[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Sigman

- v -

Town Sports

INDEX NO. 102838/08

MOTION DATE 9/2/10

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

E 10/26/10 dc

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

RECEIVED
OCT 26 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that Gloria Sigman's motion to reargue Trico Equities' summary judgment motion, the summary judgment cross motion of Town Sports International, Inc., d/b/a New York Sports Club, and TSI Lexington, Inc., and Sigman's cross motion to amend her pleadings is granted; and it is further

ORDERED that, upon reargument, the decision and orders of June 22, 2010, including the additional order of reference, on Trico Equities' summary judgment motion, the summary judgment cross motion of Town Sports International, Inc., d/b/a New York Sports Club and TSI Lexington, Inc., and Gloria Sigman's cross motion to amend her pleadings, are vacated; and it is further

ORDERED that the branch of Trico Equities' motion and Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross motion seeking an order granting them summary judgment dismissing Gloria Sigman's complaint is granted, solely to the extent of dismissing all claims against these defendants that negligence on their part caused Gloria Sigman to slip on the stairs, including due to the presence of a slippery substance on the stairs, and/or because the stair treads were unduly smooth, but is otherwise denied; and it is further

Dated: _____

Page 1 of 2

J.S.C.

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

NYS SUPREME COURT E-FILED AS DOCUMENT # 15 10/26/10

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

ORDERED that Gloria Sigman's cross motion to amend her pleadings is granted, solely to the extent that her bill of particulars as to Trico Equities is amended to add Administrative Code §§ 27-375 (f), 27-127, and 27-128, but is otherwise denied; and it is further

ORDERED that the branch of Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross motion seeking an order dismissing Trico Equities' cross claims against it is granted solely to the extent of dismissing Trico Equities' cross claim sounding in common-law indemnity, but is otherwise denied; and it is further

ORDERED that the branch of Trico Equities' motion, which seeks an order dismissing Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross claims, is granted solely to the extent of dismissing the cross claims against Trico for contractual and common-law indemnification, but is otherwise denied; and it is further

ORDERED that the branch of Trico Equities' summary judgment motion, which seeks an order granting it conditional contractual indemnification from Town Sports International, Inc., d/b/a New York Sports Club, and TSI Lexington, Inc. is denied; and it is further

ORDERED that in light of this Court's vacatur of the June 22, 2010 order directing a reference, TSI shall serve a copy of this order upon the Special Referee's office within 30 days.

This constitutes the decision and order of the Court.

Dated 10/22/10 **ENTER:** _____ **J.S.C.**

HON. CAROL EDMEAD

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

GLORIA SIGMAN, an individual,

Plaintiff, Index No. 102838/2008

-against-

TOWN SPORTS INTERNATIONAL, INC. d/b/a NEW YORK SPORTS CLUB, TSI LEXINGTON, INC., TRICO EQUITIES, IAN'S BODY ELITE, INC., XYZ COMPANIES 1-20, said names being fictitious, the persons intended being corporations or other business entities of New York Sports Club, and "JOHN DOE," said name being fictitious, the person intended being the landlord of 131 East 31st Street, New York, New York,

Defendants.

----------x

Carol R. Edmead, J.:

In this personal injury action, plaintiff, Gloria Sigman (Sigman), moves to reargue the motion and cross motion of defendants Trico Equities Company, LLC, s/h/a Trico Equities (Trico), and TSI East 31, LLC, s/h/a Town Sports International, Inc., d/b/a New York Sports Club and s/h/a TSI Lexington, Inc., (collectively, TSI)[1] for summary judgment, as well as her own cross motion to amend her bills of particulars. For the reasons which follow, the motion to reargue is granted, and upon reargument, this Court's orders and decision June 22, 2010 are

[1]Counsel for the TSI defendants did not seek to distinguish between the named defendants for purposes of the instant or underlying applications. Accordingly, they shall be treated as one.

004

vacated and are replaced by this memorandum decision and order.

