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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 103044/2009
DUFF, COLLEEN
vs.
646 TENTH AVENUE
SEQUENCE NUMBER : 009
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: July 30, 2013

_____, J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
   ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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COLLEN DUFF,

Plaintiff,

- against -

646 TENTH AVENUE, LLC WEST SIDE MANAGEMENT CORP., J.L. HEATING & CONTRACTING, LLC, HI-RISE LAUNDRY EQUIPMENT CORP. and THE HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Defendants.

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Index No. 103044/09

J.L. HEATING & CONTRACTING, LLC,

Third-Party Plaintiff,

- against -

M.J.D. BUILDING MAINTENANCE LLC,

Third-Party Defendant.

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Third-Party
Index No. 590197/11

JOAN A. MADDEN, J.:

Motion sequence numbers 009, 010, 011, and 012 are consolidated for disposition.

In motion 009, third-party defendant M.J.D. Building Maintenance LLC (MJD) moves, pursuant to CPLR 3212, for summary judgment on its counterclaims and for dismissal of the third-party complaint.[1]

In motion 010, defendant/third-party plaintiff J.L. Heating & Contracting, LLC (JL) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross

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[1]It also seeks dismissal of all cross claims against it, but there are none.

claims against it.

In motion 011, defendants 646 Tenth Avenue, LLC (646) and West Side Management Corp. (WSM) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against them, or, in the alternative, for common-law indemnification from JL.

In motion 012, 646 and WSM move, pursuant to CPLR 2308, for an order punishing nonparty witness Dr. Miguel Pineda (Pineda) for contempt of court for failing to comply with judicial subpoenas, or, in the alternative, pursuant to CPLR 3124, for an order compelling Pineda to submit to a deposition.

Background

During the relevant time period, defendant 646 owned the premises located at 646 Tenth Avenue, New York, New York (Premises), and leased apartment 3C (Apartment) to Amy Sarola and Raymond Sarola. Plaintiff Collen Duff (Duff), a resident of Pennsylvania, was visiting and staying with her high school friends, the Sarolas, the tenants of the Apartment. Duff alleges that, on December 28, 2008, while taking a shower in the Apartment, she suffered severe injuries caused by a sudden burst of scalding water. This action ensued.

The complaint alleges that WSM was the managing agent for the Premises and, together with 646, was in possession and control of its common areas, including the hot water mechanical system. Allegedly, 646 retained JL to maintain the hot water mechanical system, and either 646, or WSM, or both, retained defendant Hi-Rise Laundry Equipment Corp. to operate a laundry in the basement of the Premises. Also, either 646, or WSM, or both, retained defendant The

Hartford Steam Boiler Inspection and Insurance Company (Hartford)[2] to maintain the hot water mechanical system. Duff alleges that defendants failed to properly control and limit the hot water temperature and pressure of the bathtub and shower, and this negligence proximately caused her injuries.

JL commenced a third-party action against MJD, the superintendent of the Premises, alleging that, prior to December 28, 2008 (the date of the accident), MJD personnel performed maintenance work on the Premises' hot water mechanical system. JL contends that if Duff has suffered an injury as described in her complaint, then the injury would have been caused by MJD's negligence. In the event of a judgment against JL, the third-party complaint seeks indemnification, or contribution, or both from MJD.

MJD's answer to the third-party complaint contains one counterclaim seeking a finding that, in the event that JL sustained any damages as alleged in the third-party complaint, said damages were caused by its own negligence or other wrongdoing, and not because of any negligence or wrongful act on the part of MJD.

According to Duff's deposition testimony, she was in the shower approximately eight minutes prior to the accident (Duff dep tr at 110). She turned on the water prior to entering the bathtub/shower to obtain a comfortable temperature (*id.* at 114, 118). There was one valve ("knob") which she turned in a semi-circular motion (*id.* at 115-116, 121). She tested the water temperature before entering the shower (*id.* at 119). She found it difficult to obtain a comfortable temperature and turned the knob for about two to three minutes before entering the shower (*id.* at

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[2]The action was discontinued against Hartford pursuant to a stipulation of discontinuance dated February 10, 2011 (exhibit F to affirmation of Michael White, Esq.).

121). She recalled having to adjust the temperature of the water several times while showering prior to the accident because it kept changing by getting too hot (*id.* at134-135). As to the accident, she testified: "So I hit the apparatus on the spout to get the water that I knew was too hot away from me. My feet were directly under the spout, and so it came out of the spout and got my feet" (*id.* at 135). She testified that she hit the spout so as to move it away rather than try to turn the valve because she did not know in which direction to turn it to make the water cold (*id.* at 144-145). After leaving the shower, she put some cold water on her feet, but that did not help. Later that evening, an ambulance transported her to a hospital (*id.* at 157).

