inc. and 12 East 86th Street LLC with costs and disbursements to said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further,

ORDERED that plaintiff's cross-motion seeking leave to supplement the bill of particulars is granted and plaintiff has thirty days from the date of this Order to serve is supplemental bill of particulars upon all parties; and it is further;

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that counsel for defendants Brodsky Organization LLC s/h/a Brodsky

Organization, Inc. and 12 East 86th Street LLC is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 1/18/13

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST