SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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FRANK FERNANDEZ and SHERRY FERNANDEZ,

*Plaintiffs,*

**DECISION AND ORDER**
**(Motions # 1, 2 & 3)**

*-against-*

Index No.: 035033/2018

MOSHE LANDAU, JOEL SALAMON and SALAMON'S HOME IMPROVEMENTS, INC.

*Defendants.*
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JOEL SALAMON and SALAMON'S HOME IMPROVEMENTS, INC.

*Third-Party Plaintiffs,*

*-against-*

D'AGOSTINO LANDSCAPE & IRRIGATION and D'AGOSTINO LANDSCAPE, INC.,

*Third-Party Defendants.*
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*Sherri L. Eisenpress*, A.J.S.C.

The following papers, numbered 1 to 14, were considered in connection with (i) Defendant-Third-Party Plaintiff Joel Salamon and Salamon's Home Improvement Inc.'s (hereinafter collectively "Salamon") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment dismissing all cross-claims asserted against them[1] **(Motion #1)**; (ii) Plaintiff's Notice of Cross-Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment as to liability against Defendant Moshe Landau[2] **(Motion #2)**; and (iii) Defendant Moshe Landau's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment dismissing Plaintiff's

[1] Moving Defendants initially sought to dismiss Plaintiff's complaint on summary judgment. However, as this action has been settled as and between Plaintiff and Salamon/Salamon's Home Improvements, that portion of the motion is now moot and has been withdrawn.
[2] Plaintiff originally sought summary judgment against Defendants Joel Salamon and Salamon's Home Improvements but given the settlement between Plaintiff and the Salamon Defendants, that portion of the motion is now moot and has been withdrawn

Complaint, or alternatively, granting leave to amend the Answer to assert cross-claims against co-defendants Joel Salamon and Salmon's Home Improvements, Inc. and Third-Party defendant D'Agostino Landscape & Irrigation and D'Agostino Landscape Inc. (collectively "D'Agostino"), for common law indemnification and contribution**(Motion #3)**:

| **PAPERS** | **NUMBERED** |
|---|---|
| NOTICE OF MOTION (#1)/AFFIRMATION AND MEMORANDUM OF LAW IN SUPPORT/EXHIBITS A-U | 1-2 |
| NOTICE OF CROSS-MOTION (#2)/AFFIRMATION IN OPPOSITION TO MOTION #1 AND IN SUPPORT OF CROSS-MOTION/EXHIBITS 1-14 | 3-4 |
| NOTICE OF MOTION (#3)/AFFIRMATION IN SUPPORT/EXHIBITS A-U | 5-6 |
| AFFIRMATION IN OPPOSITION TO CROSS-MOTION (#2) AND IN FURTHER SUPPORT OF MOTION #1 BY SALAMON DEFENDANTS | 7 |
| PLAINTIFF'S AFFIRMATION IN OPPOSITION TO MOTION #3/EXHIBITS 1-14 | 8 |
| AFFIRMATION IN OPPOSITION TO CROSS-MOTION (#2) BY D'AGOSTINO | 9 |
| AFFIRMATION IN OPPOSITION TO CROSS-MOTION (#2) BY LANDAU AND IN FURTHER SUPPORT OF MOTION (#3)/AFFIDAVIT OF MOSHE LANDAU | 10-11 |
| AFFIRMATION IN REPLY BY PLAINTIFF (#2) | 12 |
| AFFIRMATION IN REPLY (#3) TO OPPOSITION OF D'AGOSTINO | 13 |
| AFFIRMATION IN REPLY TO PLAINTIFF'S OPPOSITION (#3) | 14 |

Upon the foregoing papers, the Court now rules as follows:

Plaintiff Frank Fernandez and his wife Sherry Fernandez owned and resided in a home located at 3 Ellish Parkway, Spring Valley, New York, which was sold to Defendant, Moshe Landau ("Landau"), in May 2015. Defendant Landau owned property directly behind the Eillish Parkway house, at 71 Herrick Avenue, such that the properties abutted each other. Defendant Landau purchased the Ellish Parkway property in order to prevent another buyer from erecting a tall building that would obscure the view from the home at 71 Herrick Avenue. Because Plaintiff and his family were not yet ready to complete a move to their new home in Virginia at the time of closing, an agreement was made that plaintiffs would continue to rent

the home at 3 Ellish Parkway from Mr. Landau until the end of August 2015. Mr. Landau concedes in his affidavit that he never received an executed lease agreement from Plaintiffs and is unaware of the existence of a signed agreement.

