At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 17th day of September 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

GREGORY McCOY,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 15389/06

TRANSPORT INTERNATIONAL POOL, INC., d/b/a GE CAPITAL MODULAR SPACE,

Defendants.

TRANSPORT INTERNATIONAL POOL, INC., d/b/a GE MODULAR SPACE f/k/a GE CAPITAL MODULAR SPACE.

Third-party Plaintiff,

- against -

DHL EXPRESS (USA), INC., d/b/a DHL EXPRESS,

Third-party Defendant.

The following papers numbered 1 to 7 read on this motion: Papers Numbered

Notice of Motion/
Affidavits (Affirmations) Annexed 1-2

Affirmations in Opposition	3-5
Reply Affirmations	6-7

Plaintiff in the instant action claims that on March 15, 2005, he sustained serious injuries when he tripped and fell upon an exterior set of stairs connected to a modular office trailer situated on premises located at 460 12th Avenue in New York, New York. The aforementioned trailer was owned and supplied by defendant/third-party plaintiff TRANSPORT INTERNATIONAL POOL, INC., d/b/a GE CAPITAL MODULAR SPACE (hereinafter TRANSPORT) and leased to and utilized by the plaintiff's employer, third-party defendant, DHL EXPRESS (USA), INC., d/b/a DHL EXPRESS, (hereinafter DHL).

Third-party defendant DHL now moves this Court for summary judgment and dismissal of defendant/third-party plaintiff TRANSPORT's action, as against them, pursuant to CPLR §3212, on the grounds that there are no triable issues of fact and defendant/third-party plaintiff TRANSPORT cannot establish a prima facie case against them. In support of their motion, third-party defendant DHL argues that the plaintiff has no right of recovery against them and that the third-party claims are barred by the exclusivity provision of the workers' compensation law. Specifically, third-party defendant DHL argues that the workers compensation law precludes third party contribution and indemnification claims unless the plaintiff has sustained a "grave injury", or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence, by which the employer has expressly agreed to contribution to, or indemnification of, the claimant or person asserting the cause of action, for the type of loss suffered." Third-party defendant DHL further contends that the plaintiff has not sustained a

"grave injury" as defined by the workers' compensation law, and that the language contained in the lease agreement contract between defendant/third-party plaintiff TRANSPORT and third-party defendant DHL is "generally worded", and as such, it was never intended to circumvent the provisions of the Workers' Compensation Law and it cannot be construed to usurp the provisions of the Workers' Compensation Law. Specifically, third-party defendant DHL argues that "the lease does not specifically state that the third-party plaintiff is entitled to be indemnified for injuries to the insured's employees in the course of their employment."

Defendant/third-party plaintiff TRANSPORT also moves this Court for an Order pursuant to CPLR §3212 granting them summary judgement dismissing both the plaintiff's complaint and third-party defendant DHL's counterclaims on the grounds that no issue of material fact exists and as such, defendant/third-party plaintiff TRANSPORT is entitled to judgement as a matter of law. Defendant/third-party plaintiff TRANSPORT also moves for a further Order pursuant to CPLR §3212, granting them summary judgement on their third-party action for indemnification and attorneys fees as against third-party defendant DHL. In support of their contention that the plaintiff's case against them should be dismissed, defendant/third-party plaintiff TRANSPORT argues that there is no proof that they caused, created or had any notice, either actual or constructive, of the allegedly dangerous condition that allegedly caused the plaintiff's accident. In support of their contention that they should be granted summary judgement as against third-party defendant DHL, defendant/third-party plaintiff TRANSPORT argues that the contract between the parties requires third-party defendant DHL to indemnify defendant/third-party plaintiff TRANSPORT for all personal injury claims arising from the use of the trailers and staircase, and to pay for defendant/third-party plaintiff TRANSPORT's

attorneys' fees. Defendant/third-party plaintiff TRANSPORT further contends that third-party defendant DHL has offered nothing that would prove that the lease agreement in question, including the indemnity provision, was not in effect on the date of the plaintiff's accident. Based on the foregoing, defendant/third-party plaintiff TRANSPORT also argues that third-party defendant DHL is unable to prove their counterclaims seeking indemnity and/or contribution from, and judgement over and against defendant/third-party plaintiff TRANSPORT.

In opposition to the motion by third-party defendant DHL, defendant/third-party plaintiff TRANSPORT reiterates the argument made in their own motion for summary judgement, arguing that the lease agreement makes it clear that they are entitled to indemnification and attorney's fees from third-party defendant DHL. Defendant/third-party plaintiff TRANSPORT argues that §11 of the New York State's Workers' Compensation Law does not preclude their third-party action because this action falls within the exception to the Workers' Compensation Law that permits a claim for indemnification where it is based upon a provision in a written contract entered into before the accident. Not surprisingly, defendant/third-party plaintiff TRANSPORT also states in its opposition papers that it agrees with third-party defendant DHL's argument that the plaintiff's action as against defendant/third-party plaintiff TRANSPORT should be dismissed as a matter of law.

In opposition to defendant/third-party plaintiff TRANSPORT's motion for summary judgement, third-party defendant DHL reiterates the arguments set forth in their motion for summary judgement. Specifically, third-party defendant DHL argues that defendant/third-party plaintiff TRANSPORT cannot satisfy any of the prerequisites set forth in §11 of the Workers' Compensation Law that would permit it to maintain its claims against third-party defendant

DHL, because the plaintiff has not sustained a "grave injury" as defined in the statute, and the contract between the parties does not require third-party defendant DHL to indemnify defendant/third-party plaintiff TRANSPORT for the loss in question. Third-party defendant DHL argues that a review of the plaintiff's bill of particulars as well as his medical records clearly demonstrates that the plaintiff has not sustained a "grave injury". Third-party defendant DHL further argues that a review of the lease agreement contract in question "does not reveal any direct or specific language whereby [third-party defendant] DHL unambiguously and expressly provides that [defendant]-third party plaintiff [TRANSPORT] is to be indemnified for injuries sustained by employees in the scope of their employment". Interestingly, third-party defendant DHL's opposition papers are silent as to defendant/third-party plaintiff TRANSPORT's request for dismissal of third-party defendant DHL's counterclaims.

The plaintiff opposes both motions, initially stating that he has no position on that portion of defendant/third-party plaintiff TRANSPORT's motion which seeks contractual indemnification from third-party defendant DHL. Regarding those portions of the motions seeking summary judgement against the plaintiff, the plaintiff argues that questions of fact exist which require that the motions be denied. Specifically, the plaintiff points to conflicting testimony between the witness for defendant/third-party plaintiff TRANSPORT and the witness for third-party defendant DHL regarding notice of the defect in the subject stairs as well as conflicting testimony regarding the wood braces that were placed and used under the subject stairs. The plaintiff further argues that by the language in the lease agreement between defendant/third-party plaintiff TRANSPORT and third-party defendant DHL, defendant/third-party plaintiff TRANSPORT retained responsibility for the delivery, set-up, installation and

maintenance of the leased equipment, including the aluminum steps, and more importantly, defendant/third-party plaintiff TRANSPORT retained the right to make periodic inspections of the equipment.

In reply to both the plaintiff's and third-party defendant DHL's opposition papers, defendant/third-party plaintiff TRANSPORT reiterates its' argument that the plaintiff's complaint should be dismissed as a matter of law contending that they had no notice of and did not create the condition complained of, and that pursuant to the lease agreement, they were not responsible for maintaining the stairs in a safe condition. Defendant/third-party plaintiff TRANSPORT argues that it did not own the property upon which the subject accident occurred, and as such, it is not an "out of possession" landlord as suggested by the plaintiff, and they cannot be held liable for non-specific building code violations that were never previously pled. Finally, defendant/third-party plaintiff TRANSPORT repeats its' contention that it is entitled to summary judgement on its' claims for indemnification and attorneys' fees from third-party defendant DHL as a matter of law because the indemnification provision in the lease agreement "fits squarely into [the] exception to the Workers' Compensation ban on litigation against an employer".

In reply to the opposition papers submitted by the plaintiff and defendant/third-party plaintiff TRANSPORT, third-party defendant DHL repeats its' arguments that the plaintiff cannot establish a prima facie case of negligence as against defendant/third-party plaintiff TRANSPORT, that there are no triable issues of fact with regard to third-party defendant DHL, and that the indemnity language contained in the lease agreement contract "does not specifically state that the third-party plaintiff is entitled to be indemnified for injuries to the insured's

employees in the course of their employment".

Summary judgment standard

The proponent of summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See* Alvarez v Prospect Hospital, 68 N.Y.2d 320, 324 (1986); Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 A.D.2d 648, 649 (3rd Dept., 1981); Greenburg v Manlon Realty, 43 A.D.2d 968, 969 (2nd Dept., 1974); Winegrad v New York University Medical Center, 64 N.Y.2d 851 (1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 A.D.2d 610 (2nd Dept., 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 N.Y.2d 1065 (1979).

