White v John St. Parking Corp.
2011 NY Slip Op 33801(U)
March 15, 2011
Supreme Court, New York County
Docket Number: 105254/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 105254/2008
WHITE, STEPHEN
VS.
JOHN STREET PARKING
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 3/3/11
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

this motion to/for ______

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

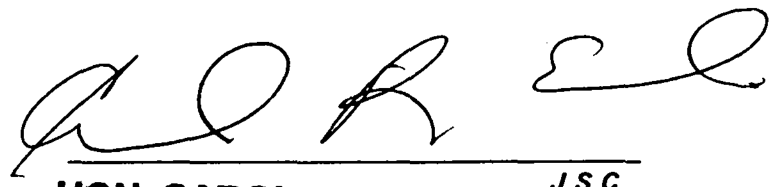
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant RBNB Wall Street Owners, LLC for summary judgment dismissing the complaint of the plaintiff, Stephen White, or in the alternative, for contractual and common law indemnification from John Street Parking is granted to the extent that summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: 3/15/11



HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
STEPHEN WHITE,

Plaintiff, Index No. 105254/2008

-against-

JOHN STREET PARKING CORPORATION
AND RBNB WALL STREET OWNER, LLC,

Defendants.
---X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this slip and fall action, defendant RBNB Wall Street Owners, LLC ("RBNB") moves for summary judgment dismissing the complaint of the plaintiff, Stephen White ("plaintiff"), or in the alternative, for contractual and common law indemnification from John Street Parking ("John Street").

Factual Background[1]

Plaintiff allegedly sustained personal injuries on February 5, 2007 when he slipped and fell on ice on a driveway leading into the parking garage at 63-67 Wall Street, New York, New York (the "premises"). RBNB, as owner, leased the premises to John Street pursuant to a written commercial lease operating a parking garage (the "Lease").

The Lease (Article 1) defines the premises as the "street level entrance and below grade garage space substantially as shown by the hatching on Exhibit A-1 and A-2" (emphasis in original). The floor plans attached to the Lease show that the driveways leading into the parking garage are included in the premises.

[1] The Factual Background is taken from RBNB's moving papers.

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Pursuant to Section 3.4(l) of the Lease, John Street, was responsible to maintain the parking garage, including all driveways:

> Tenant shall, at Tenant's sole expense, maintain . . . the Demised Premises and all driveway areas connected therewith in a clean and uncluttered, neat, sanitary and safe condition within the context of Tenant's obligations, and shall, at Tenant's sole expense, provide or cause to be provided all maintenance supplies, materials and equipment necessary to maintain the Demised Premises in such manner.

John Street was also obligated to "(i) keep the sidewalks, curbs and runways which are part of the Demised Premises free from snow, ice, dirt and rubbish . . . ." (Section 3.4(o)) and make all nonstructural repairs to the premises as follows:

> Tenant shall promptly, at its sole cost and expense . . . (i) make all nonstructural repairs to the Demised Premises and the fixtures, equipment, appurtenances therein . . . .
> Section 7.2 (entitled "Tenant's Repair and Maintenance")

Pursuant to Section 13.1(a)(iii), John Street was also responsible to provide a garage liability policy, "including coverage for Bodily Injuries, or death resulting therefrom . . . ." naming RBNB as an additional insured (Section 13.1(d)). The insurance was to include "coverage for the liability assumed under the Indemnity clause contained in this Agreement." (*Id*). The Lease's indemnification clause states:

> . . . Tenant shall indemnify, defend, protect and hold harmless each of the Indemnitees from and against any and all Losses to which any Indemnitee may (except to the extent arising from the gross negligence or willful misconduct of any such Indemnitee in the operation and maintenance of the Building) be subject or suffer, whether by reason of, or by reason of any claim for, any injury to, or death of any person or persons . . . arising from or in connection with the use of any part of the Demised Premises.
> Section 32.1(a) (entitled "Tenant's Indemnity")

Section 32.1(b) states that "the term 'Losses' means any and all losses, liabilities, damages, claims, judgments, fines, suits, demands, costs, interest and expenses of any kind or nature (including reasonable attorneys' fees and disbursements) incurred in connection with any

claim, proceeding, or judgment and the defense thereof . . . ." Further, the Lease defines "Indemnitees" as the landlord, the landlord's agent, as well as the mortgagee and lessor and each of their agents.

At plaintiff's deposition, he stated that he was walking down the concrete driveway that leads from the street level down to the parking garage (Plaintiff EBT, pp. 36, 38, 40). As he was "almost all the way to the end," approximately "six feet" away from the bottom of the driveway, he slipped on a patch of ice (*id.* pp. 39-40). The patch of ice was "oblong in shape, approximately two to three feet long" and "three to four inches" wide (*id.* p. 46). The ice was "dark grey," and he did not know if it had any depth (*id.* p. 49). It did not appear to be raised (*id.*). The ice patch was six to eight inches away from the wall (*id.* p. 48). When asked if the ice was water, soda, coffee or something else, plaintiff testified "Yes. I guess it could have been. I don't know exactly what it was. . . ." (*id.* p. 132). When asked from where the ice patch may have emanated, plaintiff stated "The only thing I can think of would be the pipes running along the wall . . . [b]ecause the ice looked like it had started from down there . . . like there was a leak or condensation or something from one of the pipes that was leaking" (*id.* p. 47). "The pipes run the length of the wall. They run down from - - I don't know where they start, but I now they run length-wise down the wall to the bottom of the grade (Plaintiff EBT, p. 47). Plaintiff further testified that the nine photographs marked at his deposition depicted the bottom portion of the driveway where he slipped (*id.* p. 51). When presented with certain photographs, plaintiff agreed that they did not depict pipes (*id.* p. 131).

RBNB's building superintendent for the subject premises at the time of the plaintiff's accident, Orlando Gonzalez ("Gonzalez"), testified that the photographs marked at his deposition

depict the parking garage driveway, the guardrail, a hose wrapped around the guardrail and a bucket on top of the guardrail (Gonzalez EBT, pp. 33, 38, 39). Gonzalez observed one of the parking garage attendants utilize the hose and the bucket depicted in the photographs to wash a car at the bottom of the ramp and to the left in an area of the parking garage "probably ... two, three times" prior to the date of the plaintiff's accident (*id.* pp. 34-38, 54, 124-127). He never observed the hose being used for any other purpose, and he never observed any other hose (*id.* pp. 36, 53). There is no water spigot on the driveway (*id.* p. 69). He never observed any ice or other slippery substance on the parking garage driveway (*id.* pp. 57, 101, 103). There was a pipe belonging to the building that ran across the ceiling over the bottom of the ramp (*id.* pp. 47-49). Gonzales did not know what the pipe carried or what it was used for (*id.*).

RBNB's property manager after the date of the accident, David Pian ("Pian"), testified that RBNB is not responsible for the operation of the parking garage, and that he was not aware of any work performed in the parking garage by RBNB prior to the plaintiff's accident (*id.* p. 37). Pian was never made aware of any leaking or broken pipe in the parking garage at the time of plaintiff's accident (*id.* pp. 29, 75), and was not aware of any problems with ice patches forming on the driveway of the parking garage; he did not know why an ice patch would have formed on the driveway and never saw any ice on the ramp (*id.* pp. 36-37, 63, 100). Looking at defendant's Exhibit A, Pian also testified that there was at least one pipe running over the subject ramp, but he did not know the purpose of the pipe (*id.*, pp. 88-89).

John Street's witness, Roberto Carlos Maldonado Ortiz ("Ortiz"), testified that he was "in charge collecting the money and parking the cars" in the garage (Ortiz EBT, p. 7). Ortiz was responsible to walk around the garage and inspect the garage for any dangerous condition (*id.* pp.

