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

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* PART 5

GIOVANNI RAGUSA and LISA RAGUSA,

Plaintiffs,

- against -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., THE VIVIAN BEAUMONT THEATER, INC., THE CITY OF NEW YORK, HARDY HOLZMAN PFEIFFER ASSOCIATES, YORKE CONSTRUCTION CORPORATION and GOAL ENTERPRISES, INC.,

Defendants.

(AND 3 OTHER THIRD-PARTY ACTIONS).

INDEX NO. 101343/02

MOTION DATE 11/16/05

MOTION SEQ. NO. 005

MOTION CAL. NO. 112

DECISION AND ORDER

The following papers, numbered 1 to 18 were read on this motion and cross motions for summary judgment

	PAPERS NUMBERED
Notice of Motion — Notices of Cross Motion — Affidavits — Exhibits	1-7
Answering Affidavits — Exhibits	8-13
Replying Affidavits	14-18

Cross-Motions (5): X Yes ☐ No

Upon the foregoing papers, it is ordered that the motion and cross motions for summary judgment by defendants are decided in accordance with the annexed memorandum decision.

FILED
MAR 0 1 2006
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN J.S.C.

Dated: 2/17/06

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
DATED:

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

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GIOVANNI RAGUSA and LISA RAGUSA,

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- against -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., THE VIVIAN BEAUMONT THEATER, INC., THE CITY OF NEW YORK, HARDY HOLZMAN PFEIFFER ASSOCIATES, YORKE CONSTRUCTION CORPORATION AND GOAL ENTERPRISES,

Defendants.

----------X

THE VIVIAN BEAUMONT THEATER, INC.,

Third-Party Plaintiff,

- against -

HARDY HOLZMAN PFEIFFER ASSOCIATES, YORKE CONSTRUCTION CORPORATION AND GOAL ENTERPRISES, INC.,

Third-Party Defendants.

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GOAL ENTERPRISES, INC.,

Second Third-Party Plaintiff,

- against -

CONTINENTAL MARBLE, INC.,

Second Third-Party Defendant.

----------X

CONTINENTAL MARBLE, INC.,

Third Third-Party Plaintiff,

- against -

PAVERS INTERLOCK/TRIBEC, LTD. J.V.,

Third Third-Party Defendant.

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Index No. 101343/02

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

Pursuant to CPLR 3212, defendant/second third-party defendant Continental Marble, Inc. moves for an order dismissing the second third-party complaint of Goal Enterprises, Inc., and any cross-claims asserted against Continental.

Defendant Lincoln Center for the Performing Arts, Inc. cross-moves for summary judgment dismissing the complaint and all cross-claims, or, in the alternative, granting summary judgment on its claims against defendant The Vivian Beaumont Theater, Inc. (VBT) for contractual indemnification, and on its claims for common law indemnification against Goal, defendants Hardy Holzman Pfeiffer Associates (HHPA), Yorke Construction Corp., and Continental.

VBT cross-moves for summary judgment dismissing the complaint and all cross-claims, or, in the alternative, granting summary judgment on its indemnification claims against HHPA, Yorke, Goal and Continental.

Yorke cross-moves for summary judgment dismissing the complaint, the third- party complaint and any cross-claims against it. HHPA and Goal each cross-move separately for summary judgment dismissing all claims against it.

This decision address the motion and the five cross-motions.

BACKGROUND

Plaintiffs brought this action against Lincoln Center, VBT, the City of New York, HHPA, Yorke and Goal to recover for personal injuries allegedly sustained by plaintiff Giovanni Ragusa on November 9, 2000 in an accident on the walkway adjacent to the Vivian Beaumont Theater, located at 100/150 West 65th Street in Manhattan. At the time of the accident, Ragusa was employed by Poland Spring Water as a delivery person. He was allegedly unloading water bottles from the truck when a rolling dolly tipped over, causing seven to nine bottles of water to fall across his body. He contends that the entrance walkway at the West 65th Street garage entranceway was negligently installed, in that it had an excessive incline that caused the dolly to tip over.

Lincoln Center owns the building in which the theater is located, which is leased to VBT. VBT engaged Yorke as the construction manager in connection with the renovation of portions of the theater, including the 65th Street entrance area where the accident took place.