Background

Sigman was a member of a health club, which was located in a building owned by Trico, which leased those portions of the building comprising the health club to TSI Lexington, Inc. The health club was located principally on portions of two floors, the first and the basement. The health club's first floor, which was two steps down from the street level, had an exercise room. At least one staircase went from that level down to the basement level. The exact configuration of the basement level was not made clear on the original applications or on the instant motion.

According to James Gray, a health club personal/floor trainer, the basement level was L-shaped. At the bottom of the stairs, between the first and basement levels, and to the right, there was a door leading to a free-weights room. Gray ebt, at 24. It appears that there was a hallway in the basement, which contained rental lockers stacked on the right. It is not stated whether this hallway was totally enclosed or whether the staircase from the first floor flowed directly, without separation, e.g., by doors, into it. There was an office off the hallway. At an end of the hallway, to the left, there was a landing, which led to a staircase. Whether the landing or stairway was closed off from the hallway by a door or whether there was simply a door-like opening is not revealed. The

stairway contained about five steps, covered with rubber treads, which led up and directly into a warm-up area, which contained mats (the mat room), where club members could stretch before using the club's other facilities, or do floor exercises. It is unclear whether the mat room was also the room referred to by TSI's architect as the "aerobics studio." Hattar aff. in support of original TSI cross motion, ex. L., Berzak letter of 2/18/1997. If, in fact, it was, then the means of egress required for that studio was an "opening directly into the building stair hall." *Id.*

Facing up the stairs, the subject stairwell was walled in on the left side. The right side was partially walled in up to the floor level of the mat room. That wall was topped by a metal railing, made up of several horizontal bars, which prevented the occupants of the mat room from falling into the stairwell. No handrail was present. The staircase had exposed metal stringers along both sides, above the risers and treads. On the wall over the stairwell, inside the mat room, was an exit sign. There was a door in the mat room, which may have opened onto another stairway. *Id.*

In December 2006, while descending the stairs in the mat room, Sigman, who was allegedly holding onto the railing with her left hand, reached approximately the third step and started to fall down the stairs. She twisted around toward the railing, in

an attempt to grab onto it with her other hand as well, but nonetheless slid into a sitting position. She suffered fractured ribs, and both of her legs were severely gouged, almost to the bone on her left leg, with the skin torn off, which required skin grafts from her thigh and hospitalization. At her deposition, Sigman indicated that she had started to fall forward down the stairs, but could not recall whether she had slipped. She also did not know whether she had fallen on the metal stringers, although she testified that it was possible. Sigman ebt, at 68.

In 2008, Sigman commenced this action, initially naming Town Sports International, Inc., d/b/a New York Sports Club, and various fictitious defendants, whose identities were unknown. The complaint alleged that Sigman had slipped down the stairs, which had no handrail, fractured her ribs, and gouged her legs on "sharp-edged steel stair stringers." Complaint, ¶ 7. The complaint further alleged that the property was operated in violation of the New York City Building Code (Title 27 of the Administrative Code of City of NY [Administrative Code]), and in particular, Administrative Code § 27-375 (f), which required the presence of handrails on "interior stairs." The complaint set forth one cause of action sounding in negligence, and alleged that the defendants had created a hazardous condition "due to the stairway's improper design and installation." Id., ¶ 15.

The complaint was thereafter amended in 2009 to add

defendants TSI Lexington, Inc., Trico, and Ian's Body Elite, Inc.,[2] the original lessee of the space, which had assigned its lease to TSI Lexington, Inc. The lease was later renewed on largely the same terms as the original lease. The substantive allegations of the amended complaint are essentially the same as those of the original complaint.

TSI asserted cross claims against Trico, sounding in contribution, and in contractual and common-law indemnity. Trico served an answer asserting three somewhat redundant cross claims against TSI, which in essence sought contribution, and common-law and contractual indemnity. The latter claim was principally, but not exclusively, set forth in Trico's third cross claim which recited that TSI had agreed to provide and maintain liability insurance for Trico's benefit, that TSI breached that agreement, and that if Sigman recovered against Trico in this action, then Trico would be damaged and entitled to be indemnified by TSI.

