

<b>Laster v 125-129 Park Ave. Realty LLC</b>
2009 NY Slip Op 31102(U)
May 13, 2009
Supreme Court, Kings County
Docket Number: 19172/05
Judge: Bert A. Bunyan
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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 13<sup>th</sup> day of May, 2009.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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SHERMAINE LASTER, ARTHUR STOUDMIRE,  
AS ADMINISTRATOR OF THE ESTATE OF CHRYSTAL  
STOUDMIRE, DELMA LOWRY, JOSE ARIAS AND  
VERIZON NEW YORK, INC.,

Plaintiffs,

- against -

Index No. 19172/05

125-129 PARK AVENUE REALTY LLC, et al.,  
Defendants.

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125-129 PARK AVENUE REALTY LLC,  
Third-Party Plaintiff,

-against-

SEABOARD OUTDOOR ADVERTISING CO. INC., et al.,  
Third-Party Defendants.

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The following papers numbered 1 to 24 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2, 3-4, 5-6 _____
Opposing Affidavits (Affirmations) _____	7-17 _____
Reply Affidavits (Affirmations) _____	18-24 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendants/third-party defendants Advanced Environmental Services (Advanced) and Raul Mora (Mr. Mora) move, pursuant to CPLR

3212, for summary judgment dismissing plaintiffs' complaint, defendant/third-party plaintiff 125-129 Park Avenue Realty, LLC's (125-129 Park) third-party complaint, and all cross-claims asserted against it. Defendants/third-party defendants Vista Media Group (Vista) and Seaboard Outdoor Advertising Co. (Seaboard) (collectively, Seaboard-Vista) cross-move for summary judgment dismissing plaintiffs' complaint and all third-party claims and cross-claims asserted against them. Defendant/third-party defendant Metropolitan Sign & Rigging Corp. (Metropolitan) cross-moves for summary judgment dismissing plaintiffs' complaint and all third-party claims and cross-claims asserted against it.

### ***Background Facts and Procedural History***

The instant consolidated action arises out of a May 2, 2005 incident in which the common wall of a four-story building located at 125-127 Park Avenue, Brooklyn, New York (the building) collapsed onto the roof of an adjoining one-story bodega/mini-market located at 129 Park Avenue (the store). As a result of the wall-collapse, portions of the store's roof caved in and Chrystal Stoudmire, a customer in the store, sustained fatal injuries. In addition, plaintiffs Shermaine Laster and Delma Lowry, who were also store customers, and Jose Arias, a store employee, sustained personal injuries. Finally, plaintiff Verizon sustained certain property damage caused by the collapse.

For some 30 years prior to the accident, the building was uninhabited and in poor condition. On June 8, 1998, Seaboard entered into a five-year agreement with defendant "Pablo Molina as Landlord" to lease the east side wall of 125 Park Avenue. Thereafter,

Seaboard, which was in the outdoor advertising business, erected and hung a billboard structure on the wall which weighed approximately five hundred pounds. In 1999, Vista acquired Seaboard. In or about 2000, defendants 125-129 Park and Silvestre Castillo<sup>1</sup> purchased the building as well as the adjoining store. After the expiration of the five-year lease agreement in June 2003, Seaboard-Vista's billboard remained on the wall. Furthermore, Seaboard-Vista paid the annual \$2000.00 rent for the use of the wall in June 2003 and June 2004.

In or about 2004, Mr. Castillo decided to renovate the building so as to construct apartment units in the upper floors of the premises and to provide commercial space on the ground floor. In accord with this plan, Mr. Castillo hired defendant Julio Leder-Luis as the architect on the project. According to Mr. Leder-Luis' deposition testimony, when he first inspected the building, he noticed that the wall that eventually collapsed "didn't look plumb." He further testified that the wall "was leaning a little bit towards the min-mart" and that although he was "concerned" about the wall, he did not feel it was in imminent danger of collapsing. In addition to Mr. Leder-Luis, pursuant to a written agreement dated July 13, 2004, Castillo hired defendants Mayancela Construction Co., Inc., Miguel Mayancela d/b/a Michael Construction (collectively, Mayancela) to serve as the general contractor on the project .