Based upon her verified bill of particulars, Duff suffered (1) scalding burns (second and third degree) to both feet and toes, (2) severe blistering, (3) deep thermal burns to the left foot and left 2nd to 5th toes and to the right great toe, (4) surgical repair of burn sites, (5) severe pain, (6) horrific scarring, (7) inability to ambulate, (8) contracture of the skin at the burns site, and (9) severe embrassment, and mental anguish.

JL, 646, and WSM each move for dismissal of the complaint. For the reasons discussed below, all motions are denied based on the existence of triable issues of fact. The motion by 646 and WSM for sanctions or to compel a nonparty deposition is denied as moot.

Discussion

Motion 009

Third-party defendant MJD moves for summary judgment on its counterclaim, and for dismissal of the third-party complaint. Its counterclaim alleges that, in the event that JL incurs damages, such damages will have been caused by its own negligence or other wrongdoing, and not because of any negligence or wrongdoing on the part of MJD. It seeks indemnification or

contribution from JL for the excess paid by it over its equitable share of the judgment. However, there can be no judgment against it in the main action, because it is not a party thereto. Hence, in effect, its purported counterclaim is merely a defense to JL's third-party complaint.

The third-party complaint seeks either contribution or indemnification from MJD in the event that JL becomes liable. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability" of the parties (*Godoy v Abamaster of Miami,* 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]).

"The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 [1st Dept 1999]). To the extent that JL is found liable, although it was MJD that was negligent, common-law indemnification is available as a remedy (*see Edwards v BP/CG Ctr. I, Inc.*, 102 AD3d 413, 414 [1st Dept 2013] ["In light of the issue of fact whether its employee created the dangerous condition resulting in plaintiff's injuries, Temco's common-law indemnification claim against Pro–Quest was correctly permitted to proceed"]). "To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work" (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

In arguing that it cannot be liable to JL, because of the absence of wrongdoing on its part, MJD relies on the following testimony: MJD is owned and operated by Salvatore Molinaro

(Molinaro) (Molinaro dep tr at 7, exhibit I to affirmation of Julie A. Tribble, Esq.). Molinaro worked as the superintendent of the Premises. His duties included responding to issues regarding tenant apartments. Molinaro assesses the situation. If he is able to correct it he does. If not, he reports back to WSM so that the appropriate vendor can be dispatched (Orchid Mora dep tr at 20-21, exhibit V to Tribble affirmation). Molinaro testified that his duties did not include the inspection of the boiler system at the Premises on a regular basis (Molinaro dep tr at 197). He would typically check the boiler room to see if water was leaking, but he would not check the temperature or the pressure (Molinaro dep tr at 198-200). He did not perform any maintenance on the boiler system at the Premises (Molinaro dep tr at 227).

MJD contends that Molinaro has responded to complaints of lack of heat or no heat in apartments at the Premises at times, and, on occasion, he manually introduced additional water into the heating system by use of a pressure regulator valve. However, MJD contends further, JL's own testimony confirms that Molinaro's use of this valve would have no effect on the hot water distributed throughout the Premises (*see* Joseph Lacertosa dep tr at 24, exhibit J to Tribble affirmation). According to MJD, the evidence shows that Molinaro never performed any other work or touched any devices within the boiler room in connection with his duties at the Premises, and he did not perform any work on the hot water system; any work performed on the heating system would have had no effect on the hot water distributed throughout the building.

MJD also cites the testimony of property manager Orchid Mora, an employee of WSM. According to this testimony, 646 and WSM never received any complaints of excessive hot water at the Premises. Raymond Sarola and Amy Sarola each testified that there were never any issues or complaints made regarding the temperature of the hot water in the Apartment. Hence, there is

no evidence showing that MJD had actual or constructive notice of the alleged defect.

MJD also relies upon the affidavit of its expert, Daniel G. Misa (Misa), a licensed plumber and the owner and president of "DGM Industries, Inc" (exhibit W to Tribble affirmation). Misa states that, on October 6, 2011, he personally inspected the Premises, and the heating and water distribution systems. He states that JL installed a "Watts Model T1156F Pressure Regulating Valve" to continuously introduce water into the heating system, but it is not capable of automatically maintaining sufficient pressure in the heating system without lifting the lever and manually introducing water into the system (Misa aff ¶¶ 8-10). This led to complaints of lack of heat. Molinaro appropriately responded by manually introducing additional water into the heating system, but this had no effect on the domestic hot water supply (i.e. the water for the sinks, showers, and bathtubs) (*id.*, ¶¶ 12-13).