13, 16-17, 25). If he observed any ice on the floor of the garage or on the ramp, he would clean it with salt and a shovel (*id.* pp. 23, 25). The garage attendants would clean liquid spills on the driveway leading into the parking garage (*id.* p. 72). He testified that the photographs marked at defendant's deposition depicted the protective barrier and the hose used by the parking garage attendants to clean the driveway (*id.* pp. 39, 42). The parking garage owned the hose, and the garage attendants used the hose with water to remove dust and to clean the driveway leading into the parking garage (*id.* pp. 57, 62, 64, 66, 70, 72, 81, 82). Ortiz testified that they did not hose the ramp in the wintertime (*id.* pp. 74-75). When asked if he would notify the building of if the garage ramp was dirty or slippery, Ortiz replied "No." (*id.* pp. 91, 98). The building personnel did not clean the garage (*id.* p. 98).

Ortiz stated that the pipes in the garage had been broken for some time. RBNB's superintendent informed the garage staff not to touch the broken piping. When asked for how long the pipe was the pipe disconnected from "the handle," Ortiz replied, "It's always been like that." (*id.* p. 44). Ortiz, also testified that the RBNB's superintendent informed him "not to touch [the pipe] because it doesn't work." (id, p. 44). According to Ortiz, the Super from the building maintains the pipe and disconnected the pipe (*id.* p. 46). He was not aware of any leaking or broken pipes in the parking garage (*id.* pp. 54-55).

In support of dismissal, RBNB argues that it did not create the allegedly dangerous condition, or have notice of same so as to be held liable for plaintiff's injuries. There is no water spigot on the parking garage driveway, there were no leaking or broken pipes in the parking garage, and the defendant never observed any ice or other slippery substance on the parking garage driveway. Thus, RBNB did not have any notice regarding the ice patch on the parking

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garage driveway. Further, there is no proof of the origin of the ice patch. The ice patch did not originate from or touch the wall, and plaintiff did not know what the liquid substance was. In the absence of proof as to the origin of the ice or when the ice formed, constructive notice can not be demonstrated. Thus, plaintiff offers nothing more than "speculation and guesswork" and thus, summary judgment is warranted as a matter of law.

In the alternative, RBNB seeks contractual indemnification from John Street. The Lease, as confirmed by Ortiz's testimony, obligated John Street to maintain the parking garage and driveways, and remove ice and snow from the premises, including the driveways. John Street was also required to make all nonstructural repairs to the premises. Ortiz confirmed that they did not report any slippery conditions to RBNB, and that RBNB did not clean the parking garage.

Further, the indemnification clause obligates John Street to indemnify RBNB from claims, such as the one brought by plaintiff herein, as the within claim arises from and in connection with the use of the parking garage. And, a finding on the issue of causation is not necessary to trigger the indemnification clause. Such clause was triggered when claims were presented alleging that the plaintiff slipped on a patch of ice on the parking garage driveway, and that the patch of ice was the cause of the plaintiff's injuries. There is no question of fact as to whether any negligence on the part of RBNB caused the plaintiff's accident, and RBNB was not actively negligent in connection with plaintiff's accident. Thus, RBNB is entitled to full indemnification and attorney's fees pursuant to the Lease.

RBNB also seeks common-law indemnification, arguing that its role in causing the plaintiff's injury is solely passive, and its liability is purely vicarious. If there was a patch of ice on the parking garage driveway, then the ice was caused by either John Street's washing of cars

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on the driveway, or John Street's washing of the driveway with their hose. There is no water spigot on the driveway, and there were no leaking or broken pipes in the parking garage.

In opposition, plaintiff argues that RBNB failed to establish that it met the standard of care owed to the plaintiff. As a landowner, RBNB, owed a non-depletable duty to the plaintiff to maintain a safe premises, which includes the duty to provide a reasonably safe means of ingress and egress, since plaintiff was an invitee of the subject premises at the time of the incident. Plaintiff was at the premises to repair the elevators, and thus, his presence was clearly foreseeable.