In September 2014, Landau entered into a contract with Salamon to act as general contractor for the building of a new home at 71 Herrick Avenue. Salamon testified that Mr. Landau would go to the property during the course of construction on an almost daily basis, and that Salamon needed Moshe's permission to hire sub-contractors. Salamon hired subcontractors to perform construction work at 71 Herrick Avenue, including third-party defendant D'Agostino, who was hired April 2015 to perform grading, seeding and planting work. Because some of the landscaping services performed by D'Agostino went over the property line of 3 Ellish Parkway, the fence that was located between the properties was moved, and on the day before Frank Fernandez' accident, was partially taken down. Additionally, both Landau and D'Agostino testified that drainage work was performed by D'Agostino on both properties.

On August 21, 2015, D'Agostino was doing drainage work and installing leaders and catch basins, including at the Ellish Parkway property. In connection with this work, D'Agostino installed two leaders on the back left and right of the 3 Ellish Parkway house, which were then connected to pipes in the ground that ran across the property line to 71 Herrick. An excavator was used to do the work and some of the pipes needed to be sawed. At the end of the day, D'Agostino claims that it collected all piping that had not been used and piled it directly behind the house at 71 Herrick Avenue, at approximately 5 or 6 p.m. D'Agostino's principal, Augustine Iodice, was made aware by Mr. Landau that there were renters living in the Ellish Parkway house and he was told to keep the area clean. Mr. Landau does not recall if he had been at the site that day but claims that if he had, it would have been his practice to work until 1 or 2 p.m. and then go home to prepare for the Sabbath.

Plaintiff Frank Fernandez testified that on August 22, 2015, he awoke around 3:30 a.m. to leave to Virginia. He testified that at that time, he let his dog out into the

backyard, momentarily forgetting that part of the fence was down. As Plaintiff exited the house to retrieve the dog, and while descending the five steps that let into the yard, he testified that he tripped over construction debris located on the third step up from the bottom. Mr. Fernandez believed that the debris consisted of PVC pipes that were from the drainage system that had been dismantled the day before. Photographs were produced from the day of the accident which showed pieces used in connection with drainage being stored in the vicinity of the Ellish property.

Plaintiffs and Defendant Landau move for summary judgment against each other. Plaintiff alleges that defendant Landau, as owner of the subject property, is liable to them for failure to keep their property in a safe condition, in that Landau's contractor/sub-contractor were responsible for creating the defective condition in the nature of construction debris on the stairway of the Ellish property. Defendant Landau asserts that he had no duty to maintain the premises based upon the Contract of Sale that stated that the seller was to maintain the premises "in the present condition" until transfer of possession. He also asserts that he was an out-of-possession owner and therefore had no responsibility for the condition of the premises. Landau additionally argues that he did not create the claimed condition; had no notice of it; and is not responsible for the actions of an independent contractor. Mr. Landau contends that Plaintiff's claim under RPL Sec. 235-b alleging that Mr. Landau breached the warranty of habitability must be dismissed because it cannot be pursued as part of a personal injury claim.