In essence, Misa lays blame on JL. He opines that JL's installation of the heating system deviated from and violated acceptable industry standards. JL installed a "Hot Water Tempering Valve," Model N170-M2, manufactured by the Watts Regulator Company. JL also installed a required hot water re-circulating pump, but without the required Aquastat control to curtail the operation of the recirculating pump when it reaches a temperature within five to ten degrees of the setting of the Aquastat. Instead, JL allowed the circulating pump to operate continuously (*id.*, ¶ 23).

Misa opines further that JL deviated from accepted standards by setting the boiler system and controls to always be operating at a temperature of no lower than 150 degrees and that the operating control high setting is set at 180-190 degrees (*id.*, ¶ 25). Misa also opines that JL failed to properly adjust the "Limit Stop Screw" of the bathtub faucet control device upon installation

(*id.*, ¶¶ 27-28). JL failed to follow the recommendations of the Weil McLain Boiler Company by not installing the "Dual Aquastat" operating control at a certain tapping near the top of the boiler, which allows for accurate and consistent temperature sensing (*id.*, ¶ 30).

In opposition, JL presented controverting evidence that is sufficient to demonstrate the existence of triable issues of fact as to the role played by MJD. For example, MJD seeks to downplay its participation in the maintenance of the boiler system. However, the record contains a work order from WSM, dated December 12, 2008, just two weeks prior to the incident. The work order pertains to a complaint by the tenant in unit 5C, stating that there was a week-long lack of heat and hot water. The work order noted similar complaints by other tenants. Molinaro signed the work order as "completed," and his notes on the order indicate that he thought that a new pressure regulator valve was needed, and he made an adjustment to raise the water pressure (exhibit D to affirmation of Charlie Green, Jr., Esq.).

MJD argues that JL has not provided any evidence that it performed any work on the boiler or that any maintenance work it performed had any effect on the hot water distribution system or the hot water distributed to the apartments in the Premises. As discussed above, the December 12, 2008 work order indicates that Molinaro thought that a new pressure regulator valve was needed, and he made an adjustment to raise the water pressure. Also, Orchid Mora testified that MJD responds to problems concerning the domestic hot water system (Mora dep tr at 12, exhibit G to Tribble affirmation).

JL also submitted its own expert affidavit from Harold M. Wasserman (Wasserman), a former Master Plumber in the City of New York, and a Professional Engineer in the State of New York (exhibit E to Green affirmation). Wasserman states that, on April 7, 2010, he conducted a

site inspection of the domestic hot water system. Wasserman opines that JL's work was properly performed. He found that water temperature of the shower/bathtub in the Apartment "reached equilibrium" and had minimal fluctuations. The shower temperature was code compliant and safe at 119 Fahrenheit (Wasserman aff, ¶ 6). The water temperature control valves were code compliant in that they were equipped with high-limit stops adjusted to a maximum hot water setting of 120 degrees Fahrenheit (*id.*, ¶ 7).

Wasserman faults 646 and WSM for permitting an unlicensed person (Molinaro) to perform work on the boiler and heating systems and to make decisions for outsourcing skilled technicians (*id.*, ¶ 10). Wasserman also challenged the findings of MJD's expert, Misa. For example, he states that Misa mentioned the installation of the temperature valve (mixing valve) at a recommended height. Yet, he asserts, this is a manufacturer's recommendation, not a requirement, and it only affects low and no-flow situations. With a recirculation system and limited space in the boiler room, there will never be a no-flow situation that can cause a scalding. If there were a deviation from proper care, it was with MJD for not routinely and periodically inspecting the tempering valve (*id.*, ¶ 21).

Contrary to MJD's assertion, the Court is not persuaded that Wasserman's affidavit is conclusory and speculative and without any probative value. To be sure, its value is limited since it is based upon an on-site inspection conducted on April 7, 2010, more than one year after the accident. Because of the passage of time, Wasserman's tests as to water temperature and whether it was code compliant (Wasserman aff, ¶¶ 6-7) is of little probative value (*see Haynes v Estate of Goldman*, 62 AD3d 519, 521 [1st Dept 2009] ["In this respect, Carrajat's opinion consisted of unfounded speculation, insufficient to raise a triable issue of fact as to the condition of the fourth

floor hoistway door at the time of the accident"]).