Plaintiff argues that while the general rule provides that a party who retains an independent contractor is not liable for the negligence of the contractor, the non-depletable duty exception, which precludes RBNB, as a landlord, from abdicating its duty to provide the public with a reasonably safe premises and a safe means of ingress and egress, applies herein. Plaintiff slipped and fell due to ice on the ramp of the garage that was owned by RBNB. The depositions establish that RBNB breached its duty to the plaintiff by failing to maintain the premises in a reasonably safe manner.

Further, an issue of fact exists as to the cause and/or origin of the subject ice patch and as to who was responsible for maintaining the area of the accident. The photographs submitted by RBNB show piping along the walls and ceiling in the area where the plaintiff fell and that there was defective and unconnected pipes in the area of the plaintiff's fall. (Exh. J). And, plaintiff testified that the ice looked like it had originated from the piping along the wall of the garage. All of the defendants were aware of unconnected pipes in the subject area. Even assuming the pictures that defendant relies upon did not clearly portray piping in the subject area, which they

do, the deposition testimony of both plaintiff and RBNB creates an issue of fact.

Further, RBNB had notice of a broken pipe located in the vicinity of the plaintiff's accident, which contributed to the accident herein. Ortiz's testimony shows that RBNB, not only had constructive notice of a dangerous condition because of the length of time the broken pipe had been present, but RBNB had actual notice and explicitly ordered the staff in the garage not to touch the disconnected pipe. Ortiz stated that RBNB's superintendent actually disconnected the pipe himself. As such, RBNB also may have actually caused the defective condition.

Finally, whether this is an indemnification issue goes to the apportionment of damages and therefore not appropriate for summary judgment on the issue of liability. Based on Ortiz's deposition, RBNB may have created the aforementioned defect by disconnecting the pipe, and at the very least, had actual and/or constructive notice of the same.

John Street also opposes the motion, arguing that questions of fact prevent the granting of summary judgment and that John Street has no obligation to indemnify or pay defense costs to RBNB in this action. RBNB's explanation for the source of the water is misleading, as it mischaracterized the deposition testimonies.

As issues of fact exist as to whether RBNB was responsible for creating the condition, RBNB's own negligence is in question and as such, RBNB cannot demand indemnification from John Street. RBNB has not submitted any evidence, such as an expert affidavit or deposition testimony, that identifies the source of the alleged icy condition or which rules out its overhead pipes as being the source of the alleged icy condition. Plaintiff theorized that either a leak or condensation on a pipe may have been the source of the ice (Plaintiff EBT, p. 47). Since RBNB has not negated the possibility that it created the alleged condition, questions of fact remain as to

whether its negligence was responsible for the alleged condition.

John Street further argues that the indemnification exempts RBNB from liability for its own acts of negligence, except for gross negligence or willful misconduct, and is thus void and unenforceable pursuant to General Obligations Law ("GOL") § 5-321. As such, RBNB cannot seek indemnification for its own negligent acts.

RBNB also failed to show that its role in causing plaintiff's injury was purely passive, as questions of fact exist as to whether its pipes caused the alleged condition. Therefore, RBNB cannot demand common law indemnification from John Street. RBNB's allegations against John Street are without any basis in fact and are grounded purely in hope and speculation, its demand for common law indemnification must fail.

In reply, RBNB argues that the "piping" that plaintiff misleadingly refers to is, in fact, a guardrail, which had nothing to do with the happening of the accident. Gonzalez, the building superintendent, was shown the six photographs that were marked at plaintiff's deposition, and he testified that the photographs depicted the guardrail, and that there was no water spigot along the ramp near the guardrail. Ortiz testified that those same photographs depicted the guardrail and the hose used by the parking garage to clean the ramp. The only thing that ran lengthwise along the wall of the ramp was the guardrail, and the parking garage's hose wrapped around the guardrail. Plaintiff's speculation that the ice may have originated from either a leak or condensation from one of the "pipes" concerns the guardrail, and is insufficient to defeat summary judgment.