In her verified bill of particulars as to TSI, Sigman indicated, in response to whether she was claiming that she slipped and fell due to a slippery floor surface, that she did not recall whether there was water on the steps or in or around the landing areas. In response to TSI's inquiry of whether there was a foreign object which contributed to the fall, Sigman stated

[2]Ian's Body Elite, Inc. has never appeared, and the New York Department of State's website allegedly shows that it has been inactive since 2003.

that there was a metal protrusion on the side of the stairs, which in large measure caused her injuries. Sigman, in response to the question of the acts of negligence which caused or contributed to the occurrence, stated that they included the failures to install a railing, maintain the premises in a safe condition, and comply with applicable building code provisions, including Administrative Code § 27-375 (f).

Sigman also served a verified bill of particulars in response to Trico's demand. That bill of particulars did not mention the sharp metal stair stringers. Instead, it alleged the failure to comply with building code provisions, including the failure to install a handrail, and the failure to maintain the premises in a safe condition. As to specific building code provisions violated, the bill of particulars recited, "§§ [C26-604, 8] 3-375."

At some point, the case was scheduled for mediation. In an April 9, 2010 letter from Sigman's counsel to the court mediator, which letter was copied to TSI's and Trico's counsel and appended a copy of the 2007 preliminary report of Sigman's expert engineer, Leonard Goldblatt (Goldblatt),[3] Sigman's counsel noted that Goldblatt had concluded in his report that Sigman's injuries were caused by a slippery liquid spilled on the smooth treads,

[3]The premises burned down shortly after Goldblatt inspected and photographed the premises in June 2007.

the absence of handrails, and sharp, exposed, and unprotected corners on the top of the stair stringers, which cut Sigman's legs on impact. The letter alleged that the defendants had violated Administrative Code § 27-375 (f), as well as §§ 27-127, and 27-128, which latter provisions required a building's owner to maintain the structure and its facilities in a safe condition.

In late April 2010, Trico moved and TSI cross-moved for summary judgment dismissing the complaint and all cross claims. Trico asserted that it was an out-of-possession landlord, which was not responsible for maintaining, cleaning, or repairing the stairs. Trico and TSI urged that they had no constructive or actual notice of any defective condition on the stairs or stairway, and noted that, at her deposition, Sigman could not recall whether she had slipped or how her fall had occurred; that there was no evidence that they were negligent in any way; that a handrail was not required under Administrative Code § 27-375 (f)[4] because the stairs were not an interior stairway within the meaning of the Administrative Code, since it was not a required exit, and did not serve as a means of egress to an open exterior space on either end; and that Administrative Code §§ 27-127 and 27-128 were inapplicable because they only reflected a general duty to maintain the premises in a safe condition and were not

[4]Trico's counsel recognized that the aforementioned code provision cited by Sigman in her bill of particulars appeared to contain a typographical error.

actionable absent the violation of a code duty imposing a specific obligation.

Trico also sought an order granting it conditional contractual indemnification from TSI, including attorneys' fees, costs, and disbursements. Trico's notice of motion alternatively sought conditional common-law indemnity, but that requested item of relief was never specifically addressed in the moving or reply affirmations.

TSI opposed that portion of Trico's motion which sought an order granting it conditional indemnity. In this regard, TSI claimed that Trico failed to demonstrate that it was a named insured under any TSI insurance policy, that it was entitled to a defense and indemnification under the lease documents, or that it timely provided TSI or its insurance carrier with notice of Sigman's claims or tendered its defense to TSI. TSI further asserted that the lease rider (¶ 56 [b]) only provided for indemnification for occurrences caused by TSI, its agents, employees, and invitees, and that since there was no evidence establishing what caused the fall, Trico was not entitled to be indemnified.

Sigman opposed defendants' summary judgment applications and asserted that defendants had failed to establish that Administrative Code § 27-375 was inapplicable. Sigman, relying on Goldblatt's unsworn preliminary report, further noted his

conclusions that the stairs were also hazardous and a cause of the incident in that the stringers were sharp and exposed and that there was a slippery substance on the smooth stair tread covers. Sigman's counsel, observing that Sigman's bill of particulars as to TSI referred to the sharp stringers, asserted that the stringers were "dangerously exposed." Albert aff. in opp. to TSI's cross motion, ¶ 39.

