SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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HELENA S. MARTIN and PETER MARTIN,

Plaintiffs,

-against- Index No: 303374/2008

DNA RESTAURANT CORP. d/b/a THE BAMBOO, BAMBOO RESTAURANT & LOUNGE, NWACHUKWU C. NWOSISI, TIMOTHY ALAPO, DAVID N. NNAH, THE ETERNAL SACRED ORDER OF CHERUBIM AND SERAPHIM CHURCH OF NY, INC., and THE ETERNAL ORDER OF CHERUBIM AND SERAPHIM (MOUNT ZION , HOTONU, AGBO, JESU-OKE OGUN) USA GENERAL HEADQUARTERS, USA, INC.,

Defendants.

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HON. ROBERT E. TORRES:

This is an action to recover damages for alleged personal injuries sustained by Plaintiff, HELENA S. MARTIN, when she fell down a single step located in the restaurant of Defendant, DNA RESTAURANT CORP., d/b/a THE BAMBOO RESTAURANT[1], a tenant of commercial premises.

The accident occurred on June 21, 2006, at 4:30 PM, in the basement area of premises owned by the moving Defendants, NWACHUKWU C. NWOSISI, TIMOTHY ALAPO, DAVID N. NNAH, d/b/a[2] THE ETERNAL SACRED

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[1] This Defendant is referred to as the BAMBOO RESTAURANT; and was sued herein as DNA RESTAURANT CORP. d/b/a THE BAMBOO, BAMBOO RESTAURANT & LOUNGE.

[2] (See moving Defendants' Answer, p.1, at Movants' Exhibit "G").

ORDER OF CHERUBIM AND SERAPHIM CHURCH OF NY, INC.[3]

***Relevant Facts*:**

Plaintiff MARTIN arrived at the BAMBOO RESTAURANT to attend a retirement party with coworkers. After walking through the restaurant's street-level entrance, Plaintiff proceeded down the stairs – to get to the basement lounge area where the party was going to take place. After reaching the bottom of the said stairs, Plaintiff passed through an open door, where there was a step which she took down. Plaintiff continued walking straight along a ten to fifteen-foot concrete walkway, following a man who was about four feet in front of her. Plaintiff, who was "looking straight ahead", stated that she did not see the man step down on the subject single-step riser. (MARTIN EBT, p. 45-61, 107). Plaintiff did not remember looking down before she fell, although she admitted that "looking down would have been fruitful." (MARTIN EBT, p. 109).

The subject step measured about eight (8) inches high.[4] This single-step riser is described as being located within a large open space within the basement

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[3] These moving Defendants are also referred to herein as NWOSISI, ALAPO, NNAH, and the CHURCH.

[4] (See Affidavit of Robert L. Grunes, Ph.D., Professional Engineer, [Defendants' expert], p. 2. See Photographs, annexed to Defendants' moving papers, at Exhibit "L").

measuring approximately 46 feet by 56 feet.[5]

Plaintiff "was looking straight ahead at the other side of the room where all the people were gathered by the bar." (MARTIN EBT, p. 108). Plaintiff further described the accident as follows: "I walked straight ahead and ... stepped out into air. My foot went out and [there was] nothing there. ... I fell forward and then I twisted my body in order to get my balance. ... I fell on the concrete. I fell on my left side ." (MARTIN EBT, p. 62-66).[6]

It is noted that, "in addition to the stairs leading up to the first floor from the basement, there are two other emergency exit doors with stairs located within the basement of Bamboo leading out to the exterior of the building."[7]

Legal Analysis:
-- Out-of -Possession Landlord:

Defendants NWOSISI, ALAPO, NNAH, and the CHURCH, move for summary judgment dismissing the Plaintiffs' complaint, as against them, upon the

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[5] (See Dr. Grunes' Affidavit, p.2).

[6] It is noted that, about one or two years prior to this accident, Plaintiff had been diagnosed with multiple sclerosis. About two years prior to being diagnosed with multiple sclerosis, Plaintiff had begun limping in her right leg. (MARTIN EBT, p. 90-91).