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<sup>1</sup>According to Mr. Castillo's deposition testimony, he is the president of 125-129 Park.

Before actual renovation work on the building could get underway, two impediments had to be overcome. In particular, all asbestos materials had to be removed from the building. Furthermore, Seaboard-Vista's billboard had to be removed from the wall of the building. With respect to the billboard, several years earlier, on July 23, 2003, the New York City Department of Buildings (DOB) issued a violation to Vista for installing the billboard without a permit and directed that the sign be removed. However, Vista failed to comply with this directive at that time and the DOB refused to issue any permits for necessary demolition work until the sign was removed.

In order to address the asbestos problem, in or about August 2004, Mayancela contacted Advanced, which was in the asbestos removal business. Shortly thereafter, Mr. Mora, who was employed by Advanced as a supervisor, met Mr. Mayancela at the building and checked it for asbestos. According to Mr. Mora, the building was "completely destroyed," with collapsed interior floors and a 5 foot by 6 foot hole in the roof. Ultimately, Mr. Mora determined that a 5/8 inch-thick waterproofing membrane on roof of the building contained asbestos and needed to be removed. The parties then reached an agreement whereby Advanced would remove and dispose of the asbestos membrane for a fee of approximately \$4,000-\$5,000. On or about September 4, 2004, some eight months prior to the wall collapse, Advanced performed this asbestos removal work during the course of a single day. Documents produced by Advanced indicate that a total of 20 cubic yards of asbestos contaminated material was removed from the building using the "wet method,

remote decon.” Mr. Mora’s deposition testimony indicates that this method involved spraying the asbestos materials with a small amount of water prior to removal in order to prevent the asbestos fibers from becoming airborne. Mr. Mora further testified that once the asbestos membrane was removed, he inspected the roof with Mr. Mayancela, who was satisfied with the job. According to Mr. Mora, Mr. Mayancela indicated that he would cover the now exposed wooden roof structure with a tarp.<sup>2</sup> Moreover, Mr. Castillo testified that Mayancela did in fact place a tarp on the roof after the asbestos work was complete.

Several months after the asbestos work was completed, in or about February 2005, 125-129 Park turned its attention to having the billboard removed from the exterior wall of the building, so that it could obtain the demolition work permits it needed from the DOB. Specifically, in series of correspondences faxed by 125-129 Park’s attorney Mitchell Mund to Vista’s Real Estate Manager, Rosario Manetta, Vista was directed to remove the billboard. In a message dated February 2, 2005, Mr. Mund’s law firm stated “the Landlord [at 125 Park Avenue] plans to perform renovations on the building in which your company erected and currently maintains two signs. Your company’s failure to remove these signs is causing a delay in the Landord’s construction project.” A message sent to Vista two days later states “As per our conversation on February 3, 2005, I am writing to confirm that your company will remove the existing signs from [the building] by February 11, 2005. Upon

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<sup>2</sup>At his own deposition, Mr. Mayancela claimed that he didn’t “have any idea if the asbestos was removed” and denied having a discussion with Mr. Mora about putting a tarp on the roof.

completion of renovations to the building, the Landlord shall discuss the terms of a new lease with your company.” A final message dated February 11, 2005 states “we expect that your company will remove the existing signs from the subject premises by February 18, 2005. Upon completion of renovations to the building, the Landlord shall discuss the terms of a new lease with your company.”

Based upon these directives, in a work order dated February 16, 2005, Vista hired defendant Metropolitan to remove the billboard from the building . Metropolitan carried out this work on March 25, 2005, nearly six weeks prior to the accident. According to Kenneth John Wanamaker, the foreman of the Metropolitan crew that performed this work, the removal work took place without incident and involved cutting and removing bolts and angle irons which had secured the sign to the wall. Mr. Wanamaker further testified that he observed cracks in the wall above the sign and that rows of bricks were missing from the parapet. In addition, Mr. Wanamaker testified that he noticed a “shredded up” blue tarp “hanging to the side” of the roof which was not preventing water from getting into the interior of the building.

Following the May 2, 2005 collapse of the wall, the New York City Department of Investigation conducted an investigation in an effort to determine the cause of the wall collapse. On December 14, 2005, The Department of Investigation issued a closing memorandum which concluded that “[a]lthough an exact cause of the wall collapse cannot

be made, it appears that the collapse is due more to exposure of [sic] the elements than from blatant negligence of maintaining the building.”