However, his on-site inspection also included an inspection of the boiler and its components in the boiler room as well as the plumbing fixtures in the bathroom of the Apartment. Moreover, MJD's own expert (Misa) conducted his on-site inspection on October 6, 2011, almost three years after the accident, although he states that his report is also based on photographs taken at the Premises, records of the New York City Department of Buildings, Plumbing Division, various manufacturer's installation guidelines and installation manuals for all products and components that were installed during the renovation of the Premises in 2005.

Hence, the flaws with JL's expert report pertain mainly to its own motion for summary judgment. The expert affidavit is not crucial to the opposition of MJD's motion since, as discussed above, there is sufficient evidence in the record of its involvement to create an issue of fact as to whether MJD played any role in the alleged accident. "Summary judgment on common law indemnification claims is only warranted where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*Tzic v Kasampas*, 93 AD3d 438, 440 [1st Dept 2012] [internal quotation marks and citation omitted]).

In its reply papers, MJD notes that neither 646 nor WSM take a position on the motion by MJD, which is not surprising in that they did not include MJD as a defendant in this action - MJD is in this action only because of the third-party complaint brought by JL. MJD argues that the experts of these entities lay the fault solely on JL, and not on MJD. However, that goes to issues of credibility, because it is JL's assertion that any finding of negligence on MJD's part could reverberate back to 646 and WSM; allegedly, they permitted MJD to perform work on the boiler and heating system for which it was not qualified.

The Court will not consider the procedural challenge to Wasserman's affidavit because it is raised for the first time in the reply papers.

Motion 010

JL installed the boiler, bathtubs, showers, and plumbing in the individual apartments of the Premises, which is six stories high and contains 17 residential units. However, JL argues that it is entitled to summary judgment as, prior to December 28, 2008, it did not create or have actual or constructive notice of any defective plumbing condition that allegedly caused Duff's injury. Also, JL argues that it had no duty to maintain the plumbing system, as it had no plumbing maintenance agreement following its 2005 plumbing installation and was called by the building management on a case-by-case basis.

JL also argues that, as a private contractor, it owed no direct duty to Duff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138-139 [2002]). Generally, a contractor does not owe a duty of care to a non-contracting third party (*Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469, 470 [1st Dept 2008]). A "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third-party" (*Espinal v Melville Snow Contrs.*, 98 NY2d at 138).

However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duty; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140 [citations omitted]). Furthermore, "when a contractor is alleged to have negligently

created or exacerbated a dangerous condition by its own affirmative acts, the scope of the defendant's duty should be determined under traditional negligence principles, without regard to any breach of contract theory" (*Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267 [1st Dept 2007]; *Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 214 [1st Dept 1999]). JL could be liable under prong number one (instrument of harm).

JL relies in large part on the testimony of the Sarolas, who stated that they used the shower almost daily, that they never complained about the showerhead or the tub spout, and they never had any trouble with the lever that turns on the water and controls the temperature. Moreover, JL contends, no one else in building complained about the shower from the time of JL's work in 2005 to the date of the incident. It asserts that Raymond Sarola even testified that he took a shower later in the evening following Duff's accident, or the very next morning, again without experiencing any problems with the shower, and that the temperature of the water did not fluctuate suddenly (Raymond Sarola dep tr at 19).

In opposition, 646 and WSM rely, in large, part on the expert affidavit of Misa, discussed above under motion 009. Accordingly, they argue that JL's negligence is responsible for the accident as it failed to follow (1) the Weil McLain Boiler Company's recommendations, (2) the Watts Regulator Company's recommendations for the necessary Aquastat for the hot water return recirculating pump, (3) the Watts Regulator Company's recommendations as to the N170-M2 tempering valve, and (4) the Watts Regulator Company's recommendations about installing the N170-M2 tempering valve at the proper height. As discussed above, these allegations are sufficient to demonstrate the existence of material issues of fact as to which, if any of the defendants, were negligent.

Motion 011

646 and WSM move for summary judgment dismissing the complaint and all cross claims and counterclaims against them or, in the alternative, for common-law indemnification from JL. Movants argue that they neither created the alleged condition nor had actual or constructive notice of it. In support, movants submit evidence showing that JL was the entity that installed the heating and hot water system at the building, including the shower, bathtub, boiler, all piping, and the mixing value. They contend that Duff, the Sarolas, Paul Brusco (a member of 646 and vice-president of WSM), Orchid Mora, and Joseph LaCertosa of JL all testified that there were no prior complaints that the water at the building was too hot. Movants also submit evidence as to the absence of any prior complaints.