Even assuming that any "piping" along the wall caused the ice to form, then the only thing that might possibly be construed as "piping" along the wall would be the parking garage's

hose which was wrapped around the guardrail. This hose was admittedly owned by the parking garage and solely used by the parking garage attendants alone. RBNB had nothing to do with parking garage's hose which was wrapped around the guardrail.

Nevertheless, plaintiff failed to demonstrate that there was some kind of a defect with this hose, and that RBNB knew or should have known of the defective hose. Plaintiff did not know what the liquid substance was, did not know the source of the ice, and stated that the ice did not originate from or touch the wall.

RBNB also argues that the claim that the ice may have originated from a pipe in the ceiling is also unavailing. The fact that there was a pipe in the ceiling has nothing to do with the happening of the accident. Plaintiff failed to show that this pipe was leaking, and that RBNB knew or should have known that it was leaking. RBNB points out that Gonzalez, the building superintendent, testified that there were no pipes over the parking lot ramp. And, even assuming that there was, there is no proof that such pipe was defective and somehow created the ice patch. Gonzalez was not aware of any leaking or broken pipes in the parking garage, and he never needed to call a plumber to fix a broken pipe in the garage. Pian, the property manager, was never made aware of any leaking or broken pipe in the parking garage at the time of plaintiff's accident.

Nor did RBNB create the ice patch. Plaintiff's argument that the building superintendent disconnected a pipe in the parking garage is a red herring because Gonzalez testified that the pipe in question is an air pipe and the pipe is not used to carry water.

As to its indemnification claim, RBNB adds that under caselaw, an indemnification clause is enforceable even for the landlord's own negligence provided there is also an insurance

procurement provision in the lease. Here, the indemnification clause is coupled with an insurance procurement clause.

Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The contract at issue is not a "maintenance contract" or "construction contract" to maintain, repair or perform construction upon the premises, but a lease for the "street level entrance and below grade garage space." The driveway upon which plaintiff's accident occurred was part of the demised premises, as defined in the Lease. Plaintiff's alleged accident occurred upon the leased premises, and did not involve the ingress or egress to the leased premises. The record, including the Lease and deposition testimonies of Gonzalez, Pian, and Ortiz, establishes that full responsibility for maintenance and (non-structural) repair of the leased premises, including the removal of ice, had, under the Lease, been placed with John Street (section 3.4(o)) (*Gronski v County of Monroe*, 73 AD3d 1439, 901 NYS2d 448 [4th Dept 2010] (where "defendant delegated all responsibility for operation and maintenance of the facility to Metro" defendant established that it "did not exercise control over the subject [facility] or assume any contractual responsibility to maintain and repair it. Rather, [Metro] was contractually obligated ...

to repair and maintain" the facility]; *Gomez by DeJesus v Walton Realty Assocs.*, 258 AD2d 307, 685 NYS2d 201 [1st Dept 1999] ["An out-of-possession owner who has relinquished control over the premises will not be held liable for subsequent injuries resulting from dangerous conditions on the premises"]).

It is well settled that an out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it "(1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Reyes v Morton Williams Associated Supermarkets, Inc.* 50 AD3d 496, 858 NYS2d 107 [1st Dept 2008] *citing Vasquez v The Rector*, 40 AD3d 265, 266, 835 NYS2d 159 [2007]).

RBNB established that it was *not* contractually obligated to make repairs or maintain the leased premises, and the record establishes that liability is not based on a structural or design defect that is contrary to a specific statutory safety provision.