In the alternative, Defendant Landau seeks to amend his answer to assert cross-claims against Salamon and D'Agostino, in the form annexed to the moving papers as NYSCEF doc. #6. Third-party Defendant D'Agostino contends that such amendment should not be granted on the ground Landau is a third-party defendant in an action commenced by Salamon, and such an amendment would be untimely and prejudicial, though no specific reasoning is provided. Lastly, the Salamon defendants move to dismiss all cross-claims against it. The only cross-claim at present appears to be made by D'Agostino against Salamon,

however, the moving papers contain no discussion regarding the basis for this aspect of the summary judgment motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

"It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care." Forbes v. Aaron, 81 A.D.3d 876, 877, 918 N.Y.S.2d 188 (2d Dept. 2011). "As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control, or special use of the property." Tilford v. Greenburgh Hous. Auth. 170 A.D.3d 1233, 1235, 97 N.Y.S.2d 278 (2d Dept. 2019). "The existence of one or more of these elements is sufficient to give rise to a duty of care." Micek v. Greek Orthodox Church of Our Savior, 139 A.D.3d 830, 831, 31 N.Y.S.3d 189 (2d Dept. 2016). Liability can also be imposed upon a party that creates a dangerous condition on the property. Id.

The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts, though there are exceptions.

Rosenberg v. Equitable Life Assur. Soc. of U.S., 79 N.Y.2d 663, 668, 584 N.Y.S.2d 765 (1992). The exceptions generally recognized involve situations where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer." Id.

Where an exception applies, the party "is vicariously liable for the fault of the independent contractor because a legal duty is imposed on it which cannot be delegated." Horowitz v., 763 Eastern Associates, LLC, 125 A.D.3d 808, 810, 5 N.Y.S.3d 118 (2d Dept. 2015)(building owner responsible for negligence of contractor when infant plaintiff was injured when he fell through glass of a fixed panel adjacent to the interior of the front entrance door.); Olivieri v. GM Realty Co., LLC, 37 A.D.3d 569, 37 A.D.3d 569 (2d Dept. 2007)(building owner responsible for actions of snow removal contractor due to non-delegable duty to keep property in safe condition.); Monroy v. Lexington Operating Partners, LLC, 179 A.D.3d 1053, 118 N.Y.S.3d 132 (2d Dept. 2020)(owner failed to establish, as a matter of law, that it could not be responsible for its contractors alleged negligence pursuant to its nondelegable duty to keep the premises safe.); Pesante v. Vertical Industrial Development, 142 A.D.3d 656, 36 N.Y.S.3d 716 (2d dept. 2016).

"A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). The duty to maintain property in a reasonably safe condition exists regardless of whether the property is open to the public or not. Peralta v. Henriquez, 100 N.Y.2d 139, 144, 760 N.Y.S.2d 741 (2003). In the instant matter, Defendant Landau owes Plaintiff a duty of care and may be responsible for the alleged negligent acts of the employees of D'Agostino and/or Salamon based upon his duty to maintain his property in a safe condition, which is one of the exceptions to the independent

contractor rule. Contrary to Defendant Landau's contention, this duty is not dependent on whether or not the property was open to the public.

Additionally, although Defendant Landau claims he was an out-of-possession owner at the time of the incident, the Court finds this not to be the case. Landau's contractual undertaking with Salamon was not a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property. See Spitzer v. Tranese, 72 A.D.3d 674, 675, 898 N.Y.S.2d 618 (2d Dept. 2010). Moreover, the evidence is that Mr. Landau was present at the site on a near daily basis, certainly belying any claim of being out-of-possession.

Nor does the sale contract dated March 24, 2015, between Plaintiff Sherry Fernandez and Landau, relieve Landau of his duty to keep the property in a safe condition. Generally, the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title. Davis v. Weg, 104 A.D.2d 617, 619, 479 N.Y.S.2d 553 (2d Dept. 1984). However, this rule does not apply where there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking. Id. In the instant matter, the Court finds that there was not a clear intention between the parties to the sale contact that the Fernandez' would be responsible for the actions of Landau's contractors with respect to work Landau contracted to have performed on his property.

Notwithstanding that the Court has determined that Landau owed a duty to Plaintiffs to keep the property in safe repair, and that he can be liable for any negligent actions of his contractors/sub-contractors, neither Plaintiff nor Landau are entitled to the grant of summary judgment as to the negligence cause of action because triable issues of fact exist. While Plaintiff asserts that the defective condition was created by D'Agostino's employees, Mr. Iodice testified that when he left at 5 or 6 p.m. on the day before the accident, all material was stacked behind the Herrick Avenue property. This conflicting testimony requires denial of both motions.