Discussion

It is well settled in New York State that a landowner has a duty to keep the land reasonably safe for persons on the land, Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 568,

352 N.E.2d 868 (1976). For a landowner to be liable to a person on the land for an injury caused by a condition on the land, the plaintiff must establish three basic elements (aside from causation and injury): a dangerous condition existed on the land; the owner created or had notice of the condition; and the owner failed to take reasonable measures to protect persons on the land from the condition. A landowner's duty regarding dangerous conditions on the land exists regardless of the cause or nature of the condition. Liability may attach to a landowner whether the danger is posed by a man-made structure or device on the land, or arises from such commonplace circumstances as the spilling of liquid, or the accumulation of debris. See generally, Drake v. State, 97 Misc.2d 1015, 416 N.Y.S.2d 734, (Ct.Cl.1979), aff'd on the opinion below, 75 A.D.2d 1017, 432 N.Y.S.2d 676 (4th Dept., 1980); Buckowski v. Smith, 185 A.D.2d 556, 586 N.Y.S.2d 386, (3rd Dept., 1992); Schechtman v. Lappin, 161 A.D.2d 118, 554 N.Y.S.2d 846, (1st Dept., 1990); Goslin v. La Mora, 137 A.D.2d 941, 525 N.Y.S.2d 66, (3rd Dept., 1988); Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 622 N.Y.S.2d 493, 646 N.E.2d 795 (1994); Downey v. R.W. Garraghan, 198 A.D.2d 570, 603 N.Y.S.2d 222, (3rd Dept., 1993); Farina v. A.R.A. Servs., Inc., 151 A.D.2d 456, 542 N.Y.S.2d 246, (2nd Dept., 1989); Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986).

Of course, the mere fact that a dangerous condition exists on a piece of property does not automatically make the owner liable for injury caused by the condition. A property owner is not an insurer of the safety of those on the land. Thus, in light of the owner's duty to exercise only reasonable care, liability normally attaches only where the owner had actual or constructive notice of the dangerous condition. *See* Barnaby v. Rice, 75 A.D.2d 179, 428 N.Y.S.2d 973, (3rd Dept., 1980); Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American

Museum of Natural History, 501 N.Y.S.2d at 647; Santoni v. Bertelsmann Property, Inc., 21 A.D.3d 712, 800 N.Y.S.2d 676 (1st Dept., 2005); Zanki v. Cahill, 2 A.D.3d 197, 768 N.Y.S.2d 471 (1st Dept., 2003); Katz v. Seminole Realty Corp., 10 A.D.3d 386, 780 N.Y.S.2d 778 (2nd Dept., 2004). A landowner has constructive knowledge of a dangerous condition only where the condition is "visible and apparent" and existed for a sufficient period of time so that the owner should have discovered it, Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647. However, a property owner's general awareness that a dangerous condition may exist does not constitute notice of a particular dangerous condition, Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American Museum of Natural History, supra.

Even where a property owner has no actual or constructive notice of a dangerous condition on the land, the owner is liable for injuries caused by the condition where the owner's negligence, or the negligence of another person acting for the owner, created the condition, Russell v. New York City Housing Authority, 194 A.D.2d 505, 599 N.Y.S.2d 576, (1st Dept., 1993); Lewis v. Metropolitan Transportation Authority, 99 A.D.2d 246, 472 N.Y.S.2d 368, (1st Dept., 1984); *see also* Gordon v. American Museum of Natural History, supra.

Where a landowner has a duty to take measures with respect to a dangerous condition and that duty is based on actual or constructive notice of the condition, the owner must act within a reasonable time of receiving the notice. Whether the time interval is reasonable depends on such factors as how soon someone on the land is likely to encounter the danger, and how serious a resulting injury is apt to be; Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647.

In this case, the Court is of the opinion that the trailers that defendant/third-party plaintiff

TRANSPORT owned and leased to third-party defendant DHL were *premises* within the meaning and contemplation of the law, despite the fact that they were transportable. After reviewing the deposition testimony from the witnesses for both defendant/third-party plaintiff TRANSPORT and third-party defendant DHL, this Court found conflicting testimony regarding when the crack in the subject stairs was first noticed or observed, and by whom, and more importantly, conflicting testimony and questions of fact regarding who designed and installed the wooden braces that were placed under the subject stairs. There also appears to be an issue of fact regarding if, when, and under what circumstances defendant/third-party plaintiff TRANSPORT was obligated to make repairs to the trailers and more specifically, to the subject stairs.