Thus, in light of RBNB's out-of-possession status concerning the leased premises, plaintiff, "to raise an issue of fact as to whether the landlord[] had constructive notice of and [was] responsible for remediating the alleged hazard, was required to show that the purported hazard constituted a structural or design defect that violated a specific statutory provision" (*Boateng v Four Plus Corp.*, 22 AD3d 323, 802 NYS2d 418 [1st Dept 2005] *citing Pavon v Rudin*, 254 AD2d 143, 146-147, 679 NYS2d 27 [1998]).

Contrary to plaintiff's contention, he failed to raise an issue of fact as to whether his injury resulted from a structural or design defect.

At the outset, the Court notes that the pipe referred to by plaintiff, as depicted in the photographs, was a guardrail:

Q. I'm showing you what's been marked as Defendant's Exhibit A; B; C; D; and E; and F. Can you just tell me generally what's shown in these photos?
A. It's showing the ramp; the guardrail; it's showing the hose wrapped around the guardrail.
Gonzalez p. 33

Q. Do you see what appears to be a fence or another guardrail going across —
Ms. Quaglia: To the right of the column.
Q. To the right of the column.
Ms. Quaglia: You pointed out before that it was the yellow and black diagonal stripes.
Mi-. Doolan: You're talking about the yellow and black fence?
Mr. Day: Correct.
Q. Is that a fence?
A. It's a guardrail, just like the one on the right (indicating).
Gonzalez pp. 122-23

Q. Do you know if there's a spigot somewhere along the ramp near the guardrail?
A. No, there's none.
Gonzalez p. 69.

Ortiz testified as follows:
Q. And showing you what's been marked as Defendants' C, can you tell us what that is.
A. This is a car and the protective barrier and the hose to clean the ramp.
Ortiz p. 39

Q. Now showing you what's been marked as Defendants' Exhibit E, please take a look at that and tell me what's shown in that photo.
A. . . . The sign, the hose, and the protective barrier.
Ortiz tr. p. 42 (emphasis added).

Gonzalez testified that there were no pipes over the parking lot ramp:

Q. Are you aware of any pipes that go over the ramp?
A. No.
Gonzalez tr. p. 89

And, Gonzalez testified that he was not aware of any leaking or broken pipes in the

parking garage, and he never needed to call a plumber to fix a broken pipe in the garage:

Q. Did anyone ever make you aware of a leaky pipe in the garage?
A. No.
Gonzalez p. 54-55.

Q. Did anyone ever make you aware of a broken pipe in the garage?
A. No.
Gonzalez p. 55.

Further Pian, the property manager, testified that he was not made aware of any leaking or broken pipe in the parking garage at the time of plaintiff's accident (Pian pp. 29, 74-75).

Therefore, the record fails to establish that any overhead pipes was the source of the alleged ice patch.

And, there is no indication that a disconnected pipe was used to carry any water or liquids or had anything at all to do with the formation of the ice patch. Gonzalez testified that the pipe in question was used for the intake of air for use in the dry sprinkler system.:

Q. There is a vertical pipe and spigot depicted in Defendants' F and Defendants' E. To your knowledge, what is that pipe connected to?
A. That's connected to the dry system.
Q. Okay. In Defendants' Exhibit E it looks as though that pipe is disconnected at the lever at the top —
A. Uh-huh, at the bottom of the lever.
Q. Yeah, below the lever.
A. Yes.
Q. Do you know why that pipe was disconnected?
A. The valve was replaced.
Q. And when you say this is part of the dry system, that's part of the dry system that's part of the fire prevention system in the building?
A. That's the dry system for the garage only.
Q. And that pipe, to your knowledge, did not carry any water?
A. No.
Q. What did it carry when it was connected?
A. Air.
Gonzalez tr. p. 42-43
A. No. That pipe actually has an elbow on the bottom, it's open. It's just to relieve the

air.
Gonzalez p. 44

Gonzalez explained the operation of the dry sprinkler system as follows:

Q. But it's a dry sprinkler?
A. Yes.
Q. Let me clarify, there are sprinklers in the garage?
A. There are sprinklers, but it's a dry system. There's no water in the pipe until it picks up heat.
Q. Okay.
A. And then it releases the air and then the water will come out with force.
Gonzalez tr. p. 55-56.