Defendant Landau, however, is entitled to dismissal of the claim premised upon violation of Real Property Law Sec. 235-b, which permits a tenant to recover limited economic loss in the form of rent abatement where the premises are not fit for human habitation. The implied warranty of habitability provision of Real Property Law Sec. 235-b was not intended to create an alternative remedy to recover damages for personal injuries that are recoverable in a negligence action. Stone v. Gordon, 211 A.D.2d 881, 621 N.Y.S.2d 220 (3d Dept. 1995).

As alternative relief, Defendant Landau seeks leave to amend his Answer to assert cross-claims against Salamon and D'Agostino, in the form annexed to the moving papers as NYSCEF doc #106. D'Agostino opposes the motion as untimely. Leave to amend a pleadings or a Bill of Particulars "is to be freely given in the absence of prejudice or surprise to the opposing party." Ancona v. Waldbaum, Inc., 305 A.D.2d 436; 758 N.Y.S.2d 816 (2d Dept. 2003) citing Scheuerman v. Health & Hosps. Corp. of City of N.Y., 243 A.D.2d 553, 554, 663 N.Y.S.2d 123 (1997). While a court has broad discretion in deciding whether leave to amend should be granted, it is an improvident exercise of discretion to deny leave so as to assert an otherwise apparently meritorious cause of action or claim absent an inordinate delay and a showing of prejudice...or where the party opposing the motion to serve an amended pleading cannot demonstrate prejudice resulting directly from the delay. Sclafani v. City of New York, 271 A.D.2d 430, 706 N.Y.S.2d 129 (2d Dept. 2000). In the instant matter, the Court grants that portion of Defendant Landau's motion which seeks leave to amend his Answer to assert various cross-claims against the Salamon Defendants and D'Agostino, as the amendment does not come as a surprise; the matter was just recently placed on the trial calendar, a trial is not imminent, and such amendment will not require additional discovery.

Lastly, the Court denies the Salamon Defendants' motion to dismiss any cross-claims/counterclaims asserted against them. Although Defendants pray for such relief, they in no way affirmatively address D'Agostino's cross-claim in their moving paper. As such, they failed to meet their prima facie burden upon summary judgment.

Accordingly, it is hereby

**ORDERED** the Notice of Motion (#1) filed by Defendants Joel Salamon and Salamon's Home Improvements, Inc. for summary judgment dismissing all counter or cross-claims against them is DENIED; and it is further

**ORDERED** that the Notice of Cross-Motion (#2) filed by Plaintiff for summary judgment as to liability against Defendant Landau is DENIED; and it is further

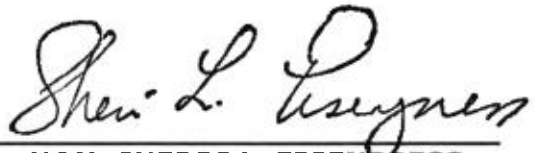
**ORDERED** that the Notice of Motion (#3) filed by Defendant Landau is DENIED with respect to that portion of the motion for summary judgment and dismissal of Plaintiff's negligence action, but is GRANTED to the extent that Plaintiff's Real Property Law Sec. 235-b cause of action is dismissed; and it is further

**ORDERED** that the Notice of Motion (#3) filed by Defendant Landau is GRANTED to the extent that the Proposed Amended Answer is deemed filed and served and Defendants are directed to file an Answer to the counterclaims within twenty (20) days of this Order; and it is further

**ORDERED** that all parties are to appear for a settlement conference on **APRIL 7, 2021 at 10:30 a.m**. via Microsoft Teams. Counsel participating in the settlement conference must have knowledge of the matter, as well as authority, and must arrange to be able to speak to their clients with respect to settlement offers, if necessary.

The foregoing constitutes the Decision and Order of this Court on Motions #1-3.

Dated: New City, New York
February 24, 2021



**HON. SHERRI L. EISENPRESS**
**Acting Justice of the Supreme Court**

TO: (All parties via NYSCEF)