It is well settled that an out-of-possession owner can be held liable for a subsequent injury resulting from a dangerous condition on the premises under a theory of constructive notice where it has reserved the right to enter the premises to perform inspections. *See generally*, Guzman v. Haven Plaza Housing Development Fund Co., Inc., 69 N.Y.2d 559, 516 N.Y.S.2d 451, 509 N.E.2d 51, (Ct. Of Appeals, 1987); Davis v. HSS Properties Corp., 1 A.D.3d 153, 767 N.Y.S.2d 72 (1st Dept., 2003), leave to appeal denied, 1 N.Y.3d 509, 777 N.Y.S.2d 18, 808 N.E.2d 1277 (2004). "An out-of-possession landlord who reserves a right of entry in the lease in order to inspect the premises and make necessary repairs is deemed to have constructive notice of any existing statutory violations.", Spencer v. Schwarzman, LLC, 309 A.D.2d 852, 766 N.Y.S.2d 74 (2nd Dept., 2003).

According to the lease agreement in this case, defendant/third-party plaintiff TRANSPORT did specifically reserve the right to enter and inspect the subject trailers and stairs. It also cannot be said that the condition complained of was neither structural nor a design defect

violative of law. As such, questions of fact exist regarding the issue of notice that precludes granting summary judgement to defendant/third-party plaintiff TRANSPORT as against the plaintiff.

It is also well settled in this State that §11 of the Workers' Compensation Law prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." *See* Workers' Compensation Law §11.

In Rodrigues v N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 839 N.E.2d 357, 805 N.Y.S.2d 299, (Ct. of Appeals, 2005), the Court, citing Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, (1998), opined that despite the Workers' Compensation Law section that shields employers from liability as joint tortfeasors, a third party may recover against an employer pursuant to a contract. As the Court stated in Rodrigues, supra: "Indeed, the statute expressly permits indemnification claims "based upon a provision in a written contract"."

Third-party defendant DHL argues that the indemnification provision contained in the contract between defendant/third-party plaintiff TRANSPORT and third-party defendant DHL is not specific enough and does not state that the third-party plaintiff is entitled to be indemnified for injuries to the insured's employees in the course of their employment. Just as the Court of Appeals rejected the identical argument in Rodrigues, supra, this Court finds that language of the contract was purposefully intended to indemnify, defend and hold harmless, "defendant/third-party plaintiff TRANSPORT, its employees and agents from any and all losses, claims, or

liabilities that may arise from, or in connection with, the injury to any person as a result of, in whole or in part, the use or condition of the equipment". This Court finds the language to be both clear and unambiguous. Similar to the Court of Appeals finding in Rodrigues, supra, this Court also finds that the subject contract and more importantly, the indemnification agreement contained therein satisfies section 11's requirement of a "written contract." Workers' Compensation Law §11 requires only that the indemnification claim arise from an indemnification provision in a written contract entered into before the injury. Here, the written agreement contained an indemnification provision, entered into before the injury occurred. The Court in Rodrigues, supra, citing Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363 (Ct. of Appeals, 2005), also specifically refused to impose specificity requirements not contained in the statute. "So long as a written indemnification provision encompasses an agreement to indemnify the person asserting the indemnification claim for the type of loss suffered, it meets the requirements of the statute."

In the present case, this Court finds that the indemnification section of the subject contract more than clearly evidences third-party defendant DHL's promise to "indemnify, defend, and hold harmless" defendant/third-party plaintiff TRANSPORT, in the event of an injury to "any person" as a result of the use or condition of the equipment. As such, that portion of defendant/third-party plaintiff TRANSPORT's motion seeking summary judgement on its claim for indemnification and attorneys' fees, is granted. There being no opposition thereto, the portion of defendant/third-party plaintiff TRANSPORT's motion seeking dismissal of third-party defendant DHL's counterclaims for contribution and indemnification is also granted.

Conclusion

Accordingly, it is

ORDERED, that the portion of defendant/third-party plaintiff TRANSPORT's motion seeking summary judgement and dismissal of the plaintiff's claim is denied; and it is further

ORDERED, that the portion of defendant/third-party plaintiff TRANSPORT's motion seeking summary judgement on its third-party claim for indemnification and attorneys' fees as against third-party defendant DHL, is granted; and it is further

ORDERED, that the portion of defendant/third-party plaintiff TRANSPORT's motion seeking dismissal of third-party defendant DHL's counterclaims for contribution and indemnification, is granted; and it is further

ORDERED, that the motion of third-party defendant DHL seeking summary judgement and dismissal of the third-party complaint, is denied.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

HON. BERNADETTE BAYNE