Q. And just to clarify, this is the first time I've been exposed to the term "dry system." Like I previously thought it would be a chemical or some sort of fire suppression system, such as that. So your [sic] saying that the pipes themselves are filled with air and that after the seal is broken, then they would fill with water?
A. Correct.
Gonzalez pp. 93-94.

Q. And if that valve was opened, the ball valve was opened, would that release the pressure in the system?
A. It would release air and following air would come water.
Gonzalez tr. p. 118.

Q. So where does the pipe below the valve lead to?
A. It doesn't. It's an open pipe just to blow towards your feet, that's it.
Q. I see. So it was kind of like —
A, Like to bleed down. That's to test.
Q. -- like on a water heater or something like that?
A. Yes.
Q. I got you. And what would be the purpose of that valve?
A. That's for the fire department when they do tests. They want to have a valve that they could blow it down and see how long the water gets there for us to hold the certificate.
Gonzalez p. 119-120.

The sprinkler system was not activated in the week prior to the plaintiff's accident.

Q. So are you aware of the sprinkler system being activated, let's say, within a week of February 5, 2007?
A. No.

Q. If the sprinkler system was activated, whereby water would come out of the sprinklers on the garage level, is that something you would have been made aware of?
A. Sure. And the New York Fire Department.
Q. Okay. So you are not aware of any such incident in the week prior to the time of this accident?
A. No.
Q. Did it ever happen in the time you worked there?
A. The sprinkler going off?
Q. Yeah, in the garage.
A. Yes.
Q. And when was the last time prior to February 5, 2007?
A. December of 2005 or in January, somewhere around that time. The holidays.
Gonzalez p. 56-57.

Nor is there evidence that RBNB created the ice patch.

Further, plaintiff's reliance on cases for the proposition that RBNB failed to establish that it satisfied its nondelegable duty to maintain safe ingress and egress to the premises is misplaced (*see Gronski v County of Monroe*, 73 AD3d at 1440 ["Inasmuch as defendant did not retain operational control over the facility, we reject plaintiffs' further contention that defendant, as the landowner, owed a nondelegable duty to provide for plaintiff's safety"]). Such cases did not address the situation in which the landowner was an out-of-possession landowner (*Walsh v Super Value, Inc.*, 76 AD3d 371 [2d Dept 2010] [plaintiff slipped on a curb painted pursuant to the landlord and lessee's contract with the painting contractor]; *Thomassen v J & K Diner Inc.*, 152 AD2d 421 [2d Dept 1989] [landowner and restaurant owner may be vicariously liable for an independent contractor's alleged improper construction of a staircase leading to the restaurant]; *Kellman v 45 Tiemann Assocs., Inc.*, 87 NY2d 871 [1995] [plaintiff fell from the fire escape landing lacking safety railings]).

Having failed to raise an issue of fact as to RBNB's liability, summary judgment dismissing the complaint is granted.

Contractual Indemnification

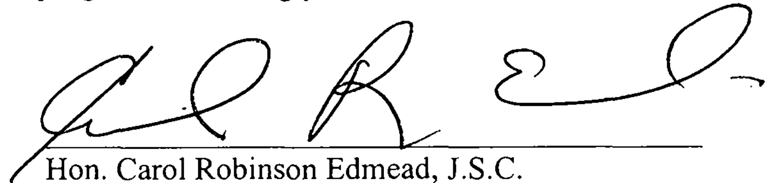
In light of the above, the Court does not reach RBNB's alternative form of relief for indemnification from John Street .

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant RBNB Wall Street Owners, LLC for summary judgment dismissing the complaint of the plaintiff, Stephen White, or in the alternative, for contractual and common law indemnification from John Street Parking is granted to the extent that summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly.



Dated: March 15, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD