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

PRESENT: HON. PAUL G. FEINMAN Justice PART 52

Index Number : 122125/2001

SONNY BOY REALTY, INC.

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. 122125/01

MOTION DATE 1/23/08

MOTION SEQ. NO. #002

MOTION CAL. NO. 8

read on this motion to/for PSJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

FILED

APR 30 2008

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 4/25/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
SONNY BOY REALTY, INC.,
Plaintiff,

against

THE CITY OF NEW YORK,
Defendant.
----------X

Index Number	122125/2001
Submission Date	Jan. 23, 2008
Mot. Seq. Nos.	002, 003
Cal. Nos.	8, 9

DECISION AND ORDER

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Papers considered in review of these motions for partial summary judgment, and for summary judgment and to amend:

	Papers	Numbered
Seq. 002	Pl. Notice of Motion and Affidavits Annexed	1
	Affirmation in Opposition, Memo of Law	2, 3
	Reply Affirmation	4
Seq. 003	Notice of Motion, Affidavits, Exhibits, Memo of Law	1,2,3
	Amended Affidavits of Service	4, A, B, C
	Affirmation in Opposition	5
	Reply Affirmation	6

PAUL G. FEINMAN, J.:

Plaintiff's motion for partial summary judgment pursuant to CPLR 3212 (motion sequence no. 002) and defendant's motion for summary judgment pursuant to CPLR 3212 (motion sequence no. 003), are consolidated for purposes of decision.

For the reasons which follow, plaintiff's motion is denied; defendant's motion is granted in part and otherwise denied.

Factual and Procedural Background

Plaintiff is the owner of a property located at 3030 Bruner Avenue, Bronx, New York.[1] In July 1995, plaintiff and the City of New York entered into a lease agreement with an option to renew, in which the City's Administration for Children's Services (ACS) was to occupy the premises as a residence for adolescent boys (Pl. Mot. Ex. A, Lease). At issue are the clauses of the lease pertaining to the responsibility and liability of the parties for repairs to the premises.

On September 16, 2000, one of the residents of the group home was arrested after "intentionally set[ting] fire to [a] shirt and throw[ing it] on [the] floor next to" the bed of another resident, heavily damaging the premises (Pl. Not. of Mot. Ex. M, N [Police Complaint Report; Bolan Aff. ¶ 5). The City's Director of Leasing Management notified plaintiff by letter dated September 18, 2000, that the residents had been evacuated, the premises were not habitable due to the severity of the damages, and the City was treating the damage as "total" for purposes of the lease agreement (Def. Not. of Mot. Ex. F). By letter dated September 26, 2000, plaintiff's attorney noted his client's agreement that the damage was "total," and also that Sonny Boy Realty would "prefer to complete the necessary repairs rather than terminate the lease" (Def. Not. of Mot. Ex. G). The letter further stated that because the lease was due to expire in about a year and repairs would take approximately seven months, plaintiff "asked that your agency exercise the option to renew . . . and rescind the option to terminate contained in [the lease] before" plaintiff commenced renovations (Def. Not. of Mot. Ex. G).[2] On December 1, 2000, one of

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[1]There are three principals of Sonny Boy Realty: Anthony Monaco, Joanne Monaco, and Michael Monaco.

[2]According to Anthony Monaco, the premises had been constructed specifically for the City's use as a residence home (Def. Mot. Anthony Monaco EBT, 13:11-14). After the fire, the principals planned, if the City did not renew its lease, either to rent to another organization or, to rebuild the building in a different configuration, perhaps as three two-family homes (Def. Mot.

plaintiff's principals wrote to the City in part to confirm that the City had indicated that Sonny Boy should repair only the damage caused by the fire and its suppression, and that previous damages caused by the residents were the City's responsibility to correct (Def. Not. of Mot. Ex. H).[3] The letter also notes that plaintiff would commence repair work immediately after its insurance company "signs off to the loss," and it had received the City's letter "exercising the 5 year option" to renew the lease agreement (Def. Not. of Mot. Ex. H). At the time Sonny Boy Realty commenced restoration work, its principals believed that the City would exercise its option to renew (Def. Mot. Michael Monaco EBT 25:16-25, 17:2-6). The attorney for Sonny Boy who handled the aftermath of the fire, testified that in about December 2000 or January 2001, the parties had a meeting in which the City agreed to exercise its option to renew (Def. Mot. de Palma EBT 19-20:1-10). However, only by letter dated August 7, 2002, did the City notify plaintiff that it exercised its option to renew the lease for an additional five years commencing December 1, 2002 (Bolan Aff. in Opp. to Def. Mot. Ex. B).

After September 2000, the City stopped paying rent pursuant to the lease; it resumed payments in July 2001, after its inspector had determined that repairs to the premises had been fully made (Shaw Aff. in Opp. to Pl. Mot., Macuha Aff. ¶¶ 4-5). The lease was terminated in May 2004 and the parties settled a claim for the rental arrears (Shaw Aff. in Opp. to Pl. Mot.,

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Michael Monaco EBT, 23: 20-25, 24: 2-4, 10-16).

[3]At least one of the principals of Sonny Boy has no recollection that the Realty requested or demanded that the City repair the fire damage (Def. Mot. Michael Monaco EBT 43:2-15, 44:9-13).

Maryles Aff. ¶¶ 4-5; Kondraft Aff. Ex. B).[4]

Plaintiff repaired the premises and submitted a claim to its property insurance carrier, Greenwich Insurance Company; the carrier paid plaintiff $292,201.01 in repair costs and is now subrogated to the rights of plaintiff (Pl. Mot. Ex. C, Complaint ¶¶ 5, 7). Defendant did not pay for or reimburse plaintiff for the costs. Plaintiff filed suit against the City in about November 2001, for breach of the lease and seeks consequential damages.

The Lease Agreement

Pursuant to the terms of the lease agreement, plaintiff as landlord was to make all exterior and structural repairs, "excluding such repairs necessitated by the negligence of Tenant or its invitees" (Lease, Art. 13, p. 16). The City as tenant was to perform interior, window pane, plumbing, air conditioning, and electrical system repairs (Lease Art. 10, p. 15). The City was to surrender the premises, at the end of the lease, in good order and condition, "with ordinary wear and tear, and damage by the elements, including fire or other casualty, excepted" (Lease Art. 12, p. 16). If, during the tenancy, the premises was damaged by fire or other casualty to such an extent that it was "unsuitable or untenantable for use for the purpose for which they [were] leased," the City would cease paying rent from the date of the damage until the landlord fully repaired the premises and the City certified that it had reoccupied the premises (Lease Art. 15, pp. 19-20). Within 30 days of the fire or other casualty, either party could terminate the lease but if neither did, then within 45 days after the casualty, the landlord was to commence repairs and

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[4]According to the then- ACS Division Director of Bronx Congregate Care, William Fletcher, the premises never operated as a group home again, because the floors, wall, and ceilings were not satisfactorily repaired, and there continued to be roof leaks (Def. Mot. Fletcher EBT 64: 3-25, 65: 2-23).

complete them within 180 days; if it did not timely commence or complete, the tenant could terminate the lease within 10 days or could perform the repairs and reimburse itself from the rents due (Lease Art. 15, p. 20).

The lease terms were the subject of previous motion practice. In 2002, the City's motion to dismiss the negligence and breach of contract claims was granted by another justice of this court (Pl. Mot. Ex. D, *Sonny Boy Realty, Inc. v The City of New York*, Sup Ct, NY County, July 12, 2002, Evans J.).[5] Upon appeal, the Appellate Division reinstated the breach of contract claim (*Sonny Boy Realty, Inc. v City of N. Y.*, 8 AD3d 171 [1st Dept. 2004]). The Court referenced Article 13, concerning repairs, and in a footnote referenced the end-of-term provision in Article 12, to hold that

> [T]he only rational conclusion that can be drawn from the lease's express imposition of an obligation on the part of the landlord [*n.b.*: *to make all exterior and structural repairs, excluding such repairs necessitated by the negligence of Tenant or its invitees - Lease, Art. 13*] is a coexistent obligation on the part of the tenant to make all . . . repairs necessitated by its negligence and the negligence of its invitees . . . [T]here is nothing in the lease that can be read to absolve the City from the obligation to make such repairs.

(8 AD3d at 171). The Court noted that as the premises were "undisputedly damaged by a fire started by one of [the City's] residents, the allegation in the complaint that the City was negligent, inter alia, in the supervision of the home's residents and training of supervisory staff is a sufficient predicate for the City's liability" (8 AD3d at 172). Finally, it noted that plaintiff's motion for summary judgment was correctly denied in part because there was a question of fact as to the City's negligence (8 AD3d at 172).

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[5]The second count of the complaint, sounding in negligence, was dismissed for failure to file a notice of claim.

The Court of Appeals affirmed, "agree[ing] with the Appellate Division that the lease imposed an obligation on the tenant to make repairs necessitated by its own negligence or the negligence of its invitees" (*Sonny Boy Realty, Inc. v City of N. Y.*, 4 NY3d 858, 859 [2005]).

Plaintiff and defendant filed and served the instant motions within days of each other. Sonny Boy seeks summary judgment as to its claim for breach of contract. The City seeks summary judgment and dismissal of the breach of contract claim or, alternatively, to amend the Answer to assert the defenses of waiver and estoppel, and to move for summary judgment and dismissal on the ground that the plaintiff waived any claim it had to seek repayment, and that the City detrimentally relied on the agreement by plaintiff to repair the premises in exchange for the City's agreeing to extend the lease agreement. The arguments are presented below.

Sonny Boy Realty's Motion for Summary Judgment

Plaintiff moves for partial summary judgment on its claim of breach of contract. It contends that the rulings by the Appellate Division and the Court of Appeals establish that it is entitled to summary judgment on its breach of contract claim as a matter of law, and that it does not have to demonstrate that there was negligence on the part of the City. Specifically, it argues that because the Appellate Division's reasoning was based not only on the lease's Article 13 repair provision, and also cited the Article 12 end-of-term provision which obliges the tenant to return the premises in good condition and does not require the landlord to establish negligence in order to maintain a breach of contract claim, that it is now law of the case that the City is contractually liable for the cost of the repairs. It also offers documentary evidence to establish that the City's negligence was the proximate cause of the fire, so as to satisfy the requirement of Article 13 concerning who is responsible for repairs. Plaintiff further argues that the City was

negligent in failing to evaluate or treat the youth at issue. Its evidence includes the witness statements gathered directly after the fire, deposition testimony, the City's records for the male youth arrested for causing the fire, an internal report written on September 18, 2000 about the fire, and an ACS "Third Party Case Review Report" dated September 29, 2000 concerning the agency's handling of the youth's case from the time he was admitted to the residence up until the date of the fire (Pl. Not. of Mot., Ex. O-Y).

The Third Party Case Review Report of the adolescent boy indicates that although the youth was housed at the residence beginning in April 2000, many pieces of information were not created or available for review as of September 29, 2000 (Pl. Mot. Ex. Y). Among the items lacking was a case record, a review of the youth's case, and a plan to address his needs. Records had not been obtained from the therapist, there were no up to date medical records, and the report concluded that there was a failure by the agency and residence to offer services. It noted that the youth was a member of the Bloods, and had been attacked on several occasions by other Bloods members. It noted that the youth's Case Planner said that the youth's mother told her after the fire, that her son had "done this before," although she had never previously mentioned this fact to the Case Planner. The report concludes, among other items, that the youth was a "fire setter," and that prior to the fire he smoked marijuana and may have sold crack cocaine. Its "general case observation" is that "supervision and the case planner were aware that the case had significant problems in the field office."

Plaintiff argues that this report shows that the City failed to evaluate and address the needs of this youth or determine that he posed a potential threat. It also argues that the City failed to follow its own rules and regulations as concerns the youth's behavior at the facility, as

set forth in ACS manuals and procedures (Pl. Mot. Q, R).[6] It points to the testimony of the adolescent's Case Planner, Aline Fertil, who said that officials at the residence believed the boy was taking drugs, and that she suspected he was "into something" such as selling drugs (Pl. Mot. Ex. W, EBT of Aline Fertil 47: 21-24).