[7] (See Dr. Grunes' Affidavit, p.3. See also Affidavit of Elise Dann, Registered Architect [Plaintiffs' expert], p. 4, ¶10).

ground that, as out-of-possession landlords, they are not liable under the circumstances, since there was no "significant structural or design defect that is contrary to a specific statutory safety provision" within the meaning of the applicable law. In this regard, it has long-been established that:

> "an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair (Manning v New York Tel. Co., 157 AD2d 264, 266-269; see also, Worth Distribs. v Latham, 59 NY2d 231, 238). However, constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists (Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 566; Worth Distribs. v Latham, supra; see also, Santiago v Port Auth., 203 AD2d 217, lv denied 84 NY2d 807; Levy v Daitz, 196 AD2d 454). **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** (Quinones v 27 Third City King Rest., 198 AD2d 23, 24; Levy v Daitz, supra)." [emphasis added]

Velazquez v. Tyler Graphics, 214 A.D.2d 489 (1st Dept. 1995).

At issue herein is whether the NYC Administrative Code[8] sections invoked by Plaintiffs serve as a predicate to liability on the moving Defendants who are out-of-possession owners. "Statutory interpretation is a question of law that should be decided by the court." DeRosa v. City of New York, 30 A.D.3d 323, 326 (1st Dept. 2006). Thus, using the Code's "definitional backdrop, we turn to the Code provisions that are at the heart of plaintiff's claim." See Gaston v. New

[8] The NYC Administrative Code is also referred to herein as the Code.

York City Hous. Auth., 258 A.D.2d 220, 221 (1st Dept. 1999).

The NYC Administrative Code §27-232 "Definitions" gives the following pertinent definitions: "INTERIOR STAIR" is defined as "a stair within a building, that serves as a required[9] exit." "ACCESS STAIR" is defined as a stair between two floors, which does not serve as a required exit.

As far as an "EXIT", it 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[10], exit passageways[11], horizontal exits[12], interior stairs, exterior stairs, fire towers or

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[9] The word "REQUIRED" is defined as meaning "required by the provisions of this code." See NYC Administrative Code §27-232 "Definitions".

[10] "VERTICAL EXIT" is defined as a "stair, ramp, or escalator serving as an exit from one or more floors above or below the street floor". See NYC Administrative Code §27-232 "Definitions".

[11] "EXIT PASSAGEWAY" is a "horizontal extension of a vertical exit, or a passage leading from a yard or court to an open exterior space." See NYC Administrative Code §27-232 "Definitions".

[12] "HORIZONTAL EXITS" are defined in NYC Administrative Code §27-373 as follows: "A horizontal exit to an area of refuge may consist of doors through walls or partitions having at least a two hour fire-resistance rating; of a balcony or exterior vestibule leading around the end of a fire division to another fire area or building; or it may be a bridge or tunnel between two buildings."

fire escapes; but not including access stairs, aisles, corridor doors or corridors".[13] See NYC Administrative Code §27-232 "Definitions". [emphasis added]

Assuming that the subject step were an "interior stair", Plaintiffs postulate that it would not be compliant with the Code unless it had at least two risers, and handrails. In this regard, Plaintiffs cite to NYC Administrative Code §27-375(d)(2), and §27-375(f), which provide, inter alia, that: "Interior stairs shall comply with the following requirements: ... No flight of stairs shall have less than two risers", and "Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides".[14]

In deciding whether the subject step would be deemed an "interior stair" within the meaning of the aforesaid NYC Administrative Code, we look to the Court of Appeals, which recently held that "stairs that ran from the first floor to the basement of a building" were not "interior stairs" within the meaning of the

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[13] A "CORRIDOR" is an "enclosed public passage providing a means of access from rooms or spaces to an exit." See NYC Administrative Code §27-232 "Definitions".

[14] NYC Administrative Code §27-375(f) more fully provides that: "Interior stairs shall comply with the following requirements: ... Guards and handrails. Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width."

Code. Rather, such stairs constituted "access stairs". Cusumano v. City of New York, 15 N.Y.3d 319, 322 (2010). The Court explained that, "**by all accounts, the stairs from where plaintiff fell did not serve as an "exit" as defined by the Administrative Code ..., but rather as a means of walking from the first floor to the basement.** Therefore, [defendant's] motion to dismiss" should have been granted. [emphasis added] Cusumano v. City of New York, supra, 15 N.Y.3d at 322.

In another case similar to Cusumano, a "plaintiff was injured when he slipped and fell on a staircase ... [which] provided access between the first floor and the basement levels of the building". Even though, at trial, "the plaintiff introduced expert testimony attempting to prove that the staircase violated Administrative Code of the City of New York § 27-375, which pertains to interior stairs", the Court determined that:

> "**those stairs were not interior stairs as that term is defined in Administrative Code** of the City of New York § 27-232, and thus the Code regulations governing interior staircases did not apply (see, Union Bank & Trust Co. v Hattie Carnegie, Inc., 1 AD2d 199; see also, Gaston v New York City Hous. Auth., 258 AD2d 220; Nameny v East N. Y. Sav. Bank, 267 AD2d 108). The plaintiff failed to prove that the defendant, an out-of-possession landlord, violated any specific statutory provision (see, Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559; Kilimnik v Mirage Rest., 223 AD2d 530). Accordingly, the court properly dismissed the complaint at the close of the evidence." [emphasis added]

Walker v. 127 W. 22nd St. Assocs., 281 A.D.2d 539, 540 (2d Dept. 2001). See

Maksuti v. Best Italian Pizza, 27 A.D.3d 300 (1st Dept. 2006). See Mansfield v. Dolcemascolo, 34 A.D.3d 763, 764 (2d Dept. 2006).

Therefore, Courts hold that stairs to and from a first floor to a basement are not deemed "interior stairs", but are "access stairs" – which, by definition, are stairs between two floors which do not serve as a required exit.

By extension, accordingly, it follows that the single step at issue herein – which was located ten to fifteen feet *beyond* the bottom of the basement stairs[15] – could not serve as a required exit. Thus, it is not an "interior stair" within the meaning of the Code.

A case factually similar to the one at bar concerned a plaintiff who fell on steps that "led to and from an elevated lounge area inside the Club and a lower dance floor inside the Club". Westra v. Ten's Cabaret, Inc., 2009 NY Slip. Op. 31521U (N.Y. Sup. Ct. July 10, 2009).[16] The Court held that the subject steps were not "interior stairs" within the meaning of the code, since they "did not provide a means of egress to the street or public area outside of the premises." Id.

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[15] "The single riser stair is located at the end of a concrete walkway that continues from the base of the stairway entrance into the basement", according to Plaintiffs' expert's description of the area. (See Dann Affidavit, p.4, ¶10).

[16] It is noted that this Westra case was cited by, and relied upon, by both parties.

The Court was not persuaded by the:

> "plaintiff's argument that the subject stairs lead to the dance floor that contains the only two doors that open to the public [, since,] ... to adopt plaintiff's argument that the subject stairs must be used to exit the premises would **improperly expand the definition of internal stairs to include all stairs within a building**. Further, although the definition of "interior stair" does not require that the "exit" be immediately adjacent to or connected to the "interior stair," the definition makes clear that the stair must be a means of egress from the interior of the premises "to an open exterior space," and "open exterior space" is defined as a "street" or "other public space" i.e., an "open space outside of a building." The dance floor or lounge area to which the subject stairs lead does not fall within the definition of "open exterior space." Accordingly, the requirements set forth in Administrative Code § 27-375(f) governing handrails installed in interior stairs do not apply, and Gramercy, an out-of-possession landlord, cannot be said to have violated the Administrative Code." [emphasis added]

Westra v. Ten's Cabaret, Inc., supra.

Similarly, in a case where a plaintiff fell in the lobby of a building, when "she took a step backward and fell down two steps from the lobby into a smaller room where the building tenants' mailboxes were located", the First Department Court concluded that the subject stairs were not "interior stairs", since they did not serve as an exit to the building within the meaning of the Code. Remes v. 513 W. 26th Realty, LLC, 73 A.D.3d 665, 666 (1st Dept. 2010).

Another case having similarities to the case at bar also involves a plaintiff who was a restaurant patron, who fell on a single step. Langer v. 116 Lexington Ave., Inc., 2010 NY Slip. Op. 32068U (N.Y. Sup. Ct. Aug. 3, 2010). The pertinent

facts in Langer include that plaintiff was going "to attend a private function in a banquet room on the second floor. To get there, [plaintiff] walked down a hallway toward a door that opened into the banquet room, where there was a single step down... [Plaintiff] Langer noticed a bartender in the banquet room, and was looking toward him when she stepped in to the room. She stumbled, fell, and suffered a serious injury." Langer v. 116 Lexington Ave., Inc., supra. The Langer Court analyzed the Code sections alleged to be violated and found that the step in question was not a required exit within the meaning of the Building Code, (despite the opinion of plaintiffs' expert); and held that:

> "**the opinion expressed by plaintiffs' expert that the presence of a single step riser is in violation of the Building Code is mistaken**. Building Code section 27-375 is titled "Interior Stairs". Building Code section 27-232 defines "Interior Stairs" as "[a] stair within a building, that serves as a required exit"... Not all indoor stairs are "Interior Stairs" within the meaning of the Building Code ... Likewise, the opinion from plaintiffs' expert that the lack of a hand rail on this "interior stair" was a violation of Building Code section 27-375(f) is without merit... Plaintiffs also are mistaken in contending that Building Code section 27-370 applies, because there is no evidence that [plaintiff] Langer fell in an "Exit Passageway", which is defined as "A horizontal extension of a vertical exit, or a passage leading from a yard or court to an open exterior space" (Building Code section 27-232)." [emphasis added]

Langer v. 116 Lexington Ave., Inc., supra. See Schwartz v. Hersh, 50 A.D.3d 1011 (2d Dept. 2008). See Dooley v. Vornado Realty Trust, 39 A.D.3d 460 (2d Dept. 2007).

Likewise, in the case at bar, the subject single-step riser where Plaintiff fell was not an "interior stair", since it did not serve as a required means of egress out of the building to an open exterior space. Rather, it was a means within the basement to step down to the lounge area level.

As the Court stated in Westra, supra, we cannot adopt a plaintiff's argument which would result in the expansion of the definition of "interior stairs" to include every step within a building. Thus, contrary to Plaintiffs' contentions herein, the step was not an "interior stair"; and so it was not required to consist of two or more steps, and it was not required to have handrails. See NYC Administrative Code §27-375(d)(2)[17], and See NYC Administrative Code §27-375(f).[18]

As far as Plaintiffs' argument that changes in level in an exit passageway are required to be made by ramp, with handrails, such is not relevant, because the

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[17] NYC Administrative Code §27-375(d)(2) provides that: "Interior stairs shall comply with the following requirements: ... No flight of stairs shall have less than two risers."

[18] NYC Administrative Code §27-375(f) provides that: "Interior stairs shall comply with the following requirements: ... Guards and handrails. Stairs shall have walls, grilles, or guards at the sides and shall have handrails on both sides, except that stairs less than forty-four inches wide may have a handrail on one side only. Handrails shall provide a finger clearance of one and one-half inches, and shall project not more than three and one-half inches into the required stair width."

subject area was not an "exit passageway".[19] In this regard, Plaintiffs cite NYC Administrative Code §27-370(d), which provides that: "Changes in level requiring less than two risers *in an exit passageway* shall be by a ramp complying with section 27-377[20] of this article." [emphasis added].

Plaintiffs' reliance on NYC Administrative Code §27-371(h)[21] is also misplaced, because it is not applicable under the facts herein. Rather, it pertains to the level of the floor on both sides of certain doors "for a distance ... equal to the

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[19] "EXIT PASSAGEWAY" is a "**horizontal** extension of a vertical exit, or a passage leading from a yard or court to an open exterior space." [emphasis added] See NYC Administrative Code §27-232 "Definitions". Also, NYC Administrative Code §27-370 entitled "Exit Passageways" more fully describes the capacity, width, height, construction, openings, finish, etc, of exit passageways; and there is no basis to assume that the subject area met those requirements.

[20] NYC Administrative Code §27-377(c)(5) " Ramps" provides that: "Interior or exterior ramps may be used as exits in lieu of interior or exterior stairs provided they comply with the applicable requirements for interior stairs in section 27-375 of this article or exterior stairs in section 27-376 of this article, respectively, and with the following: ... (c) Design (5) GUARDS AND RAILINGS. Guards and railings of ramps shall comply with the applicable requirements of subdivision (f) of section 27-375 of this article except that only ramps having a slope steeper than one in twelve need comply with the requirements for handrails and intermediate handrails shall not be required."

[21] NYC Administrative Code §27-371 (h) "Floor level" provides that "the floor on both sides of all exit and corridor doors shall be essentially level and at the same elevation for a distance, perpendicular to the door opening, at least equal to the width of the door leaf, except that where doors lead out of a building the floor level inside may be seven and one-half inches higher than the level outside."

width of the door leaf"; and requires that that portion of the floor be at the same elevation.

As far as NYC Administrative Code §27-127 "Maintenance requirements"[22], and §27-128 "Owner Responsibility"[23], the First Department recently reiterated that they "merely require that the owner of a building maintain and be responsible for its safe condition, [so **they] do not impose liability in the absence of a breach of some specific safety provision of the Administrative Code**." [emphasis added] Hinton v. City of New York, 73 A.D.3d 407, 408 (1st Dept. 2010). It has been repeatedly held that those sections fail "to offer an independent basis of liability." Mansfield v. Dolcemascolo, 34 A.D.3d 763, 764 (2d Dept. 2006).

For instance, in a case where it was alleged that a plaintiffs' expert engineer "would testify that ... [the aforesaid] general safety provisions" were violated, the

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[22] NYC Administrative Code § 27-127 "Maintenance requirements" provided that: "All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code, or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order."

[23] NYC Administrative Code § 27-128 "Owner responsibility" provided that: "The owner shall be responsible at all times for the safe maintenance of the building and its facilities."

First Department held that such was insufficient to impute liability on the out-of-possession owner, since plaintiffs had failed to identify "a structural or design defect that violated a **specific** statutory provision". [emphasis added] Boateng v. Four Plus Corp., 22 A.D.3d 322, 324 (1st Dept. 2005).

"Administrative Code §§ 27-127 and 27-128 are general safety provisions that cannot support a claim of liability against an out-of-possession landlord based on a significant structural defect." Ram v. 64th Street-Third Ave. Assocs., LLC, 61 A.D.3d 596, 597 (1st Dept. 2009). (It is noted that both Administrative Code §§27-127 and 27-128 were repealed, effective July 1, 2008, and replaced by §28-301.1[24]).

Accordingly, the subject single-step riser was "structurally sound ... and was not in violation of the New York City Building Code and was not part of any

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[24] NYC Administrative Code § 28-301.1 "Owner's responsibilities" now provides as follows: "All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter."

required exit facility", as stated by Defendants' expert.[25]

Also, Plaintiffs' expert's citation to alleged general guidelines – which she refers to as "nationally recognized industry standards and accepted architectural safety practices"– is unavailing. (See Dann Affidavit, p. 5-11). The language cited makes recommendations for avoiding, accentuating, and enhancing, single-step risers. However, the referenced standards do not substantiate any allegation that the subject step was violative of New York law; on the contrary, they show that single-step risers are commonplace throughout the country.

Under the circumstances, Plaintiffs' expert's references to inapplicable standards, and "conclusory and speculative opinion [are] insufficient to defeat summary judgment". Pena v. Women's Outreach Network, Inc., 35 A.D.3d 104, 111 (1st Dept. 2006).

Accordingly, the Motion by Defendants NWOSISI, ALAPO, NNAH, and the CHURCH, for summary judgment dismissing the Plaintiffs' complaint, as against them, is granted, because, as out-of-possession landlords, they are not liable, since there was no "significant structural or design defect that is contrary to a specific statutory safety provision" within the meaning of the applicable law.

--Indemnification:

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[25] (See Dr. Grunes' Affidavit, p.4).

Since Defendants NWOSISI, ALAPO, NNAH, and the CHURCH, are dismissed from the case, the remainder of their Motion, seeking summary judgment on their Cross Claim[26] against the BAMBOO RESTAURANT, for indemnification, is deemed academic.[27]

However, it is noted that, if this Court were to decide the issue, it would find that the moving Defendants would be entitled to indemnification from the BAMBOO RESTAURANT, as set forth herein.

The pertinent facts herein include that it was the Defendant tenant, the BAMBOO RESTAURANT, who made renovations to its leased premises which included the creation of the subject step, as well as the ambiance lighting. (Castillo EBT, p. 114-116, 20-23).

Accordingly, "the present factual scenario brings this squarely within those cases holding that an out-of-possession landlord will not be held responsible for unsafe conditions brought about through the act of its tenant." Davison v. Wiggand, 259 A.D.2d 799, 802 (3d Dept. 1999). The facts in Davison were that

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[26] (See moving Defendants' Answer, ¶¶ 21-42, at Movants' Exhibit "C").

[27] In a case on point, the First Department held that, "in light of our dismissal of the complaint as against [the landlord] Mosbacher, the question of indemnification is academic." Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496, 498 (1st Dept. 2008).

