At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July, 2008.

P R E S E N T:

HON. LAURA L. JACOBSON,
Justice.

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ANDRZEJ DROZDZAL,
Plaintiffs,

- against -

Index No. 39145/05

SPOON INCORPORATED AND SUZANNE SEMEL AND RUTH SEMEL,
Defendants.

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The following papers numbered 1 to 13 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 4-5, 6-7
Opposing Affidavits (Affirmations)	8, 9, 11
Reply Affidavits (Affirmations)	12, 13
Affidavit (Affirmation)	
Other Papers (Memoranda of Law)	3, 10

Upon the foregoing papers, defendants Suzanne Semel and Ruth Semel (collectively, the Semels) move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims asserted against them. Co-defendant Spoon Incorporated (Spoon) also moves for summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiff Andrzej Drozdzal (Drozdzal) cross-moves for leave to amend his bill of particulars.

This personal injury action arises out of an incident which occurred on November 1, 2005 at 5001 13th Avenue in Brooklyn, when Drozdzal allegedly slipped and fell down an interior staircase at Spoons Restaurant (Spoons). At the time of the incident, the subject premises was owned by the Semels and occupied by Spoon, pursuant to a lease agreement between the parties. Drozdzal was an employee of Ossie's Fish Market and was responsible for delivering fish to Spoons, as he did on the morning of the incident. At his deposition, Drozdzal testified that he fell while making a delivery of fish to the basement of Spoons after an employee at the front directed him to take the fish downstairs. Drozdzal also testified that he noticed that the stairs were wet as he was taking his first step down the stairs, but that, at that point, it was too late to stop himself from descending. He allegedly fell backward and slid down the staircase. Drozdzal claims that there was a wet spot approximately six inches in diameter in the middle of every step. According to Drozdzal, he had descended the same staircase on at least two prior occasions without noticing any wetness or other dangerous or defective condition on the stairs. Drozdzal posits that, from his personal experience in the restaurant industry and from his observations on the day of the accident, it appeared that the stairs had recently been mopped prior to his fall. Spoons opened in September 2005 and Spoons proprietors, Jack Chait (Chait) and David Rappaport (Rappaport), testified that, before the restaurant opened, the property underwent renovations; however, Chait and Rappaport maintain that the staircase renovations were limited to the addition of a black non-slip stair covering and a new handrail. However, Moses Semel, the husband of Suzanne

Semel and the individual responsible for handling business with lessees on the property, testified that the staircase appeared to be completely replaced during the renovation process because it looked to be constructed of "new wood." There is no evidence that plans for the stated renovations were ever given to the Semels or that permits were obtained for the work. The basement of the restaurant was used for food preparation and it also housed the dishwasher, freezer, slop sink, and cleaning supplies. Spoons' employees carried dishes and utensils up and down the stairs throughout the day in sealed bus boxes. Chait also testified that the restaurant was cleaned at night, which included sweeping and damp-mopping the stairs. According to Chait, cleaning was done throughout the day as needed, but there was no set schedule for the cleaning. All employees were responsible for inspecting the restaurant for any spills and reporting them. The steps to the basement were intended for use by restaurant employees only and a sign was posted in this regard. Drozdzal maintains that he was directed to the basement by an employee at the front of the restaurant, even though Chait argues that this was not the normal custom for deliveries at Spoons. Pursuant to the lease agreement between the Semels and Spoon, Spoon was responsible for the routine maintenance of the property, which all parties agree included the day-to-day cleaning of the restaurant.

Drozdzal's Cross Motion to Amend the Bill of Particulars

In his cross motion, Drozdzal argues that he should be granted leave to amend his bill of particulars in order to assert New York City Building Code violations found by Heino

Ainso (Ainso), Drozdzal's expert engineer. Drozdzal points out that photos from Ainso's investigation were exchanged with the defendants and that, as a result of Ainso's investigation, Ainso "formulated a report clearly documenting that the stairs fail to comply with NYC Building Code section 27-375" which regulates interior staircases. Drozdzal avers that issues of fact exist as to "whether the subject stairway's failure to comport to NYC Building Code requirements were substantial causative factors in plaintiff's accident."

In opposition, the Semels argue that, rather than an amendment to the bill of particulars, what Drozdzal really seeks is to "back-door a time-barred, never-before pleaded cause of action in an attempt to create a question of fact as to the Semels' liability." The Semels further contend that, after three years of litigation and various discovery demands, Drozdzal now seeks to amend the bill of particulars "only to create opposition to the Semels' motion for summary judgment...to add a statutory violation claim to permit their engineer's affidavit to be considered." The Semels cite case law to the effect that asserting a new theory of liability in opposition to a motion for summary judgment is improper. Accordingly, the Semels argue that summary judgment in their favor is warranted because Drozdzal can offer no other opposition to the Semels' motion without advancing the existence of proposed code violations. The Semels contend that an August 11, 2006 preliminary conference order specifically directed plaintiff to provide a supplemental bill of particulars as to alleged statutory violations and that, until his cross motion, no such violations were alleged. In response to Drozdzal's contention that the amendment would not cause "meaningful

prejudice," the Semels counter that, because the plaintiff never timely alleged a statutory violation after the expert investigation, "the Semels were expressly led to believe that no such claims existed."