Plaintiff also points to the testimony of Harold Diaz, a security officer hired by an outside company, who worked at the residence and saw the youth shortly before the fire was set (Pl. Mot. Ex. V, Harold Diaz EBT [hereinafter Diaz EBT]). Diaz testified that on the morning in question, the youth discovered that his beeper was missing and said, "where is my f-n beeper. . . if I don't get my fucking beeper in ten minutes I am going to blow this -- I'm going to set this place on fire," and that, "If I don't get my fucking beeper in five fucking minutes I will go set this mother-fucker on fire," after which he went outside to smoke a cigarette (Diaz EBT 53: 20-23, 54: 4-10). Diaz went outside with him and attempted to calm him down (Diaz EBT 55: 3-12). When they returned inside, the youth said "Nobody got my beeper? You will see." (Diaz EBT 54:10-12). Present when the boy "made this statement," was Fertil, and another case worker who tried telling the boy to "relax" and that they would find what was going one; both Fertil and the other case worker were rebuffed (Diaz EBT 54: 18-21, 55: 13-20, 56: 7-9).[7] The boy then went

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[6]The manual notes that smoking is discouraged, but allowed (Pl. Mot. Ex. Q, ACS Manual, sec. 7 [5]). It notes that weapons, firearms, controlled substances, and marijuana are prohibited, as well as articles considered to be dangerous to the child or harmful to others (ACS Manual, sec. 5 [5]). Searches of a child's person may be undertaken when it is determined that the youth or others are in "imminent danger of serious harm due to the youngster's intent to use or distribute an object or substance in his/her possession." (ACS Manual, sec. 5 [5]).

[7]Fertil did not recall the youth making any threats to burn down the facility, nor did she have any conversation with him about his missing beeper (Pl. Mot. Ex. W, EBT of Aline Fertil 65: 4-22).

upstairs to his room (Diaz EBT 58: 9-11). The fire was set shortly thereafter. Plaintiff argues that defendant had or should have had sufficient notice of the youth's propensity for destructive activity and of his likelihood of acting out destructively on the day in question.

In opposition, the City argues that there remain questions of fact concerning the proximate cause of the fire and the reasonableness of the agency's actions, such as would implicate Article 13, and that summary judgment must be denied accordingly. In particular, it notes that there is no evidence that ACS was aware of the youth's "fire setting history" prior to September 16, 2000,[8] and that although the agency noted "bad behavior" by the youth in the weeks prior to the incident, the physical altercations with other residents could not establish notice of potential arson. As concerns the dearth of information on the boy, the City offers the testimony of the former ACS Division Director of Bronx Congregate Care, William Fletcher, who testified that although the field office did not have a file on the youth, the residence itself had a file for his case (Def. Mot. EBT of William Fletcher [hereinafter Fletcher EBT] 54: 10-11). According to Fletcher, the individual who undertook and completed the Third Party Review Report, after the fire, did not or could not look for pertinent information in all the locations where it was stored (Fletcher EBT 58: 13-21, 60: 7-24). Fletcher remembered that a psychological report was in the youth's file shortly before the Third Party Review was undertaken, and he could not explain why the individual conducting the review did not see the report (Fletcher EBT 61: 14-25). In addition to the psychological report, Fletcher recalled seeing the agency's intake sheet, progress notes, referrals for school programs, incident reports

[8] Fertil testified in her EBT that the mother had not told her this history on the more than one occasion when they had met prior to the incident (Fertil EBT, 55:23-57, 10).

concerning times the youth was AWOL and the times he was in fights, and possibly a psycho-social report (Fletcher EBT 62: 16-25, 63: 2-17). However, according to David Reznik, who was an ACS Supervisor Level 2 in 2000, it is possible that the youth's records were destroyed in the aftermath of the fire; Reznik himself went through all the case records in the residence to determine which were salvageable, and while he did not remember the youth's records in particular, he conjectured that the person conducting the Third Party Review Report might have not found any documents (Def. Mot. EBT of David Reznik 113: 9-25).

The City also points to the testimony showing that on the day of the incident, the ACS workers as well as the outside security officer, all attempted to defuse the youth's anger and agitation prior to his decision to set his room on fire, and argues that there is a question of fact as to whether defendant had notice or acted reasonably under the circumstances. It also argues that there are questions as to whether the youth had matches or a lighter on his person which were prohibited under the ACS rules, and whether the defendant's custom and policy for searching the residents and their rooms was reasonable and complied with.

The Defendant City's Motion

The City moves for summary judgment and dismissal of the complaint on the ground that the City was not contractually obligated to repair fire damages. It also seeks permission to amend its Answer to add a defense of waiver/estoppel, so as to move for summary judgment and dismissal on the alternative ground that plaintiff waived, or is estopped from asserting, any contractual duty owed by the City to repair the damages.