VBT retained HHPA, an architectural firm, for design services, including the design of the entrance at the garage level. Yorke engaged Goal to perform construction work on the pedestrian walkway in question, and Goal in turn subcontracted work to Continental.

The accident occurred three years after the completion of the garage entranceway. No changes were made to the entranceway from the installation in 1997 to the date of the accident.

VBT had a house technician who was present during regular office hours and who provided access to delivery persons. On this particular occasion, however, plaintiff was not planning to make deliveries inside the building, but was merely dropping off bottles for another Poland Spring delivery person, who was then supposed to take the bottles inside the building.

Ragusa and another Poland Spring employee were dropping off six-gallon water bottles. Those bottles were taken off the truck parked at the curb and then placed onto a dolly. The dolly did not have a locking system or brake, but a rope attached to the dolly could be used to prevent the dolly from rolling away. Ragusa loaded one dolly without incident. Then, shortly before the accident, he loaded seven to nine bottles onto another dolly. When Ragusa faced the delivery truck to take another bottle off the truck, the dolly was about three feet behind him. Plaintiff testified that there was a small decline in the area where he placed the dolly, and that he noticed this condition prior to the accident (Ragusa tr., at 84 and 219). Ragusa did not know where his co-workers were at the time of the accident, and was unaware of any witnesses. All he knew was that the dolly tipped over and hit his body.

DISCUSSION

It is undisputed that VBT hired Yorke as the construction manager and HHPA as the architect, and that VBT engaged Goal to install the walkway in accordance with HHPA's designs. Goal contends that Continental did the actual installation of the walkway. Goal, HHPA, and Yorke all contend that the walkway was properly constructed. In any event, they argue that the allegedly defective construction of the walkway did not proximately cause Giovanni Ragusa's accident.

Yorke, Goal, and Continental establish a prima facie case for summary judgment dismissing the complaint as against them. "Ordinarily, a general contractor bears no responsibility for the integrity of a construction plan, but only for its competent execution" (Ferguson v Abrams, 129 AD2d 524, 526 [1st Dept 1987]). "A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (Ryan v Feeney & Sheehan Building Co., 239 NY 43, 46 [1924]).

Here, Jack Martin, who was deposed on behalf of HHPA, testified that the pedestrian walkway that was actually installed conformed to the design plans (Martin tr., at 42). Michael Hewes, Yorke's project superintendent, also said that the garage entranceway was installed in accordance with the architect's drawings and plans (Hewes tr., at 28-29). Thomas McNamara, vice-president of Continental, testified that whatever pavers were installed at the theater entrance would be in accordance with everything the architect wanted (McNamara tr., at 55).

Plaintiffs fail to raise a triable issue of fact as to the contractors' liability. Plaintiffs' expert, Peter Pomeranz, P.E., reviewed the blueprints and had no opinion as to whether the architectural plans should have put the contractors on notice that the walkway, as designed, would be dangerous

or likely to cause injury.

Therefore, the Court grants the cross-motions of Yorke, Goal, and Continental for summary judgment dismissing the complaint as against them. Dismissal of the complaint necessarily leads to dismissal of all the third-party claims and cross-claims against these defendants that sound in common-law indemnification and contribution. VBT's claim for contractual indemnification against Yorke is also dismissed. Under section 19.12 of its agreement with Yorke, VBT is only entitled to indemnification arising from Yorke's negligent acts or omissions (see Bendix Affirm., Ex N).

VBT and HHPA have not established a prima facie case for summary judgment. Although they contend that the walkway was built to code, they do not cite any provision of the City code to substantiate their contentions. Jack Martin, Michael Hewes, and Continental's engineer, P.A. Ast, all claim that the slope of the walkway did not exceed the building code requirement of "1 in 12," i.e., one feet of rise over 12 feet of run.[1] However, none of them specify the building code provision which applies to the slope of this walkway. When Hewes was asked what he understood the building code required, Hewes replied only that Yorke built it according to the drawings (Hewes tr., at 30). By contrast, plaintiffs' expert contends that the "1 in 12" slope apparently refers to the building code requirements of a ramp, not a sidewalk. Instead, plaintiffs' expert argues that Section 2-09 of the rules of the City of NY Dept of Transportation apply.[2] VBT and HHPA have not demonstrated, as a matter of law, that the "1 in 12" provision applies to the subject walkway, or that

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[1] Jack Martin testified that this walkway had a pitch of one in 28, which meant that for every 28 feet of walkway, the pitch would change one foot (Martin tr. at 32).