In reply, Drozdzal argues that the bill of particulars sets forth that "the Court will take judicial notice of all statutes, ordinances, rules and/or regulations which the plaintiff claims the defendant violated" and this language should have placed the defendants on notice as to Drozdzal's ability to seek amendment of the bill of particulars prior to trial. Drozdzal further asserts that the proposed amendment is not a "new theory," but rather a "mere amplification" of the theories alleged in the original bill of particulars. In addition, Drozdzal contends that defendants still have an opportunity to hire their own expert to examine the staircase, as the condition of the stairs has not changed since the date of the accident.

Generally, leave to amend pleadings is to be freely granted absent prejudice or surprise resulting from the delay (see CPLR 3025[b]; *see Fahey v County of Ontario,* 44 NY2d 934 [1978]; *see also Leutloff v Leutloff*, 47 Misc2d 458 [1965] [CPLR 3025[b] is to be liberally construed and amendment should be allowed in the absence of laches, undue prejudice and unfair advantage]). However, when an amendment to a pleading or a bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such an amendment should be discrete, circumspect, prudent and cautious *(see Eggeling v County of Nassau*, 97 AD2d 395 [1983]). Moreover, the plaintiff must present a reasonable excuse for a lengthy delay in seeking to amend a bill of particulars (*see Thomas v Mat. Power, Inc.*, 205

AD2d 525 [1994]). "In exercising its discretion, the Court will look at such factors as the length of the delay, the creation of prejudice and, where the case has long been certified as ready for trial, how long the moving party had full knowledge of the substance of the amendment for which leave is sought" *(Franza v London Terrace Gardens*, 9 Misc3d 1112(A), 2 [2005]). Further, "a new theory, presented for the first time in opposition to a motion for summary judgment cannot bar relief which is otherwise appropriate" (*Scanlon v. Stuyvesant Plaza, Inc.*, 195 A.D.2d 854, 854 [1993]).

Here, the court notes that the proposed amendment stems from an expert affidavit dated February 12, 2007, which is more than nine months before the note of issue was filed on November 2, 2007. Drozdzal offers no explanation or reasonable excuse for the delay in seeking to amend his bill of particulars. Further, even though defendants were allegedly present during Ainso's investigation, this fact does not qualify as notice of Drozdzal's intention to assert any specific building code violations. Similarly, Drozdzal's request that the court take judicial notice of any alleged code violations also fails to qualify as significant notice to defendants. Drozdzal claims that amending the bill of particulars would not cause any "meaningful prejudice" to defendants. However, defendants would be required to complete discovery on the eve of trial in response to the alleged code violations and, in such cases, the court must grant the amendment cautiously. Finally, although Drozdzal argues that the code violations are not a "new theory" asserted for the first time in opposition to summary judgment, this is not the case. The original bill of particulars indicates that the

cause of the accident was a "wet/slippery" staircase. Drozdzal now attempts to add the alleged code violations to show that the staircase failed to comply with regulations regarding stair width and other construction. The assertion of specific building code violations is a new theory in this context. Therefore, Drozdzal's motion to amend the bill of particulars is denied.

The Semels' Motion for Summary Judgment

In their motion, the Semels seek summary judgment on the basis that they are out-of-possession landlords and that there is no evidence of a significant structural or design defect in violation of a specific statutory provision. The Semels argue that the bill of particulars indicated that a "wet/slippery staircase" was the cause of Drozdzal's fall, not a violation of a statutory provision or a structural or design defect. In addition, the Semels emphasize that, according to the language of the lease agreement, the tenant is responsible for the routine maintenance of the restaurant. According to the Semels, Moses Semel, who was responsible for the building's affairs, "did not check on Spoons' work or even visit the premises on a weekly or monthly basis." The Semels allege that they had no actual notice of the wet condition of the stairs, that they did not see the staircase immediately before the accident and that they had received no complaints about the subject staircase prior to the accident. The Semels also argue that there is no evidence that the wetness existed for an appreciable length of time so as to give rise to an inference of constructive notice.

In opposition, Drozdzal argues that questions of fact exist that require denial of defendants' respective summary judgment motions. Drozdzal cites the deposition testimony of Moses Semel that Spoon did major renovations prior to possession without obtaining permits, including replacing the entire staircase. Drozdzal also alleges that, according to his expert, the stairs were not compliant with the New York City Building Code, and a specific code violation, combined with a general failure to maintain, may be a basis upon which to hold a landlord liable for plaintiff's injuries. In addition, Drozdzal states that the lease indicates that "landlord Semel retained the right to re-enter and make repairs, thus evidencing a [retention] of control." Finally, Drozdzal also maintains that, although his testimony was that he slipped on water on the stairs, a jury should be permitted to consider concurrent causes of the accident and he should be allowed to assert alternative theories which might individually or in conjunction have caused the accident.

In partial opposition to the Semels' motion, Spoons contends that Moses Semel's testimony is "baseless and erroneous" because he only assumes that a new staircase was constructed, and he has no direct evidence to support his statement. In any event, Spoon points out that "it has not been alleged that a proximate cause of the accident is the stair's general construction" and, therefore, "it is impossible for Spoons to address Semel's liability in terms of design, repair or structural defect since none has been identified or alleged."

In reply, the Semels argue that the expert affidavit and alleged statutory violations should be disregarded as irrelevant, lacking foundation, and having no causal nexus to

Drozdzal's incident or injuries.

Summary judgment is a drastic remedy which should not be granted when there is any significant doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter *(see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v Monroe County*, 77 AD2d 232, 236 [1980]). In negligence cases, summary judgment is rarely appropriate *(see Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]; *also see Smith v Key Bank of Western New York*, 206 AD2d 848, 849 [1994]).

It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or was contractually bound to repair the unsafe condition (*see Eckers v Suede*, 294 AD2d 533 [2002]) Moreover, "[r]eservation of a right to enter the premises for purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect" (*Nikolaidis v. La Terna Restaurant*, 40 A.D.3d 827

[2007]; *see Guzman v Haven Plaza Hous. Fun Co.*, 69 NY2d 559 [1987]; *also see Gavallas v Health Ins. Plan of Greater New York*, 35 AD3d 657 [2006]).

In the instant case, it is undisputed that the Semels were out-of-possession landlords and that Spoon was a tenant in possession of the premises where the accident occurred. The Semels established their prima facie entitlement to judgment as a matter of law by demonstrating their status as out-of-possession landlords who retained no control over the premises and had no contractual obligation to maintain the premises. There is no evidence that the Semels retained meaningful control over the premises simply because they retained a right to re-enter, nor were they contractually obligated under the lease to perform routine maintenance at the premises. In addition, Drozdzal failed to establish the existence of a significant structural or design defect that was contrary to a specific statutory provision because he failed to allege said defect in the bill of particulars and cannot now assert the existence of Building Code violations as a new theory of liability in opposition to summary judgment. In the absence of any evidence that the Semels had actual or constructive notice of the wetness on the stairs or any proof that they created the wet/slippery condition, the motion by the Semels for summary judgment is granted.

Spoon's Motion for Summary Judgment

In its motion, Spoon seeks summary judgment in its favor on the ground that Spoon did not have notice of the alleged defective condition, nor did Spoon create the defective condition. Spoon also alleges that Drozdzal's claims are merely speculative and that

Drozdzal cannot identify the proximate cause of the accident. Spoon points out that Drozdzal "generally could not identify the liquid nor did he know how the stairs became wet." Spoon also emphasizes that "wet/slippery staircase" is the only dangerous condition alleged by Drozdzal in his bill of particulars and that "the plaintiff does not allege Spoons violated any statutory rules, ordinances, or regulations, or that the plaintiff's injuries were the result of a construction, design or structural defect associated with the staircase." According to Spoon, there is no evidence that it had notice that the stairs were or that Spoon caused the stairs to become wet and slippery. Spoon alleges that neither Chait or Rappaport were questioned about notice of the alleged condition and that there is no evidence that the condition was recurring or in existence long enough to constitute constructive notice. Spoon asserts that the stairs were never mopped at any time other than in the evening and that there is no evidence that Spoon created the condition. In addition, because Drozdzal admitted that he had used the staircase during two previous deliveries, "it cannot be safely assumed a Spoons employee must have caused the stairs to become wet and slippery because [of the argument that] only Spoons employees had access." Spoon also contends that summary judgment is appropriate when the plaintiff cannot identify the proximate cause of the accident and relies solely on circumstantial evidence without showing it was more likely that the injury was caused by the defendant's negligence than by some other agency. Spoon claims that Drozdzal does not know whether the first step was slippery or wet, nor does he know whether he actually stepped in a wet or slippery substance before falling.

In opposition, Drozdzal argues that issues of fact exist as to both defendants that preclude summary judgment. Drozdzal repeats his own testimony that he believes the wetness on the stairs came from the mopping of the steps. Drozdzal also reiterates that members of the kitchen staff made several trips to the basement throughout the day for food preparation and dishwashing and that the steps were intended for use by employees of the restaurant only. Drozdzal maintains that inspections of the staircase were to be done by every employee present throughout the day. Accordingly, Drozdzal submits that the allegedly wet staircase proves that "Spoon, by and through its employees failed to fulfill its obligations to maintain a clean stairway." Drozdzal further argues that "Spoon Restaurant failed to adhere to its own standards of inspection and remedy of the slippery conditions on the steps."

In opposition to Spoon's motion, the Semels argue that the wetness on the stairwell, coupled with the clear testimony that Spoon inspected and cleaned the stairwell throughout the day, "create questions of fact as to whether Spoons knew or should have known of the alleged wetness, or whether they created same." Further, the Semels contend that Spoon's testimony that utensils and dishes were carried up and down the stairs at various times throughout the day "is sufficient circumstantial evidence that Spoon's employees caused and created the wet spots on each step in the stairwell as claimed by the plaintiff." The Semels additionally argue that Spoon was the only party in possession and control of the subject stairwell who also had a contractual duty to maintain the stairwell. Therefore, according to

the Semels, "questions of fact remain as to whether Spoons breached their contractual obligation of maintenance of the subject stairwell under the lease."

In reply, Spoon argues that, "although plaintiff's counsel would argue that the plaintiff's personal experience is sufficient evidence that the water on the stairs must have been left there by a Spoons employee after mopping, the plaintiff actually testified during his deposition that he cannot identify the liquid, and does not know how the stairs became wet." Spoon also contends that, although Drozdzal alleges that the stairs were used exclusively and continuously by Spoon's employees, his presence on the staircase expressly contradicts his testimony. Spoon suggests that a food vendor could have easily caused the alleged condition, rather than a Spoon employee. Further, Spoon maintains that Drozdzal's allegations are speculative and do not prove that the injury was more likely caused by the defendants' negligence than some other agency. In addition, Spoon argues that Chait testified explicitly that the stairs were not wet-mopped in the morning or afternoon hours and that, even though spills were cleaned up immediately during the day as they occurred, there is no evidence that the restaurant was ever wet-mopped during business hours.

It is well settled that "[i]n order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition" (*Kraemer v K-Mart Corporation*, 226 AD2d 590 [1996]; *see also Hollinger v Chestnut Ridge Raquet Corp.*, 227 AD2d 380 [1996]). "To constitute constructive notice,

a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "The mere happening of an accident does not establish liability on the part of the defendant" (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 251 [1984], affd 64 NY2d 670 [1984]); rather, it must be shown that "the owner ha[d] a sufficient opportunity, within the exercise of reasonable care, to remedy the situation," and failed to do so (*see Mercer v City of New York*, 223 AD2d 688, 689 [1996], affd 88 NY2d 955 [1996]). Moreover, a plaintiff may prove the claim that a defendant is responsible for the condition that caused him to slip without direct evidence. Such claims may be substantiated with circumstantial evidence sufficient to create an issue of fact as to whether the defendant created the condition. "It is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Schneider v Kings Highway Hosp.*, 67 NY2d 743, 744 [1986], *quoting Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). The plaintiff's burden at trial will be to render other possible causes less likely, reasonable or logical than the inference of the defendant's negligence (*see Schneider*, 67 NY2d 743).

Here, viewing the evidence in the light most favorable to the plaintiff, an issue of fact exists as to whether Spoons' employees, acting within the scope of their employment, created a dangerous condition on the stairway. Drozdzal offers evidence, albeit circumstantial, that, because the subject staircase was reserved for only Spoon's employees and because Spoon's

employees used the staircase frequently throughout the day in order to facilitate food preparation and dishwashing in the basement, it can be reasonably inferred that an employee created the wet/slippery condition, thereby imputing responsibility to Spoon. The fact that Drozdzal, a food vendor, was present on the staircase on the day of the incident is not dispositive of the issue of whether an employee did or did not create the alleged wetness on the stairs. Because issues of fact exist concerning the creation of the alleged wet condition on the stairs by Spoon's employees, normal delivery customs for food vendors at Spoon and the apparent restricted usage of the interior basement staircase, Spoon's motion for summary judgment is denied.

In conclusion, the motion by plaintiff Andrzej Drozdzal to amend the Bill of Particulars is denied, the motion by defendant Spoon, Inc. for summary judgment is denied and the motion by defendant Suzanne Semel and Ruth Semel seeking an award of summary judgment dismissing this action as to the Semels is granted.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

HON. LAURA JACOBSON