The City argues that its motion to dismiss the complaint on summary judgment grounds must be granted, and the plaintiff's motion for summary judgment denied, because Article 15 of

the lease clearly requires the landlord to repair the premises when the damage is caused by fire if the landlord chooses not to terminate the lease. The City does not dispute that Article 15 does not absolve it from potential liability in tort (Shaw Reply Aff. ¶ 6). It agrees with plaintiff that the rationale for providing that the landlord is to repair fire damage, rather than the tenant, is because the owner of the premises wants to control the repair of its property (Shaw Reply ¶ 6). However, the City argues that once the landlord became obligated to repair by not terminating the lease, it cannot bring a breach of contract claim under the general repair provisions of Article 13 and Article 10.[9]

Alternatively, the City argues that Sonny Boy waived the City's performance when it offered to repair the fire damage on the condition that the City exercise the option to extend the term of the lease for five more years, and the City thereafter exercised its option. The City contends that it renewed the lease in reliance on plaintiff's agreement and undertaking of the work. The City further argues that it detrimentally relied on plaintiff's agreement to perform repairs, by agreeing to extend the lease when it was under no obligation to do so, and that plaintiff should be estopped from seeking reimbursement for the repairs.

In opposition, plaintiff argues that based on the rulings by the Appellate Division and Court of Appeals, any contentions by the City concerning its lack of obligation under the lease to repair for damages it negligently caused, have been considered and rejected. It also contends that the City's argument concerning the language of Article 15 of the lease was previously presented

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[9]The City also argues that reliance on Article 12, the end-of-term provision, is misplaced, as there has been no evidence to show that on the date the City removed itself from the premises, there was any damage remaining from the fire. It provides documentary evidence to show that the damages from fire were repaired before it broke the lease in May 2004.

to the Court of Appeals and found not to have merit, and should not be considered herein. It further argues that Article 15 pertained to accidental fire or casualty, not arson, and was not designed to permit a tenant to escape its rental obligations (Bolan Reply Aff. ¶ 19). It also notes that the City presents nothing to show that Sonny Boy agreed to forego any rights to seek recovery for the cost of repair.

Plaintiff also opposes the motion to amend the Answer. It argues that the Answer was interposed about three and a half years after the Complaint was filed, after protracted motion practice and appellate proceedings, and that the City never sought to amend it during the ensuing two years of litigation. Plaintiff concedes that defendant's counsel "mentioned that defendant was pursuing evidence to establish a defense of waiver," but contends it was never made aware of the intent to assert a defense of estoppel (Bolan Aff. in Opp. to Def's. Mot. for Summ. Judg. unnumbered p. 10).[10] Plaintiff argues that it is severely prejudiced because it never questioned the witnesses about the issue of detrimental reliance and did not seek additional depositions as concerns that issue.

Legal Analysis

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form

[10]Plaintiff's attorney writes, "the issue of waiver, and estoppel, was being 'developed' by the City at least as early as the date of the deposition of Anthony Monaco, which was conducted on October 30, 2006, more than one year prior to the City's present motion." (Bolan Aff. in Opp. to Def. Mot. unnumbered p. 11),

sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]). Summary judgment is only appropriate when there is no genuine issue as to any material fact and the disposition of the causes of action may be decided as a matter of law (*see, Security Pacific Bus. Credit, Inc. v Peat Marwick Main & Co.*, 79 NY2d 695, *rearg denied* 80 NY2d 918 [1992]).

Plaintiff's Motion for Summary Judgment

Plaintiff's motion for summary judgment based on law of the case is denied. Although the Appellate Division and the Court of Appeals held that Article 13 of the lease agreement obligated the tenant to make repairs necessitated by its negligence or the negligence of its invitees, neither Court held that the City as tenant was negligent as a matter of law. Whether certain actions or omissions constitute negligence is peculiarly a fact-specific, case-by-case determination best left, in most instances, for the finder of fact at trial.

The City's arguments concerning the scope of Article 15, are necessarily limited by the Court of Appeals' holding that the lease "imposed an obligation on the tenant to make repairs necessitated by its own negligence or the negligence of its invitees." (4 NY2d at 859). The City's appellate brief for the Court of Appeals, while making the argument that the various lease provisions provide for which party is responsible for what sorts of repairs, and specifically that Article 13 does not place any responsibility of repair on the tenant, pointed to the language of Article 15 as an example of the lease obligating the landlord to repair the premises following a fire, no matter how the fire was caused (Pl. Mot. Ex. J, Appellant's Brief, *Sonny Boy Realty, Inc. v The City of New York*, Dec. 7, 2004, pp. 17-18). The Court of Appeals did not indicate that the lease contained an exception in Article 15 to the general ruling that under the lease, the tenant was responsible for its own negligence. There remains a question of fact as concerns whether

Article 15 implicitly requires the tenant to pay for repairs made by the landlord following a fire or casualty that is shown to have been negligently caused by the tenant.

Nonetheless, plaintiff's motion for summary judgment is denied. Although the claim is for breach of contract, a breach will only be established where it is shown that the City's negligence was the proximate cause of the fire, and that the City was therefore liable for repair of the damage. There remain questions of fact as to whether the City had sufficiently specific knowledge or notice of the youth's dangerous propensities and could have anticipated them (*Mirand v City of N.Y.*, 84 NY2d 44, 49 [1994]). The reasonableness of conduct is normally a jury question (*Ugarriza v Schmieder*, 46 NY2d 471, 475 [1979]). The reasonableness of an agency's actions and whether they were the proximate cause of the accident are nearly always questions of fact for the jury (*see, Benitez v New York City Bd. of Educ.*, 141 AD2d 457 [1st Dept. 1988], *rev'd other grounds* 73 NY2d 650 [1989]). Adequacy of supervision and proximate cause are generally questions for the jury (*Oakes v Massena Central Sch. Dist.*, 19 AD3d 981, 982 [3d Dept. 2005]).

Here, although it appears that much of the history and records of the young man were not available to the assessor when conducting the Third Party Review Report, and perhaps never created, there are questions as to whether the missing records would have given notice of the youth's propensity to set fires. There are also questions as to whether the agency and residence acted reasonably on the day in question, both as concerns the interactions with the boy, and in response to the fire. Accordingly, summary judgment is not appropriate, and plaintiff's motion is denied.

City's Motion to Amend Answer and for Summary Judgment

Leave to amend pleadings will be freely given, absent prejudice or surprise resulting from the delay (*see, Caskey, Davies & Assoc., Inc., v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]; CPLR 3025 [b]). Amendment will be allowed "in the absence of laches, undue prejudice and unfair advantage." (*Leutloff v Leutloff*, 47 Misc 2d 458, 459 [Sup. Ct., Onondaga County1965]). "Prejudice in this context means that the party opposing the amendment has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (*Garrison v Wm. H. Clark Municipal Equipment*, 239 AD2d 742, 742-743 [3d Dept 1997]).

The branch of defendant's motion seeking to amend its answer to assert the defenses of waiver and estoppel is granted. Plaintiff concedes it has been on notice since at least October 2006 that defendant was developing both theories (*see* Bolan Aff. in Opp. to Def. Mot. unnumbered p. 11). Although it argues that it will be prejudiced, in that it did not question witnesses concerning the defenses and will need to conduct further discovery, given the alleged facts of this case, it must be concluded that the defense has long been apparent, and any prejudice to plaintiff is nominal. Nonetheless, summary judgment and dismissal of the complaint based on the theory that plaintiff waived its right to pursue reimbursement for the repairs is denied, as this is a disputed question for the jury. Similarly, defendant's motion for summary judgment and dismissal on the ground of estoppel denied as there are factual issues as to whether a detriment was suffered.

Defendant's motion for summary judgment based on the scope of Article 15, is also denied, for the reason discussed above. There is a question of fact as to whether the language of Article 15 should be interpreted to include a requirement that the tenant is responsible for paying

for the costs of repairs following a fire or casualty that is shown to have been negligently caused by the tenant. It is

ORDERED that Sonny Boy Realty's motion for summary judgment is denied; and it is further

ORDERED that the City of New York's motion for summary judgment is denied; and it is further

ORDERED that the City of New York's motion to amend its Answer is granted to the extent that it may amend its answer to assert a claim of waiver and estoppel; and it is further

ORDERED that the City is to serve on plaintiff and file an amended Answer with the Clerk of the Court (60 Centre, Bsmt), within five (5) days of entry of this order; and it is further

ORDERED that the parties are to appear on May 5, 2008, as previously scheduled, for trial in Part 27, Supreme Court, New York County.

This constitutes the decision and order of the court.

Dated: April 25, 2008
New York, New York

Paul G. Feinman
J.S.C.