[2] 34 RCNY 2-09 (f) (4) (xi), applicable to sidewalks, permits a minimum allowable transverse slope from the building line toward the curb of 1 inch in 5 feet, and a maximum allowable cross slope of 3 inches in 5 feet.

the walkway was built to code. Indeed, the evidence before the Court is insufficient to demonstrate, as a matter of law, that it is a "ramp" or a "sidewalk."

Contrary to their argument, VBT and HHPA have not shown, as a matter of law, that the walkway's construction was not a substantial factor in causing Giovanni Ragusa's alleged injuries. Plaintiffs' proof of causation is based on circumstantial evidence, not speculation. This is not a case where plaintiffs cannot specify a defect, or are unaware of the cause of the accident. On the contrary, plaintiffs believe that the slope of the walkway was a substantial factor in causing the dolly to tip over.

> "It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently 'remote' or 'technical' to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation" [internal citation omitted].

(Feder v Tower Air, Inc., 12 AD3d 190, 191 [1st Dept 2004]). Based on plaintiffs' showing here, it cannot be said that a jury could not reasonably find that the placement of the dolly upon the sloped walkway was a substantial factor in causing it to tip over. The connection between the slope of the walkway and the dolly tipping over is "logical and immediate enough" to permit a jury to find a causal relationship between them (see generally Ferrer v Harris, 55 NY2d 285, 293-294 [1982]). Although VBT argues that the manner in which plaintiff placed the water bottles on the dolly caused it tip over, it does not offer any evidence to support this alternative theory.

Therefore, HHPA's cross- motion, and the branch of VBT's cross-motion, for summary judgment dismissing the complaint as against them, are denied.

As to Lincoln Center, it maintains that it had nothing to do with the construction of the walkway where the accident occurred. VBT's facilities manager, Alex Mustelier, testified that

Lincoln Center was responsible for cleaning the garage entranceway. Following the accident, Mustelier inspected the area in question and did not observe anything wrong (Mustelier tr., at 39). Like its co-defendants, Lincoln Center similarly argues lack of proximate cause.

"[A]n owner, who contracts for the erection of a building, may not be liable, on the principle of respondeat superior, for the acts or omissions of the contractor or his servants, or for those of the architect" (Haefeli v Woodrich Engineering Co., 255 NY 442, 450 [1931]; Burke v Ireland, 166 NY 305, 314 [1901]). An exception to this rule is that the owner is vicariously liable if a nondelegable duty is involved, such as the duty "to provide the public with a reasonably safe premises and a safe means of ingress and egress" (see Reynolds v Sead Dev. Corp., 257 AD2d 940 [3d Dept 1999]; Richardson v David Schwager Assocs., Inc., 249 AD2d 531 [2d Dept 1998]). However, "an out-of-possession owner who did not create the unsafe condition will not be liable for injuries that occur on the premises unless it has retained control over the premises or is contractually or statutorily obligated to repair or maintain the property" (Negron v Rodriguez & Rodriquez Storage & Warehouse, Inc., 23 AD3d 159, 160 [1st Dept 2005]).

Here, the fact that Lincoln Center had nothing to do with construction of the walkway is insufficient to establish, as a matter of law, that it has no liability. As the owner of the theater, Lincoln Center had a non-delegable duty to ensure that the walkway was safe, because it is a means of ingress and egress from the theater. Because Lincoln Center is an out-of-possession owner who did not construct the walkway, it must establish that it was neither contractually nor statutorily obligated to maintain the property to establish a prima facie case for summary judgment. Lincoln

Center was apparently under no contractual duty to repair the walkway.[3] However, Lincoln Center did not meet its burden of establishing that it had no statutory duty to repair or maintain the walkway.

As discussed above, whether the construction of the walkway proximately caused Giovanni Ragusa's injuries is a question of fact for the jury. Therefore, the branch of Lincoln Center's cross-motion for summary judgment dismissing the complaint as against it is denied.

The branch of Lincoln Center's motion seeking summary judgment in its favor against HHPA, Yorke, Goal, and Continental for common-law indemnification is also denied. As discussed above, Yorke, Goal, and Continental are not liable for the design of the walkway, and the evidence establishes that the walkway was built according to HHPA's designs and specifications. Lincoln Center is not entitled to common-law indemnification from HHPA at this time because HHPA's negligence has not been established.

However, Lincoln Center is entitled to conditional summary judgment in its favor for contractual indemnification against VBT. Under Article XX of its lease with Lincoln Center, VBT agreed to indemnify Lincoln Center

> "from any and all expenses, loss or liability paid, suffered or incurred, and against any and all judgments and claims by or on behalf of any person, firm, or corporation (municipal or private) arising from: . . . (b) any condition of the Theater or any street, curb or sidewalk adjoining the Theater, or of any passageways or space, if any, therein or appurtenant thereto which is under the jurisdiction of the Company . . . or (e) any accident, injury or damage howsoever caused to any person occurring during the term of the lease in or about the Theater, or upon or under the sidewalks and the land adjacent thereto with [sic] are under the jurisdiction of the Company."

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[3] The record indicates that, pursuant to Article XII of its lease with Lincoln Center, VBT had the obligation "to take good care of, repair, and maintain the sidewalks, passageways, curbs, and vaults, if any, adjoining the Theater" (see Plotkin Affirm., Ex C).

(See Plotkin Affirm., Ex C [Lincoln Center's emphasis]). The walkway at issue falls within the jurisdiction of VBT, because it is undisputed that the walkway was constructed at VBT's request. Although VBT's facilities manager testified that he observed Lincoln Center staff cleaning the walkway, VBT does not dispute its liability under the broad indemnification clause. The fact that Lincoln Center personnel cleaned the walkway is not sufficient to raise an issue of fact as to whether the walkway was under VBT's jurisdiction, as set forth in VBT's lease.

Finally, the branch of VBT's cross-motion seeking summary judgment in its favor for contractual indemnification against HHPA, Yorke, Goal, and Continental is denied. The indemnity provisions of HHPA's and Yorke's agreements with VBT require indemnification for the negligent acts or omissions of these defendants. (see Bendix Affirm., Exs L & N). As discussed above, HHPA's negligence has not been established, while Yorke cannot be held liable for the design of the walkway. VBT did not submit a copy of its contract with either Goal or Continental. Exhibit M to VBT's cross-motion consists of only the title page of its contract with Goal.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Continental Marble Inc. is granted, and the complaint and all cross-claims for common-law indemnity and contribution are severed and dismissed as against this defendant, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the first and second causes of action of the second third-party complaint against second third-party defendant Continental Marble, Inc. are dismissed; and it is further

ORDERED that cross-motion for summary judgment by defendant Yorke Construction Corporation is granted, and the complaint and all cross-claims for common-law indemnity and

contribution are severed and dismissed as against this defendant, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the first and third causes of action of the third-party complaint are dismissed as against third-party defendant Yorke Construction Corp.; and it is further

ORDERED that the cross-motion for summary judgment by defendant Goal Enterprises, Inc. is granted, and the complaint and all cross-claims for common-law indemnity and contribution are severed and dismissed as against this defendant, with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the first cause of action of the third-party complaint are dismissed as against third-party defendant Goal Enterprises; and it is further

ORDERED that the cross-motion for summary judgment by defendant Hardy Holzman Pfeiffer Associates is denied; and it is further

ORDERED that the cross-motion for summary judgment by defendant The Vivian Beaumont Theater, Inc. is denied; and it is further

ORDERED that the cross- motion for summary judgment by defendant Lincoln Center for the Performing Arts, Inc. is granted only to the extent that this defendant is entitled to conditional summary judgment in its favor on its cross-claim for contractual indemnification against defendant The Vivian Beaumont Theater, Inc., and the cross-motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: **February 17, 2006**
New York, New York

ENTER:

MICHAEL D. STALLMAN, J.S.C.