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

PRESENT: HON. PAUL WOOTEN Justice — PART 7

NORA TERESA DEVLIN and IAN MEL DEVLIN,

Plaintiffs,

- against-

BLAGGARDS III RESTAURANT CORP. d/b/a BLAGGARDS PUB, BLAGGARDS RESTAURANT CORP. d/b/a BLAGGARDS PUB, and FRAGLOW REALTY LLC,

Defendants.

INDEX NO. 113986/2007

MOTION DATE

MOTION SEQ. NO. 001, 004

MOTION CAL. NO.

The following papers, numbered 1 to 10, were read on this motion by plaintiffs for leave to file a second amended complaint and for summary judgment; motion by defendants Blaggards III Restaurant Corp. d/b/a Blaggards Pub and Blaggards Restaurant Corp. d/b/a Blaggards Pub for leave to file an amended answer and for summary judgment; and cross-motion by defendant Fraglow Realty LLC for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4, 5, 6, 7
Replying Affidavits (Reply Memo)	8, 9, 10

Cross-Motion: ■ Yes ☐ No

This is a personal injury action by plaintiff Nora Teresa Devlin ("plaintiff") and her husband Ian Mel Devlin (collectively "plaintiffs") against Blaggards III Restaurant Corp. d/b/a Blaggards Pub ("Blaggards III"), Blaggards Restaurant Corp. d/b/a Blaggards Pub ("Blaggards Restaurant"), and Fraglow Realty LLC ("Fraglow") (collectively "defendants"), to recover damages for injuries plaintiff allegedly sustained when she slipped and fell on a wet floor in the ladies room during the course of her employment at Blaggards Pub.[1] At the time of the accident, Blaggards III was plaintiff's employer and Fraglow was the owner of the building. The

[1]Blaggards III and Blaggards Restaurant will at times be collectively referred to as the "Blaggards defendants."

parties have completed discovery and a Note of Issue was filed on September 22, 2009. Before the Court are three motions, which will be construed as cross-motions. First, plaintiffs move for: (1) leave to file a second amended complaint against Blaggards III, pursuant to CPLR 3025, to clarify that their cause of action is premised upon Workers' Compensation Law § 11; and (2) summary judgment against Blaggards III, pursuant to CPLR 3212, on the issue of liability under Workers' Compensation Law § 11, based on an alleged failure to have workers' compensation coverage at the time of the accident. Second, the Blaggards defendants move for: (1) leave to file an amended answer, pursuant to CPLR 3025, to raise an affirmative defense under Workers' Compensation § 11; and (2) summary judgment dismissing the complaint and all cross-claims against them, pursuant to CPLR 3212, on the grounds that workers' compensation provides the exclusive remedy for the injuries. Third, Fraglow moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it on the issue of liability, or alternatively, for summary judgment against Blaggards III on its cross-claims for indemnification.

BACKGROUND

In support of its arguments, plaintiffs submit, *inter alia*, a proposed second amended complaint; plaintiff's deposition and affidavits; and a deposition of Liam Lynch. The Blaggards defendants submit, *inter alia*, a proposed amended answer; plaintiff's deposition; an affidavit and deposition of Lynch; an affidavit of Paul Gruber; and a workers' compensation policy issued by the New York State Insurance Fund ("State Insurance Fund"). Fraglow submits, *inter alia*, depositions of plaintiff, Lynch and Liz Fuchs; photographs of the ladies room at Blaggards Pub; and the lease agreement between Fraglow and Blaggards III. The following facts are undisputed.

Blaggards III is the owner and operator of a pub known as "Blaggards Pub" which is located at 8 West 38th Street, New York, New York. The pub occupies a ground floor space

pursuant to a lease agreement between Blaggards III and the buildings owner, Fraglow. Blaggards Restaurant has no ownership interest in either the subject pub or building, and operates a different pub at another location.

On July 11, 2007, plaintiff was employed by Blaggards III as a bartender at Blaggards Pub. She was paid "off the books." At approximately 11:30 p.m., while working at the pub, she slipped and fell on a wet floor while exiting a stall in the ladies room. Her left foot slipped on water that had accumulated on the floor, purportedly due to a continuing leak from an overhead air conditioner duct. She sustained injuries to her left knee requiring surgery.

Plaintiff claims that shortly after the accident, she was verbally advised by Liam Lynch, the President of Blaggards III, that her injuries were not covered under any workers' compensation policy. Based on her belief that there was no workers' compensation coverage, she and her husband commenced the present negligence and derivative loss of services action against the Blaggards defendants. They thereafter filed an amended complaint adding Fraglow as a defendant. Defendants answered the amended pleadings, asserting cross-claims for indemnification and contribution against each other.

The Blaggards defendants maintain that there was in fact a workers' compensation policy issued by the State Insurance Fund in effect on the date of the accident that covered plaintiff's injuries. According to the affidavit of Paul Gruber, an underwriter for the State Insurance Fund, policy No. M 1348 834-1 was issued to Blaggards III on January 16, 2007, and it was effective from March 5, 2007 until March 5, 2008. In addition, Lynch testified that he informed plaintiff that she was covered under a workers' compensation policy at the time of the accident.

Plaintiff alleges that she became aware of the leaking air conditioner about four to six weeks prior to the accident when she observed Fraglow's superintendent, Anthony Babino, having a conversation with Lynch about the leak while examining the air conditioner and

removing tiles from the ceiling. Fraglow's property manager, Liz Fuchs, also testified that she had a conversation with Babino in which he told her that the air conditioning system at Blaggards Pub needed repairs and that Blaggards III had taken care of it. Defendants did not submit any testimony from Babino, however.

Under the terms of the lease agreement between Blaggards III and Fraglow, Blaggards III was solely responsible for maintenance of the air conditioner and ducts above the ceiling in the bathrooms at Blaggards Pub. Lynch never asked Fraglow to do any repairs to the ladies room, and retained an outside contractor to maintain and repair the air conditioners. Their lease granted Fraglow the right to enter to premises to make repairs, providing in pertinent part:

> "13. Owner . . . shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the demised premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities" (Not. of Cross-Mot. for Summary Judgment, Ex. J).

The lease also provided that Blaggards III would indemnify Fraglow for any liability and damages that might be asserted against Fraglow from lawsuits or personal injuries on the premises.

DISCUSSION

Plaintiffs and the Blaggards defendants cross-move to amend the pleadings and for summary judgment under Workers' Compensation Law § 11. Fraglow cross-moves for summary judgment dismissing the claims against it, or, alternatively, seeks common-law and contractual indemnification from Blaggards III. The Court will address the motions in turn.

A. Amendment Of The Pleadings

As a threshold matter, plaintiffs and the Blaggards defendants cross-move for leave to

amend the pleadings. Plaintiffs seek leave to file a second amended complaint, *nunc pro tunc,* to clarify that the cause of action against Blaggards III is premised upon Workers' Compensation Law § 11. The Blaggards defendants seek leave to file an amended answer to raise the affirmative defense that plaintiffs' action is barred under Workers' Compensation Law § 11. The decision whether to permit amendment of the pleadings is committed to the discretion of the Court, and leave to amend shall be freely granted absent a showing of prejudice or unfair surprise (*see McCaskey, Davies & Assoc., Inc. v New York City Health & Hosp. Corp.*, 59 NY2d 755, 757 [1983]).

The Court grants the respective motions to amend the pleadings. Amendment would result in no significant prejudice or undue surprise as the parties have had an opportunity to address the workers' compensation issue during discovery (*see id.*; *Muhlstock v Cole*, 245 AD2d 55, 59 [1st Dept 1997]; *Speroni v Mid-Island Hosp.*, 222 AD2d 497, 498 [2d Dept 1995]). The proposed amended pleadings submitted by the parties will, accordingly, be deemed served.

B. Liability Under Workers' Compensation Law § 11

Plaintiffs argue that they are entitled to judgment as a matter of law against Blaggards III on the issue of liability under Workers' Compensation Law § 11 because Blaggards III did not have workers' compensation coverage for plaintiff's injuries on the date of the accident. The Blaggards defendants oppose the motion and cross-move for summary judgment dismissing the complaint. Blaggards III argues that it did in fact have a valid policy issued by the State Insurance Fund, and that the claims must therefore be dismissed under Workers' Compensation Law § 11 since plaintiffs' exclusive remedy lies with workers' compensation. Blaggards Restaurant argues that it is not liable because it did not own the property where the accident occurred or operate any business at that location. Plaintiffs do not oppose dismissal of the claims against Blaggards Restaurant.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is well established that where "an employee is injured in the course of employment, his [or her] exclusive remedy against his employer is ordinarily a claim for workers' compensation benefits" (*Valenziano v Niki Trading Corp.*, 21 AD3d 818, 820 [1st Dept 2005]; *see also* Workers' Compensation Law § 11; *O'Rourke v Long*, 41 NY2d 219, 221 [1976]; *Martinez v Canteen Vending Serv. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 [1st Dept 2005]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139 [1st Dept 2000]). Further, "all employees of an employer are deemed covered by the employer's workers' compensation policy, regardless of whether an

employee may have been working 'off the books,' where the employer has secured a policy of insurance coverage" (*Baljit v Suzy's Dept. Store, Inc.*, 211 AD2d 555, 555 [1st Dept 1995]).

There is an exception to the exclusive remedy rule, however, where an employer fails to obtain workers' compensation coverage (*see Burke v Torres*, 120 AD2d 283, 285 [1st Dept 1986]). Pursuant to Workers' Compensation Law § 11, "if an employer fails to secure the payment of compensation for his or her injured employees . . . an injured employee . . . may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury." Thus, if the "defendant did not in fact secure its obligation as required by law, plaintiff would have an election between compensation and plenary suit" (*O'Rourke*, 41 NY2d at 224). The obligation of alleging and proving non-coverage rests with the plaintiff (*Murray v City of New York*, 43 NY2d 400, 407 [1977]; *Lanpoint v Savvas Cab Corp., Inc.*, 244 AD2d 208, 210 [1st Dept 1997]).

Here, there is no dispute that plaintiff was employed by Blaggards III, albeit "off the books," or that she was injured during the course of her employment. Rather, plaintiffs seek to hold Blaggards III absolutely liable under Workers' Compensation Law § 11 on the basis that Blaggards III had no workers' compensation coverage for plaintiff's injuries. Plaintiffs have failed, however, to prima facie establish non-coverage (*see Baljit*, 211 AD2d at 555-56).

Even though plaintiffs allege that they commenced the instant action based on Lynch's representation that Blaggards III did not have a workers' compensation policy covering plaintiff, in their reply papers plaintiffs expressly concede that they recently discovered that Blaggards III has, in fact, maintained continuous coverage with the State Insurance Fund since 2003. According to plaintiffs' counsel:

> "This office previously searched the Workmans Compensation Board website to determine if "Blaggards III Restaurant Corporation" had workmans compensation coverage and ascertained that no coverage existed for that entity. Upon receipt of the Affirmation in Opposition, this office searched the workmans compensation Board website for "Blaggards III Restaurant Corp." and *ascertained that Defendant has maintained continuous*

> *workmans compensation coverage with the State Insurance Fund from 2003 to the present time*" (Reply Aff. at p. 3) (emphasis added).

Indeed, defendants have submitted a copy of the subject policy, and plaintiffs have not disputed its accuracy.

Therefore, since the uncontroverted evidence clearly demonstrates that plaintiff was employed by Blaggards III, that she was injured during the course of her employment, and that Blaggards III had a workers' compensation policy in effect at the time of the accident, plaintiffs' exclusive remedy lies with workers' compensation (*see Baljit*, 211 AD2d at 555-56 [granting summary judgment dismissing personal injury action as barred by Workers' Compensation Law because, "[i]nasmuch as plaintiff [did] not dispute that he was employed by [defendant], albeit 'off the books,' or that he was injured in the course of his employment, and concede[d] that [defendant] had a workers' compensation insurance policy, he ha[d] failed to sustain his burden of alleging and proving noncoverage"]).

Plaintiffs further argue that they are entitled to relief under the doctrine of equitable estoppel because Blaggards III purportedly "misled" plaintiff into believing that she was not covered under any workers' compensation policy for 21/2 years, and, consequently, their action is now time-barred by the two-year statute of limitations for bringing a workers' compensation action (*see* Workers' Compensation Law § 28; *Layton v General Elec. Co.*, 176 AD2d 390, 390 [3d Dept 1991]). Blaggards III responds that plaintiffs have offered no support for their claim that it misled plaintiff.

"[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board" (*see Botwinick v Ogden*, 59 NY2d 909, 911 [1983]), and "whether estoppel applies is a question of fact for the Board to resolve" (*DiLascio v Tilden Glen Head, Inc.*, 69 AD3d 1171, 1171-72 [3d Dept 2010]). Therefore, the issue of whether equitable estoppel should apply is not properly before this Court.

Accordingly, plaintiffs' motion for summary judgment against Blaggards III is denied. The cross-motion by Blaggards III and Blaggards Restaurant for summary judgment dismissing plaintiffs' complaint as against them is granted.

C. Fraglow's Cross-Motion For Summary Judgment

Fraglow cross-moves for summary judgment dismissing plaintiffs' complaint as against it on the grounds that there are no triable issues of fact as to liability, or alternatively, for summary judgment against Blaggards III on its cross-claims for indemnification. Fraglow contends that it cannot be held liable for the injuries because it is an out-of-possession landlord and did not retain control over the premises or have a contractual obligation to maintain the property. Fraglow further argues that although it had a right to re-enter the premises, plaintiffs have not shown a significant structural or design defect that violated a specific statutory provision and Fraglow cannot be held liable for a mere maintenance problem. Fraglow also claims that it is entitled to common law and contractual indemnification from Blaggards III because it was not negligent, and, further, the terms of the lease provided for indemnification.[2]

Plaintiffs argue that Fraglow is liable the injuries because it had *actual* notice of a continuing air conditioning leak, and reserved its right to re-enter the premises to inspect and make necessary repairs. They point to plaintiff's testimony that she observed Babino examining the leak and removing tiles in Lynch's presence weeks before the accident, as well as Fuch's corroboration that Babino informed her that the air conditioner needed repair. They also argue that Fraglow has failed to offer any admissible evidence refuting that it had actual notice, such as an affidavit from Babino.

The Blaggards defendants argue that there are issues of fact regarding notice which precludes summary judgment. They also assert that summary judgment on the cross-claims for indemnification is premature since there remain issues of fact regarding Fraglow's negligence.

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[2]Plaintiffs do not take a position with respect to Fraglow's request for indemnification from Blaggards III.

They additionally contend that under the lease, Fraglow is only entitled to indemnifcation to the extent that it is not reimbursed by insurance, and that Fraglow has an applicable insurance policy.

An out-of-possession landlord, such as Fraglow, "will not be liable for injuries that occur on the premises unless it has retained control over the premises or is contractually or statutorily obligated to repair or maintain the property" (*Negron v Rodriguez & Rodriguez Storage & Warehouse, Inc.*, 23 AD3d 159, 160 [1st Dept 2005]; *see also Chapman v Silber*, 97 NY2d 9, 19 [2001]; *Wrubel v Rose Boutique II, Inc.*, 13 AD3d 264, 265 [1st Dept 2004]). Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*Zappel v Port Auth. of New York*, 285 AD2d 389, 389 [1st Dept 2001]; *Cherubini v Testa*, 130 AD2d 380, 382 [1st Dept 1987]; *Fernandez v Town of Babylon*, 72 AD3d 636 [2d Dept 2010]).

Further, an "out-of-possession landlord may not be held liable for a third party's injury on [the] premises unless the landlord has notice of the defect and consented to be responsible for maintenance" (*Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 231 [1st Dept 2002]; *see also Davis v HSS Properties Corp.*, 257 AD2d 500, 501 [1st Dept 1999]). Notice of a dangerous condition may be actual or constructive (*see Velazquez v Tyler Graphics, Ltd.*, 214 AD2d 489, 489 [1st Dept 1995]). Constructive notice may be found where the landlord "reserves a right under the terms of the lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists. In such case, only a significant structural or design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord" (*id.* [citations omitted]).

Fraglow has failed to establish its entitlement to judgment as a matter of law (*see Balasis v Power U.S. Properties, Inc.*, 251 AD2d 243, 243 [1st Dept 1998]. Fraglow submits no evidence establishing that its lack of actual notice. It does not dispute plaintiff's testimony that

she observed Fraglow's superintendent and Lynch discussing the air conditioner in ladies room weeks before the accident. Indeed, Fraglow's own property manager specifically testified that she had a discussion with Babino about the air conditioner. Fraglow also acknowledges that the lease granted it the right to re-enter the premises to inspect and, if necessary, to make repairs.

Since neither the issue of control nor actual notice may at this point be resolved in Fraglow's favor, Fraglow has not demonstrated its entitlement to summary judgment dismissing the complaint (*see id.* [out-of-possession landlord was not entitled to summary judgment dismissing complaint alleging negligent maintenance of stairway, as the issues of notice and control could not yet be resolved in landlord's favor where lease granted landlord the right to re-enter premises for inspection and repairs; landlord's chief executive admitted that he sometimes inspected the building; and plaintiff testified as to the defective condition of the stairway]; *Zappel*, 285 AD2d at 389-90; *Davis*, 257 AD2d at 501-02; *Cherubini*, 130 AD2d at 382).

To the extent that Fraglow seeks common-law and contractual indemnification from Blaggards III, the motion is denied as there remain issues of fact regarding Fraglow's negligence, if any, and whether Fraglow is entitltled to indemnifcation under the lease if it is covered by an applicable insurance policy (*see Bellefleur v Newark Beth Israel Medical Ctr.*, 66 AD3d 807 [2d Dept 2009]).

Accordingly, Fraglow's cross-motion for summary judgment is denied in its entirety.

For these reasons and upon the foregoing papers, it is,

ORDERED that, upon service of a copy of this Order with Notice of Entry thereof, the Court will deem served the following amended pleadings: (1) plaintiffs' proposed second amended complaint; and (2) the Blaggards defendants' amended answer; and it is further,

ORDERED that plaintiffs' motion for summary judgment against Blaggards III is denied, and Blaggards III and Blaggards Restaurant's cross-motion for summary judgment dismissing plaintiffs' complaint as against them is granted; and it is further,

ORDERED that Fraglow's cross-motion for summary judgment is denied; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the Blaggards defendants shall serve a copy of this order, with Notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: May 25, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**