Based on the foregoing, movants have made a prima facie showing that they neither created the alleged condition nor had actual or constructive notice of it, which, if not adequately opposed, would entitle them to summary judgment dismissing the complaint (*see Chorostecka v Kaczor*, 6 AD3d 643 [2d Dept 2004]). In *Chorostecka v Kaczor,* while taking a shower, hot water allegedly scalded the plaintiff when the shower head came off. The plaintiff sued the owner of the apartment building and the independent contractor that the owner hired to install the boiler and hot water heating system, alleging that defendants were negligent in supplying excessively hot water to her apartment.

In affirming the trial court's dismissal of the complaint, the Appellate Division found that the owner made a prima facie showing that he neither created nor had actual or constructive notice of a defect in the shower head or of the allegedly excessive hot water temperature. The owner could not be vicariously liable for the alleged negligence of the independent contractor,

because the employer has no right to control the manner in which the work is to be done (*id.* at 643-644). However, the significance of the holding is somewhat abated because the independent contractor was found not to have been negligent (*id.* at 644).

Other decisions with similar holdings include, among others, *Flores v Langsam Prop. Servs. Corp.* (63 AD3d 502 [1st Dept] [Court dismissed action against building owner by plaintiff allegedly burned by a burst of scalding water emanating from plaintiff's showerhead after it was turned off, because the plaintiff failed to rebut defendants' prima facie showing that they had no notice of the defective condition or that they had no duty to inspect for a spontaneous occurrence], *affd* 13 NY3d 811 [2009]) and *Metling v Punia & Marx* (303 AD2d 386, 387-388 [2d Dept 2003] [building owner not liable to plaintiff tenant, who allegedly slipped and fell on water seeping from a toilet that had been removed from an apartment because owner exercised no control over the licensed plumbing concern/independent contractor that caused the condition nor did the owner interfere with or assumed control over the work]).

The rationale is that the employer of an independent contractor has no right to control the manner in which the contractor's work is to be done and that it is, therefore, more sensible to place the risk of loss on the contractor (*Metling v Punia & Marx*, 303 AD2d at 387-388). Moreover, where there is no evidence of notice, there is no duty to inspect for a spontaneous occurrence (*Flores v Langsam Prop. Servs. Corp.*, 63 AD3d at 503); *LaTronica v F.N.G. Realty Corp.* (47 AD3d 550 [1st Dept 2008] [plaintiff, who allegedly sustained second- and third-degree burns as a result of a sudden burst of scalding water emitted from the cold water faucet in his bathtub, failed to raise a triable issue of fact whether defendants had notice of the alleged defect]).

The burden thus shifted to JL and Duff. They have submitted adequate opposition to demonstrate the existence of triable issues of fact. For example:

> "The owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition (Multiple Dwelling Law § 78). This duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. As between the owner and one voluntarily undertaking responsibility for maintenance, however, the party assuming the contractual duty is liable to the owner for the damages the owner must pay"

(*Mas v Two Bridges Assoc.*, 75 NY2d 680, 687-688 [1990]). Thus, movants may be liable even having delegated the plumbing and heating work to JL, based on the role that may have been played by MJD. Permitting an unlicensed person to work on the boiler and heating could constitute negligence (*see Smith v City of New York*, 288 AD2d 369 [2d Dept 2001] [causes of action were predicated upon numerous statutes, rules, regulations, and ordinances which they alleged were violated by the Cortez defendants, inter alia, by their conduct in hiring an unlicensed handyman to perform rewiring and other electrical work on the second floor]; *see also Mitchell v Argus Realty Co.*, 8 AD3d 18, 19 [1st Dept 2004] ["In view of the inspection and maintenance carried out by the building superintendent and the conclusions reached by plaintiff's expert, issues of fact exist as to whether the landlord had notice of the hazardous condition of the door and whether the negligence of its employee created that condition"]). As discussed above, there are factual issues as to the amount of responsibility delegated to MJD and the role it played, if any, in the incident.

Motion 012

646 and WSM seek an order punishing nonparty witness Pineda for contempt of court for failing to comply with judicial subpoenas. In the alternative, they seek to an order compelling

Pineda to submit to a deposition.

According to movants, Duff was treated at New York Presbyterian Hospital, and Pineda is the person who made the entry in the hospital record concerning Duff. Counsel for movants issued a nonparty subpoena for Pineda's deposition to be held on May 29, 2012, but he failed to appear. The record indicates that the matter has been resolved, in that Pineda appeared for a deposition on October 18, 2012, and there are no outstanding issues pertaining to the subpoena. The motion, which has not been withdrawn, is denied.

Accordingly, it is

ORDERED that motion 009 is denied; and it is further

ORDERED that motion 010 is denied; and it is further

ORDERED that motion 011 is denied; and it is further

ORDERED that motion 012 is denied.

Dated: July 30, 2013

ENTER:

J.S.C.