After the accident, the individual defendants, as well as Chrystal Stoudmire’s estate, brought separate actions against the defendants in this court while Verizon commenced its action seeking property damages against defendants in Kings County Civil Court. In addition, 125-129 Park commenced a third-party action against Seaboard-Vista, Mayancela, Metropolitan, Mora, and Advanced seeking common-law and contractual indemnification as well as damages for breach of contract to procure liability insurance. Ultimately, these actions, along with 125-129 Park's third-party action, were consolidated before this court. On or about December 3, 2007, a note of issue was filed in the consolidated action. Thereafter, motions were made to vacate the note of issue based upon outstanding discovery. In a decision and order dated April 8, 2008, Hon. David Schmidt resolved these motions and directed the various parties to comply with outstanding discovery demands. Justice Schmidt further extended the deadline for filing summary judgment motions until May 30, 2008. Finally, Justice Schmidt denied the motion to vacate the note of issue and the case remained on the trial calendar. On or about March 27, 2008, Advanced and Mora made their instant motion for summary judgment. On or about May 30, 2008, Seaboard-Vista made their instant cross- motion for summary judgment. On or about August 22, 2008, Metropolitan made its instant cross- motion for summary judgment.

*Advanced/Mora's Summary Judgment Motion*

Advanced and Mora move for summary judgment dismissing plaintiffs' action, 125-129 Park's third-party action, as well as all cross-claims asserted against them. In so moving, Advanced and Mora maintain that the asbestos removal work that they performed did not cause or contribute to the wall-collapse that occurred some eight months later. In support of this argument, Advanced and Mora note that the uncontroverted evidence before the court indicates that the building was in an advanced state of decay and disrepair before the asbestos removal work was performed. Specifically, Advanced and Mora point to Mr. Leder-Luis' deposition testimony that when he first inspected the building, the wall that eventually collapsed "didn't look plumb" and "was leaning a little bit towards the min-mart." In addition, Mr. Mora himself testified that when he inspected the building two weeks before removing the asbestos, the floors inside the building had collapsed and that there was a large hole in the roof.

Advanced and Mora also argue that the evidence demonstrates that Advanced fully performed its obligations under its agreement with Mayancela to remove the asbestos and it cannot be faulted for failing to warn the building owners regarding the condition of the building, for failing to assess the structural integrity of the building, or for failing to cover the roof after it completed its work inasmuch as such actions fell outside the defined scope of the work it was hired to perform.

In opposition to Advanced and Mora's motion, plaintiff Arthur Stoudmire argues that there is an issue of fact regarding whether Advanced and Mora were negligent in removing the asbestos membrane from the roof and in further failing to cover the exposed roof after performing this work. In addition, plaintiff avers that this negligence was a proximate cause of the subsequent wall collapse. In support of this argument, plaintiff submits an expert affidavit by Stanley H. Fein, a licensed professional engineer. According to Mr. Fein, Advanced's use of the so called "wet-method" of asbestos removal, which involved spraying water onto the asbestos materials before removing them, weighed down the roof, which adversely affected the structural integrity of the building and contributed to the collapse of the wall. Mr. Fein further claims that "common industry standard and practice" required that Advanced cover the portions of the roof from which the asbestos membrane was removed from the exposed roof so as to prevent water from seeping into the building. According to Mr. Fein, Advanced's failure to cover the roof caused damage to the interior of the building and contributed to the collapse of the wall. Finally, Mr. Fein maintains that, at a minimum, Advanced had a duty to warn the building owner of the dangers of leaving the roof exposed and to "instruct the owner concerning appropriate materials to cover the roof, as a tarp covering is inappropriate for these purposes."

In addition to plaintiff Stoudmire, defendant/third-party plaintiff 125-129 Park opposes Advanced and Mora's summary judgment motion. According to 125-129 Park, there are issues of fact as to whether the removal of the asbestos water-proofing membrane

caused the wall to collapse. In support of this argument, 125-129 Park points to the aforementioned Department of Investigation's finding that the collapse was caused by exposure to the elements. In addition, 125-129 Park argues that Advanced and Mora's motion is premature inasmuch as they have failed to comply outstanding discovery demands that they supply a copy of their log book for the project, which purportedly contains a description of the exact work that they performed on the roof.

In reply to the opposition, Advanced and Mora maintain that Mr. Fein's affidavit is of no probative value inasmuch it lacks any data or facts to support its conclusions. In addition, Advanced and Mora note that Mr. Fein has failed to identify or reference the specific industry standards that were allegedly violated by Advanced. Finally, Advanced and Mora argue that Mr. Fein's claim that the use of the "wet method" in removing the asbestos somehow contributed to the accident eight months later is baseless since Mr. Fein does not know how much water was used and Mr. Mora testified that only "a very small amount" of water was sprayed on the roofing membrane.

Turning first to plaintiffs' claims against Advanced and Mora, "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" outside the contract (*Espinal v Melville Snow Contr.*, 98 NY2d 136, 138 [2002]).

However, courts recognize three exceptions to this rule, specifically:

"(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's

duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140) (internal citations and quotations omitted).

Here, Advanced entered into a contract with Mayancela to remove the asbestos waterproofing membrane from the roof of the building. There is no evidence that plaintiffs relied upon Advanced's "continued performance" of this work. Similarly, it is clear that Advanced did not entirely displace another party to maintain the premises safely. Indeed, it is undisputed that Advanced performed its asbestos abatement work in a single day eight months before the collapse and that its contractual obligations ceased once this work concluded. Thus, the only real issue with respect to plaintiffs' claims against Advanced and Mora concerns the first exception to the rule set forth above, namely whether the abatement work launched a force or instrument of harm and/or "created or exacerbated a dangerous condition" (*Lattimore v First Mineola Co.*, \_\_AD3d\_\_, 2009 NY Slip Op 01621 [2d Dept 2009]).

Plaintiff Arthur Stoudmire maintains that Advanced and Mora created or exacerbated a dangerous condition by using the "wet method" to remove the asbestos from the roof. In addition, both Stoudmire and defendant 125-129 Park argue that Advanced and Mora created or exacerbated a dangerous condition by removing the waterproofing membrane from the roof without taking any action to protect the exposed roof from the elements.

Initially, there is no credible evidence before the court that Advanced and Mora's use of the "wet method" in removing the asbestos from the roof of the building proximately

caused the wall-collapse eight months later. Mr. Mora's uncontradicted deposition testimony indicates that this method merely involved spraying a small amount water onto the asbestos membrane prior to removal in order to prevent the asbestos fibers from becoming airborne. The speculative and conclusory claim by plaintiffs' expert Mr. Fein that this was sufficient to affect the structural integrity of the roof so as to cause the wall to collapse eight months later is of no probative value. In particular, Mr. Fein provides no data regarding how much weight would need to be added to the roof to adversely affect the building structure, nor does Mr. Fein provide any data regarding how much water would ordinarily be used in an asbestos abatement project like the one carried out by Advanced (*see Reyes v City of New York*, 29 AD3d 667, 668 [2006]). At the same time, Mr. Fein's affidavit fails to offer any explanation as to why the purported destabilizing effects of the water used in the abatement work would take eight months to manifest themselves.

With respect to Mr. Stoudmire and 125-129 Park's claim that Advanced and Mora's work exacerbated a dangerous condition by removing the asbestos membrane from the roof, there is evidence that this work played a role in the ensuing collapse of the wall inasmuch as the exposed roof was not adequately covered subsequent to the abatement work. In this regard, Mr. Mora testified that the membrane served a waterproofing function. Thus, it is clear that the removal of this membrane without taking adequate steps to cover the roof allowed water to enter the building through the roof. Moreover, the Department of Investigation's report indicated that the collapse was caused primarily by the building's

exposure to the elements. However, Mr. Mora testified at his deposition that under the terms of its agreement with Mayancela, Advanced was responsible solely for removing the asbestos membrane and transporting the contaminated materials away from the site and that it was not Advanced's job to cover the roof after its work was done. Mr. Mora further testified that Mr. Mayancela told him that he would cover the exposed roof after the abatement work was completed. In addition, Mr. Mora testified that Mr. Mayancela inspected advanced work when the job was complete, was satisfied with the job it did, and paid Advanced in cash for this work.

Similarly, Mr. Castillo testified that after the asbestos abatement work was completed, Mr. Mayancela told him that he was going to cover the roof with a tarp and shortly thereafter, he noticed that the roof was covered with a blue tarp. In addition, Mr. Wanamaker testified that when he removed the billboard from the wall six weeks prior to the collapse, he noticed a blue tarp on the roof. However, by this point in time, the tarp was "shredded" and "didn't cover anything." Finally, although Mr. Mayancela denied having a conversation with anyone regarding a tarp on the roof, at no point did he testify that Advanced was responsible for covering the roof. Indeed, according to Mr. Mayancela, Advanced merely tested the roof to see if asbestos was present.

Taken together, this evidence demonstrates that Advanced had no contractual duty to cover the roof after it completed its asbestos abatement work. In the absence of such a duty under its agreement with Mayancela, it is clear that neither Advanced nor Mr. Mora owed

plaintiffs' a duty to cover the roof after it completed its work (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 360-361 [2007] [company contracted to remove snow from parking lot owed no duty to injured third- party to sand or salt parking lot inasmuch as underlying snow-removal contract contained no terms requiring such sanding or salting]). Accordingly, there is no basis for plaintiffs' claims against Advanced and Mora.

Given the court's finding that Advanced and Mora's method of removing the asbestos from the roof did not create or exacerbate a dangerous condition, and that Advanced and Mora had no duty to cover the roof after the work was complete, there is no basis for any cross-claims or third-party claims seeking common-law indemnification against them. Furthermore, there is no evidence demonstrating that Advanced or Mora were contractually obligated to indemnify or procure liability insurance covering any of their co-defendants in this action. Accordingly, all cross-claims as well as 125-129 Park's third-party action must be dismissed against Advanced and Mora.

Finally, there is no merit to 125-129 Park's argument that Advanced and Mora's summary judgment motion should be denied inasmuch as they failed to turn over a copy of the log book for the project. The mere hope that additional discovery will produce evidence sufficient to defeat a summary judgment motion is insufficient to deny the motion (*Cavitch v Mateo*, 58 AD3d 592, 593 [2009]). In any event, according to Mr. Mora, the log book merely described the work that Advanced performed on the building. Here, Mr. Mora, who was present when the abatement work took place, was deposed at great length regarding the nature of this work.

### *Seaboard-Vista's Cross-Motion for Summary Judgment*

Seaboard-Vista cross-moves for summary judgment dismissing plaintiffs' claims, as well as all cross-claims and third-party claims asserted against it. In support of its motion, Seaboard-Vista notes that the billboard which it had hung on the subject wall pursuant to its lease agreement with the building owner had been removed nearly six weeks prior to the wall collapse. Seaboard-Vista contends that the removal of this billboard terminated the lease agreement and thereby extinguished any legal rights it had to use the wall or exercise control over the wall. According to Seaboard-Vista, absent such control, no liability flows to it for the wall-collapse that occurred over five weeks after its legal connection to the building was terminated. In support of this argument, Seaboard-Vista submits a copy of its five-year lease agreement for the wall, which indicates that the agreement expired in June, 2003. Seaboard-Vista also points to the aforementioned communications between 125-129 Park's attorney and Vista in February 2005, whereby Vista was directed to remove the billboard by 125-129 Park, and stated that Vista could enter discussions regarding entering into a new lease agreement once the renovation work on the building was complete.

In further support of its cross-motion for summary judgment, Seaboard-Vista argues that there is no evidence that the billboard, which was removed from the wall weeks before the collapse, caused the wall to collapse. Accordingly, Seaboard-Vista maintains that there is no basis for any of the claims asserted against it.

In opposition to Seaboard-Vista's cross-motion, plaintiff Shermaine Laster argues that Seaboard-Vista has failed to satisfy its *prima facie* burden of demonstrating that its

billboard did not contribute to the wall collapse. In particular, plaintiff notes that Seaboard-Vista has failed to introduce expert testimony which excludes the possibility that the billboard played a role in the accident.

In any event, plaintiff Laster argues that there are clearly issues of fact regarding whether or not the billboard contributed to the eventual collapse of the wall. In support of this argument, plaintiff submits an expert affidavit by Andrew Yarmus, a professional engineer, in which he opines that Seaboard-Vista was negligent in the erection, posting, and removal of the billboard and that this negligence was a contributing cause to the collapse of the wall. In this regard, Mr. Yarmus points to the undisputed facts that the wall was in a deteriorated condition with missing bricks and cracks, and that the wall was not plumb. Given these conditions, Mr. Yarmus maintains that the wall lacked sufficient strength to support the 500-pound weight of the billboard structure. Plaintiff Laster also notes Mr. Castillo's deposition testimony, wherein he stated that after the collapse, "[t]he wall looked like a good piece had fallen off the wall, like in a V shape. It was like a big piece where the sign had been."

In addition, plaintiff points out that Seaboard-Vista was cited by the DOB on July 23, 2003 for violating New York City Administrative Code §§ 27-147 and 26-262 inasmuch as it never obtained a permit to erect the billboard. The DOB further directed that the billboard be removed. However, Seaboard-Vista failed to comply with this directive. According to plaintiff, the violation of these Administrative Code provisions in and of themselves constitutes evidence that Seaboard-Vista was negligent.

Accordingly, given the weight of the billboard, the poor condition of the wall, the Administrative Code violations, and the fact that the wall collapsed in the same spot where the billboard had previously hung, plaintiff Laster maintains that there is clearly an issue of fact as to whether Seaboard-Vista's hanging of the billboard on the wall was a proximate cause of the collapse. Finally, plaintiff Laster argues that Seaboard-Vista's cross-motion must be denied inasmuch as Seaboard-Vista has failed to respond to outstanding discovery demands.

125-129 Park also opposes Seaboard-Vista's cross-motion for summary judgment. Specifically, 125-129 Park maintains that there is an issue of fact as to whether Seaboard-Vista was negligent in violating DOB regulations which required that it obtain a permit to erect the billboard and as to whether this failure was a proximate cause of the accident. In addition, 125-129 Park argues that there are numerous issues of fact regarding whether hanging the billboard on the dilapidated wall was a proximate cause of the accident. Finally, 125-129 Park avers that Seaboard-Vista's failure to comply with the DOB's 2003 directive to remove the billboard precluded 125-129 Park from obtaining the necessary demolition permits in a timely manner. According to 125-129 Park, but for Seaboard-Vista's failure in this regard, the collapse never would have occurred inasmuch as Metropolitan demolition work would have been performed months before the accident date.

In addition to 125-129 Park and plaintiff Laster, Metropolitan opposes Seaboard-Vista's cross-motion for summary judgment. In particular, Metropolitan argues that there is an issue of fact as to whether Seaboard-Vista was a lessee of the wall at the time of the

accident. In support of this argument, Metropolitan notes that Seaboard-Vista's billboard remained on the subject wall after the expiration of the five-year lease agreement. Metropolitan further notes that Seaboard-Vista continued to pay rent for the wall space after the expiration of the five-year lease term by remitting \$2,000 rent checks in June 2003 and June 2004 which covered the subsequent 12-month period (*i.e.*, up to June 2005, one month after the accident). In addition, Metropolitan points to the deposition testimony of Vista's president, Christopher Young, wherein he stated that Seaboard-Vista's lease agreements typically had an "evergreen clause" whereby the lease remained in effect after its expiration date if a rent check is issued and cashed for the succeeding year. Furthermore, Ms. Manetta testified that Seaboard-Vista's procedure was to continue paying rent after the expiration of a lease agreement.

In reply to these opposition papers, Seaboard-Vista argues that Mr. Yarmus's expert affidavit is inadmissible inasmuch as he was not identified as an expert during pre-trial disclosure and plaintiff has already filed a note of issue. At the same time, Seaboard-Vista maintains that plaintiff Laster should not be heard to complain about any outstanding discovery since plaintiff filed a note of issue certifying that discovery was complete. In any event, Seaboard-Vista maintains that the outstanding discovery items have no relevance to the issues now before the court. In addition, Seaboard-Vista argues that the Building Code violations that it was cited for merely pertained to erecting the billboard without obtaining a permit, and related to aesthetic matters rather than safety issues. As such, Seaboard-Vista contends that these violations have no bearing on any allegation that the billboard

compromised the structural integrity of the wall. Seaboard-Vista further maintains that the claim that it was responsible for the delay in performing the demolition work is speculative inasmuch as neither 125-129 Park nor Mayancela took any action to obtain the necessary demolition permits during the nearly six week period after the billboard had been removed from the wall. Finally, Seaboard-Vista argues that there is no merit to Metropolitan's claim that it continued to possess legal rights and obligations with respect to the wall at the time of the accident. Specifically, Seaboard-Vista notes that the 1998 lease agreement expired nearly two years prior to the accident. In addition, although it continued to pay rent and use the wall to hang its billboard after the lease expired, Seaboard-Vista maintains that all legal rights between it and the landlord/owner of the building ceased when the billboard was removed over five weeks before the accident. Seaboard-Vista notes that this is most clearly demonstrated by the communications between it and 125-129 Park's attorney wherein counsel directed Seaboard-Vista to remove the sign and indicated that a "new lease" could be negotiated after the renovation/construction work on the building was complete.

In premises liability cases involving claims against a party that formerly held an interest in the subject property, New York courts have adopted the rule that an owner who surrenders title and control of the property cannot be held liable for a subsequently occurring accident so long as his or her successor in interest had a reasonable opportunity to discover and remedy the condition that caused the accident (*Smith v Andre*, 43 AD3d 770 [2007]; *Camillery v Getty Refining & Marketing Co.*, 170 AD2d 567 [1991]; *Govel v Lio*, 120 AD2d 840 [1986]; *Levine v 465 West End Ave. Assoc.*, 93 AD2d 735 [1983]). Moreover, although

the reported cases involve former property owners, presumably the same rule would apply to former tenants.

Here, Seaboard-Vista's five-year lease for the wall expired in June 2003. The lease itself does not contain any provision for automatic renewal of the agreement. Nevertheless, it is undisputed that Seaboard-Vista's billboard remained on the wall following the expiration of the lease and that Seaboard-Vista remitted rent checks which were cashed by the building owner for the year to come in June 2003 and June 2004. Thus, Seaboard-Vista retained an interest in the wall as a holdover tenant on a year-to-year basis (*see* Real Property Law § 232-c). However, it is also undisputed that prior to the expiration of the second year-to-year tenancy term, in or about February 2005, 125-129 Park demanded that Seaboard-Vista remove its billboard from the wall and that on March 25, 2005, Seaboard-Vista voluntarily complied with this demand by having Metropolitan remove the billboard. Thus, given the fact that Seaboard-Vista's sole reason for leasing the wall was to hang its billboard, it is clear that by mutual agreement, the landlord-tenant relationship between Seaboard-Vista and 125-129 Park terminated on March 25, 2005.

Furthermore, once complete control of the wall reverted back to 125-129 Park following the termination of Seaboard-Vista's tenancy, the five plus weeks that ensued before the wall collapsed was sufficient time for it to discover and remedy the dangerous condition posed by the structural weakness of the wall. Indeed, as set forth previously, even before the billboard was removed, the deteriorating condition of the building in general and the wall in particular was open and obvious.

Accordingly, inasmuch as Seaboard-Vista relinquished all interests, control, and obligations it had with respect to the wall over five weeks before the collapse, and the owner of the building had sufficient time to discover and remedy the structural weakness of the wall, Seaboard-Vista may not be held liable for the wall collapse.<sup>3</sup> Furthermore, there is no basis for the cross-claims and third-party claims asserted against Seaboard-Vista.