Sigman also cross-moved for leave to amend her bill of particulars as to Trico and TSI to add that these defendants violated Administrative Code §§ 27-127 and 27-128, claiming that her omission of these code provisions was inadvertent, and that defendants would suffer no prejudice. Sigman also moved to amend her bill of particulars as to Trico to add Administrative Code § 27-375 to correct the code provision set forth in her bill of particulars.

Trico and TSI opposed plaintiff's cross motion to the extent that she sought to add Administrative Code §§ 27-127 and 27-128, claiming that there was no violation of a specific code requirement. TSI added that such provisions were inapplicable to it, since it was not an owner of the property. TSI and Trico further asserted that Goldblatt's report was without any evidentiary weight since it was unsworn.

By decision and orders dated June 22, 2010, the motion and cross motion to dismiss Sigman's complaint were granted; Sigman's

cross motion to amend her pleadings was granted solely to the extent of correcting her bill of particulars as to Trico to reflect that Sigman was asserting a violation of Administrative Code § 27-375 (f); TSI's cross claims against Trico were dismissed; Trico's motion for summary judgment against TSI for conditional contractual indemnity on Trico's second cross claim was granted; and a reference was ordered as to Trico's damages on that cross claim. A separate order of reference was also issued on June 22, 2010.[5]

Sigman now seeks reargument to the extent that the Court dismissed her complaint and denied her leave to amend her bills of particulars as to Trico and TSI to add violations of Administrative Code §§ 27-127 and 27-128. Trico and TSI oppose this motion.

Discussion

Leave to reargue is appropriate when a court has overlooked or misapprehended relevant facts or law in deciding a prior motion. CPLR 2221 (d) (2). After further review of the papers on the underlying applications and the case law upon which the moving defendants relied, the Court finds that there is merit to at least some of Sigman's positions, and grant her leave to

[5]The County Clerk's computer records reflect a so-ordered stipulation of October 18, 2010, effectively to adjourn the proceedings before the referee, because Trico and TSI would be opposing this motion to reargue, and that therefore, according to the stipulation, attorneys' fees and costs would be continuing.

reargue, and, upon reargument, the Court vacates the orders and decision of June 22, 2010 and substitute this decision and order.

The law is well settled that the movant on a summary judgment application bears the initial burden of *prima facie* establishing that party's entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Where a moving party makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009). Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987).

Applications to Dismiss the Complaint

Trico and TSI established on their underlying applications that any claim that their negligence caused Sigman to slip on the stairs must be dismissed because it is undisputed that Sigman testified at her deposition that she fell forward and could not

recall whether she had slipped, a concession supported by her bill of particulars as to TSI. Thus, a jury would have to speculate that she slipped. In light of Sigman's concession, any claim that she slipped due to Trico's and/or TSI's negligence, including that she slipped because of a slippery substance on the stairs, or due to stair treads which were unduly smooth, must be, and hereby is, dismissed. *See Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 (1st Dept 2007); *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept 2006); *Visconti v 110 Huntington Assoc.*, 272 AD2d 320, 321 (2d Dept 2000) (inability to identify cause of fall is usually fatal to plaintiff's claim).

Nonetheless, Trico and TSI, on their underlying summary judgment applications, failed to meet their *prima facie* burden of establishing that they lacked the duty to install a handrail on the subject stairway. Their principal argument was that the subject stairway was not an interior stairway within the intendment of Administrative Code § 27-375 (f) because the stairway was not a required exit and did not lead directly outside.

Administrative Code § 27-375 (f) requires interior stairs to have one handrail if the stairway is fewer than 44 inches wide, as was the case here. An "interior stair" is one "within a building, that serves as a required exit." Administrative Code § 27-232. An "exit" is defined as "[a] means of egress from the

interior of a building to an open exterior space which is provided by the use of the following, either singly or in combination: exterior door openings, vertical exits, exit passageways, horizontal exits, interior stairs, exterior stairs ... ; but not including access stairs, aisles, corridor doors or corridors." *Id.* The Administrative Code then goes on to define access stairs, corridors, horizontal exits, vertical exits, exit passageways, and exterior stairs *(id.)*, and their requirements (Administrative Code §§ 27-357, 27-369, 27-370, 27-373, 27-376).

While it is evident that the staircase in issue did not itself directly provide a means of egress to an open exterior space, the Administrative Code's definition of an exit is not so limited, since a "vertical exit," defined as "[a] stair ... serving as an exit from one or more floors above or below the street floor" (Administrative Code § 27-232), can constitute an exit within the meaning of Administrative Code § 27-232, if it is combined with, among other things, horizontal exits or exit passageways.

Although the issue of whether a stairway is an interior one is for the court (*DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]), the moving defendants have failed to provide adequate information to enable this court to conclusively determine the issue. On their initial moving papers, neither TSI nor Trico urged or submitted any opinion from an architect,

engineer or other building expert demonstrating that the subject stairway was not an exit because it was not combined with the requisite building elements. Nor did they claim or provide any expert opinion that the stairway was connected to a corridor or aisle, as defined by the Administrative Code, so as to take it out of the definition of an exit. They further failed to demonstrate that the stairway was not a required exit, other than through counsel's bald conclusion to that effect.

The cases relied upon by defense counsel at first blush appeared to support their position. However, upon closer examination, the Court finds that they are inapposite, because, for example, they involved aisle stairs (*Wyckoff v Jujamcyn Theaters, Inc.*, 11 AD3d 319, 320 [1st Dept 2004]), stairs which emptied into a room, rather than into a horizontal exit or exit passageway (*Remes v 513 West 26th Realty, LLC*, 73 AD3d 665 [1st Dept 2010]; *Mansfield v Dolcemascolo*, 34 AD3d 763 [2d Dept 2006]; *see also Union Bank & Trust Co. Of Los Angeles v Hattie Carnegie, Inc.*, 1 AD2d 199 [1st Dept 1956]), or exterior stairs, which were not *in lieu* of interior stairs (*Gaston v New York City Hous. Auth.*, 258 AD3d 220 [1st Dept 1999]). While the moving defendants may be able to establish at some later point in this litigation that the subject stairs were not interior stairs, they have not met their burden here.

Also, neither Trico nor TSI *prima facie* established a lack

of actual or constructive knowledge that the staircase was missing a handrail. In addition, it is unclear whether either Trico or TSI constructed that stairway without a handrail.

In the instant case, TSI took the leased premises "as is" (1991 lease rider, ¶ 48) and, except for structural repairs, which remained Trico's obligation (*see* 1991 lease, ¶¶ 3, 4, 6; 1991 lease rider, ¶ 52), agreed to maintain and repair the demised premises and comply with all applicable laws (id. at ¶¶ 4, 6; 1991 lease rider, ¶ 62). However, as the tenant in possession, even if it had no such obligations, that would not relieve TSI of liability for injuries arising from defects on the demised premises. *McNelis v Doubleday Sports, Inc.*, 191 AD2d 619 (2d Dept 1993).

Regarding Trico, as an out-of-possession landlord, which retained the right to enter the premises to make repairs which the tenant failed to make, and comply with laws and regulations (1991 lease, ¶ 13), it can be liable for negligence resulting from "a significant structural or design defect that is contrary to a specific statutory safety provision" (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]; *Nikolaidis v La Terna Rest.*, 40 AD3d 827 [2d Dept 2007]) and can be charged with constructive knowledge of the lack of any required handrail (*Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 566 [1987]; *Velazquez v Tyler Graphics*, 214 AD2d 489 [1st Dept

1995]).

Further, that Sigman testified that she held onto the railing separating the mat room from the stairwell while descending the stairs, and always did so when she was at the health club (Sigman ebt, at 47-48), strongly suggests that had a handrail been provided, she would have used it. The Court also notes that TSI failed to address, much less prima facie eliminate, the issue set forth, albeit inartfully, in Sigman's bill of particulars regarding the sharp, uncovered, metal stair stringers, which it may well have installed. Although there is no claim that such stringers caused her fall, a fair reading of Sigman's pleadings as to TSI, and that which can be reasonably inferred from them, is that Sigman's injuries were exacerbated when her legs were gouged and the skin ripped off, as a result of the stringers' corners, which were exposed and unduly dangerous, and therefore should have been covered over, an act which would not seem to require any structural repairs under the lease documents, and would therefore fall within TSI's obligations. While Sigman was unsure at her deposition whether her legs had hit the stringers, because the accident happened so quickly, a jury could reasonably find, with appropriate expert testimony, in light of the fact that the rest of the stairs consisted of smooth rubber, that the metal stringers caused the gouging and ripping leg injuries. Accordingly, TSI's and Trico's applications to

dismiss the complaint are denied, except to the limited extent previously noted.

Sigman's Application to Amend her Bills of Particulars

That portion of Sigman's underlying cross motion, which seeks to amend the bill of particulars as to Trico to reflect that Sigman was relying upon Administrative Code § 27-375 (f) is granted, since that provision was set forth in the complaint, and Trico realized that the reference to the Administrative Code provision in the bill of particulars appeared to be a typographical error.

Because Sigman's claim against Trico, based on the absence of a handrail, has not been dismissed, and since no prejudice has been established (*Campbell v Genesis Contractors, Inc.*, 76 AD3d 1038 [2d Dept 2010] [leave to amend should be granted absent surprise or prejudice, where proposed amendment is not clearly devoid of merit]), that portion of Sigman's underlying cross motion for leave to amend her bill of particulars as to Trico to add a claim that it violated Administrative Code §§ 27-127 and 27-128 is also granted (*see Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66, 67 (1st Dept 1998); *Plung v Cohen*, 250 AD2d 430, 431 (1st Dept 1998) (Administrative Code §§ 27-127 and 27-128 do not impose liability on a landlord unless there is a breach of a specific safety provision). The branch of Sigman's underlying cross motion which seeks leave to amend her bill of particulars

as to TSI to add Administrative Code §§ 27-127 and 27-128 is denied, since those provisions do not apply to TSI as the lessee. *Beck v Woodward Affiliates*, 226 AD2d 328, 330 (2d Dept 1996); *see also Zvinys v Richfield Investment Co.*, 25 AD3d 358, 360 (1st Dept 2006).

Cross Claims for Contribution and Indemnity

Although Trico and TSI have not cross-moved for reargument of their original applications to dismiss the cross claims asserted against them, or with respect to Trico's application for summary judgment granting it conditional contractual indemnity from TSI, these issues must be addressed in light of the reinstatement of Sigman's complaint.

The relevant contractual obligations of TSI and Trico are set forth in the 1991 lease and its rider. The 1991 lease (¶ 8) required TSI to procure liability insurance in an amount acceptable to Trico, naming Trico and TSI as insureds, and the lease rider (¶ 53) amplified that provision by requiring TSI to procure a liability policy in the amount of at least $1,000,000. The insurance was to cover personal injuries "occurring in or about the demised premises or arising out of the ownership, maintenance, use or occupancy thereof." *Id.* TSI had to periodically provide Trico with proof of insurance. Lease rider, ¶ 53 (3). If TSI failed to procure the insurance, Trico could itself obtain it, and charge the premium costs to TSI as

additional rent, or could pursue its other remedies as a result of TSI's default. *Id.*; 1991 lease, ¶ 8.

Under the 1991 lease (¶ 8), Trico was not liable for any injury to persons "unless caused by or due to the negligence of Owner, its agents, servants or employees." The lease rider (¶ 56 [b]) provided that TSI would indemnify Trico against "all claims, liability, loss or damage, whether for injury to persons or loss of life ... from or out of any occurrence in, or about the demised premises ... *caused by Tenant and/or its agents, employees, invitees, sublessees or licensees only* (emphasis added)." The 1991 lease (¶ 8) recited that the tenant was to indemnify Trico against

> "all liabilities, obligations, damages, penalties, claims, costs and expenses *for which Owner shall not be reimbursed by insurance*, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of the Tenant ... ." (emphasis added)"

If any action were to be brought against Trico by reason of any such claim, TSI was, on written notice from Trico, to defend such action by counsel approved in writing by Trico. *Id.* That TSI was obligated to indemnify Trico did not diminish its duty to procure insurance. Lease rider, ¶ 56 (b).

Since Sigman's complaint survives TSI's and Trico's summary judgment applications, the branch of Trico's underlying motion

which sought dismissal of TSI's contribution cross claim must be, and hereby is, denied (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d at 567-569 [where lessor reserved the right to inspect premises and make repairs if lessee did not fulfill its lease obligations, the failure to, among other things, provide appropriate handrails mandated by the Administrative Code, was a breach by the lessor of a duty owed by it directly to injured plaintiff; thus contribution, rather than common-law indemnity, applied]). Similarly, to the extent that TSI sought summary judgment dismissing Trico's cross claim for contribution, that application is denied. Because contribution, rather than common-law indemnity applies, Trico's and TSI's applications for summary judgment dismissing the cross claims sounding in common-law indemnity are granted, and those cross claims are dismissed.

This leaves Trico's and TSI's underlying applications to dismiss each other's cross claim for contractual indemnity, and Trico's application for conditional summary judgment on its contractual indemnity cross claim against TSI. The ground urged for Trico's original application to dismiss TSI's cross claim for contractual indemnity is rather cryptic. The only basis for such requested relief which can be inferentially discerned from Trico's underlying moving affirmation was Trico's claim that, under the lease documents, it was TSI which was obligated to contractually indemnify Trico (rather than vice versa). Since it

is readily apparent from those lease documents that if any party was entitled to be contractually indemnified, it was Trico, that portion of Trico's underlying motion which sought dismissal of TSI's cross claim for contractual indemnification is granted, and any such cross claim is dismissed.

Trico's underlying summary judgment application for an order granting it conditional contractual indemnity, including costs, disbursements and attorneys' fees, against TSI is denied. In its initial moving affirmation in support of its application for an order granting it conditional contractual indemnity against TSI, Trico just pointed to the indemnity and insurance provisions set forth in paragraph 8 of the 1991 lease and paragraphs 53 and 56(b) of the lease rider, and asserted that it was clear from those provisions that, if someone were injured on the leased premises, TSI would defend and indemnify the landlord. Chin aff. in support of Trico's underlying summary judgment motion, ¶ 31. While Trico's counsel referred to case law standing for the proposition that a contract clause permitting indemnity for one's own negligence is actionable, when coupled with an insurance procurement provision, counsel did not assert or establish that the lease documents in issue contained a clause exempting Trico from its own negligence. *See Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 417 (2006) ("Courts will construe a contract to provide indemnity to a party for its own negligence

only where the contractual language evinces an 'unmistakable intent' to indemnify [internal citation omitted]"). Moreover, as previously indicated, the lease explicitly provided that Trico would not be liable for personal injury, unless caused by its negligence. So, there is no specific lease provision requiring TSI to indemnify Trico for Trico's negligence.

Nonetheless, the lease provided that TSI would be required to indemnify Trico against all costs and expenses, including attorneys' fees, which were not reimbursed by insurance, if TSI breached any of its obligations under the lease, including, presumably, TSI's duty to procure liability insurance. Thus, any obligation to "indemnify" in this case would arise from an alleged breach of that contractual obligation. *See Inchaustegui v 666 5th Ave. Ltd. Partnership,* 96 NY2d 111, 116 (2001) (tenant's breach of agreement to procure liability insurance entitles the landlord to recover only for "the loss it actually suffered by reason of the breach," and since the landlord had procured its own insurance, the loss could include the amount it expended in procuring its insurance policy and its increased future insurance premium costs, but not the cost of a defense). However, Trico, in its initial moving papers in support of its summary judgment application, did not assert or present any evidence that TSI had breached any lease obligation in that regard; did not specifically mention its third cross claim; and did not assert

that it had demanded that TSI defend it in this action or that TSI had refused such a demand. *See Keelan v Sivan*, 234 AD2d 516, 517 (2d Dept 1996) (party seeking summary judgment based on a promisor's failure to name it as an additional insured must show that the contract required it, and that the promisor did not comply with that contractual provision).

In its reply papers on its underlying motion, Trico for the first time indicated that it had its own insurance,[6] and effectively conceded that it did not know whether TSI had procured insurance for it (Chin reply aff., ¶ 22). Trico then attempted in those reply papers to demonstrate that it had made a demand for TSI to defend it in this action and that such demand was ignored. It is well settled that grounds in support of a summary judgment motion raised for the first time in reply papers are unavailing. *See Matter of Moorman v Meadow Park Rehabilitation and Health Care Center, LLC*, 57 AD3d 788, 789 (2d Dept 2008); *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992). Accordingly, Trico did not meet its *prima facie* burden of establishing its entitlement to conditional contractual indemnity, and its motion for summary judgment on this issue is denied.

As to TSI's application to dismiss Trico's cross claim for

---

[6]Trico did not indicate whether its insurance policy provided coverage in the amount which TSI was required to obtain for Trico.

contractual indemnity, TSI simply urged that dismissal of Trico's cross claims was warranted because Sigman's claims against it were meritless. *See* Hattar aff. in support of TSI's cross motion for summary judgment. Since Sigman's case against TSI stands, the branch of TSI's underlying cross motion to dismiss Trico's cross claim for contractual indemnity on that ground is denied.

In conclusion, it is

ORDERED that Gloria Sigman's motion to reargue Trico Equities' summary judgment motion, the summary judgment cross motion of Town Sports International, Inc., d/b/a New York Sports Club, and TSI Lexington, Inc., and Sigman's cross motion to amend her pleadings is granted; and it is further

ORDERED that, upon reargument, the decision and orders of June 22, 2010, including the additional order of reference, on Trico Equities' summary judgment motion, the summary judgment cross motion of Town Sports International, Inc., d/b/a New York Sports Club and TSI Lexington, Inc., and Gloria Sigman's cross motion to amend her pleadings, are vacated; and it is further

ORDERED that the branch of Trico Equities' motion and Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross motion seeking an order granting them summary judgment dismissing Gloria Sigman's complaint is granted, solely to the extent of dismissing all claims against these defendants that negligence on their part caused Gloria Sigman to

slip on the stairs, including due to the presence of a slippery substance on the stairs, and/or because the stair treads were unduly smooth, but is otherwise denied; and it is further

ORDERED that Gloria Sigman's cross motion to amend her pleadings is granted, solely to the extent that her bill of particulars as to Trico Equities is amended to add Administrative Code §§ 27-375 (f), 27-127, and 27-128, but is otherwise denied; and it is further

ORDERED that the branch of Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross motion seeking an order dismissing Trico Equities' cross claims against it is granted solely to the extent of dismissing Trico Equities' cross claim sounding in common-law indemnity, but is otherwise denied; and it is further

ORDERED that the branch of Trico Equities' motion, which seeks an order dismissing Town Sports International, Inc.'s, d/b/a New York Sports Club, and TSI Lexington, Inc.'s cross claims, is granted solely to the extent of dismissing the cross claims against Trico for contractual and common-law indemnification, but is otherwise denied; and it is further

ORDERED that the branch of Trico Equities' summary judgment motion, which seeks an order granting it conditional contractual indemnification from Town Sports International, Inc., d/b/a New York Sports Club, and TSI Lexington, Inc. is denied; and it is

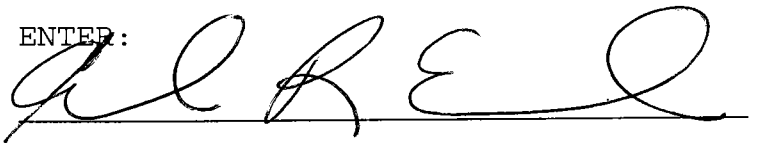
further

ORDERED that in light of this Court's vacatur of the June 22, 2010 order directing a reference, TSI shall serve a copy of this order upon the Special Referee's office within 30 days.

This constitutes the decision and order of the Court.

Dated: October 22, 2010

ENTER:



J.S.C.

HON. CAROL EDMEAD