***Metropolitan's Cross-Motion for Summary Judgment***

Metropolitan cross-moves for summary judgment dismissing plaintiffs' complaint and all cross-claims and third-party claims asserted against it. In so moving, Metropolitan notes that its sole connection to the building was that it removed the billboard from the wall during the course of a single day over five weeks before the collapse. Metropolitan maintains that there is no evidence that this work in any way weakened the wall or otherwise contributed to the wall-collapse. To the contrary, Metropolitan argues that it is clear that its removal of the billboard was completely unrelated to the collapse. In support of this argument, Metropolitan relies upon the Department of Investigation report which indicated that the presumptive cause of the collapse was a failure to maintain the building, together with exposure to the elements. In addition, Metropolitan points to Mr. Wannamaker's deposition testimony, wherein he stated that the removal work was entirely uneventful, and merely involved removing several bolts which secured the billboard to the wall. Mr. Wannamaker further testified that the removal of these bolts did not disrupt the integrity of

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<sup>3</sup>Given this finding, the court need not address the issue of whether the Seaboard-Vista's billboard was a proximate cause of the wall collapse.

the surrounding bricks and that no stress or forces were applied to the wall during the removal process. Finally, Metropolitan argues that none of the parties asserting claims against it have offered any explanation as to how Metropolitan's work, which took place in a single day, could have caused the wall to collapse over five weeks later.

In opposition to Metropolitan's cross-motion, plaintiff Shermaine Laster, Mayancela, as well as 125-129 Park maintain that the court may not entertain the motion inasmuch as it was not made in a timely fashion. In particular, these parties note that the note of issue was filed on or about December 3, 2007 and Justice Schmidt's April 8, 2008 order directed that all summary judgment motions be made by May 30, 2008. Here, Metropolitan did not make its cross-motion for summary judgment until August 22, 2008, nearly nine months after the note of issue was filed and almost three months after Justice Schmidt's deadline. Moreover, Metropolitan has failed to offer any excuse for this untimeliness. In the alternative, the opposing parties contend that Metropolitan has failed to make a *prima facie* demonstration that its removal work did not cause the wall to collapse and that, in any event, there are issues of fact regarding the proximate cause issue.

In reply to these opposition papers, Metropolitan avers that the court may consider its untimely cross-motion inasmuch as it is nearly identical to Seaboard-Vista's timely cross-motion for summary judgment. In support of this argument, Metropolitan contends that both cross-motions center around the issue of whether the billboard itself contributed to the wall collapse.

CPLR 3212 (a) provides, in pertinent part, that “the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of a note of issue, except with leave of court on good cause shown.” It is well-settled that good cause under CPLR 3212 (a) “requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial findings, however tardy” (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Recent Appellate Division authority has established that good cause to entertain an untimely summary judgment motion exists when the untimely motion is made on “nearly identical grounds” to the timely submitted summary judgment motion (*Step-Murphy, LLC. v B&B Brothers Real Estate Corp.*, 60 AD3d 841 [2009; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]).

Here, it is undisputed that Metropolitan made its cross-motion for summary judgment long after the deadline set by Justice Schmidt’s order. Moreover, contrary to Metropolitan’s claim, its cross-motion is not based upon grounds nearly identical to Seaboard-Vista’s timely cross-motion. In particular, as set forth above, Seaboard-Vista’s cross-motion is based largely upon the argument that its landlord-tenant relationship with the building owner ceased prior to the wall-collapse and therefore, it had no legal duties or obligations with respect to the wall. Moreover, Seaboard-Vista’s alternative proximate cause argument involves a different factual analysis than the proximate cause argument

raised by Metropolitan. In particular, Metropolitan's potential liability centers around the question of whether its billboard removal work on March 25, 2005 somehow weakened the wall structure and thereby contributed to the eventual collapse. In contrast, the claims against Seaboard-Vista are based upon the allegation that it was negligent in hanging the billboard on the wall between 1998 and 2005 and that this negligence was a proximate cause of the accident inasmuch as, over time, the weight of the billboard compromised the structural integrity of the wall. Under the circumstances, the court may not consider Metropolitan's untimely cross-motion for summary judgment.

### *Summary*

In summary, Advanced and Mora's motion for summary judgment dismissing plaintiffs' claims and all third-party claims and cross-claims asserted against them is granted. Seaboard-Vista's cross-motion for summary judgment dismissing plaintiffs' claims and all third-party claims and cross-claims asserted against it is granted. Metropolitan's cross-motion for summary judgment dismissing plaintiffs' claims and all third-party claims and cross-claims against it is denied as untimely.

This constitutes the decision and order of the court.

ENTER,  
  
J. S. C.  
**HON. BERT A. BUNYAN**  
**JUSTICE N.Y.S. SUPREME COURT**