"it was [the tenant's] K-Mart's subsequent interior modification, i.e., the construction of a 15-foot-high loft, the top of which was situated only five feet below the pipes' lowest extension, that created the condition giving rise to plaintiff's accident." Davison v. Wiggand, 259 A.D.2d 799, 801 (3d Dept. 1999). See Reyes v. Morton Williams Associated Supermarkets, Inc., 50 A.D.3d 496 (1st Dept. 2008).

In another case on point, the First Department held that "the out-of-possession defendant owner could not be liable for the claimed inadequate lighting, despite its right to reenter under the lease, because the defendant tenant controlled the lighting level at its restaurant, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision." Peck v. 2-J, LLC, 56 A.D.3d 277, 278 (1st Dept. 2008).

Further, the Court has held that an out-of-possession owner is entitled to indemnification where, as here, "pursuant to its lease with the owner, [the tenant] ...was required to take good care of the premises and fixtures, and, having failed to do so, [the tenant] was contractually obliged to indemnify the owner." Donohue v. Walter, 156 A.D.2d 149, 151 (1st Dept. 1989).

In relevant part, the operative Lease, dated July 8, 2004, provides, as for the "care and maintenance of premises", that the Lessee "shall maintain the premises

in good and safe condition ... Lessee shall be responsible for all repairs required."[28] Also, the Lease provides, as for "Indemnification of Lessor", that the "Lessor shall not be liable for any damage or injury to Lessee, or any other person, ... occurring on the demised premises ..., and Lessee agrees to hold Lessor harmless from any claim for damages."[29]

In this regard, it is significant that the BAMBOO RESTAURANT concedes that the Lease obligates it to indemnify the Lessor. (See the BAMBOO RESTAURANT's Affirmation in Partial Opposition by Counsel Palma, dated April 16, 2010, p. 2, ¶ 6).

However, BAMBOO RESTAURANT's Counsel argues, (without citing to any case law), that the BAMBOO RESTAURANT should not have to indemnify the Movants, since the Lease names the Lessor as being the CHURCH[30], even though title to the property was actually held by the individuals, NWOSISI, ALAPO, and NNAH, at the time that the Lease was signed (2004) and at the time of the accident (2006). The individuals owned the property since the year 2000

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[28] (See Lease, at Movants' Exhibit "P", ¶ 3).

[29] (See Lease, at Movants' Exhibit "P", ¶ 10).

[30] Namely, it states that "THE ETERNAL SACRED ORDER OF CHERUBIM AND SERAPHIM CHURCH" is the "Lessor (Landlord)". (See Lease, at Movants' Exhibit "P", p. 1).

when they were deeded title from the CHURCH (which had owned the property from 1983 until 2000).[31]

The BAMBOO RESTAURANT's President, Damien Castillo, a businessman, understood the terms of the subject Lease which he signed with Pastor Chris [NWOSISI], who was head of the CHURCH.[32] The BAMBOO RESTAURANT always paid its rent to the CHURCH by check[33]. Castillo did not know if Pastor Chris owned the building individually or in some capacity affiliated with the CHURCH.[34] It is also noted that, in their Answer, the individuals are alleged to be "doing business as" the CHURCH.[35]

Regardless, the Lessee, the BAMBOO RESTAURANT, had agreed to be responsible to indemnify the Lessor, whomever that would be. In pertinent part, the Lease, also, provides that "this Lease is binding upon and inures to the benefit of the heirs, assigns, and successors in interest to the parties".[36]

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[31] (NWOSISI EBT, p. 20-27).

[32] (Castillo EBT, p. 12-18. NWOSISI EBT, p. 20-33, 44-52. See Lease, at Movants' Exhibit "P".).

[33] (NWOSISI EBT, p. 55, 112, 117).

[34] (Castillo EBT, p. 12-18).

[35] (See moving Defendants' Answer, p.1, at Movants' Exhibit "G").

[36] (See Lease, at Movants' Exhibit "P", ¶ 21).

Accordingly, Lessee, the BAMBOO RESTAURANT, would have to fulfill its obligation to maintain the premises in a safe condition, and to hold the Lessor and its assigns, harmless. Thus, herein, the "lessor[s] out-of-possession [would] not [be] liable for injuries resulting from the condition of the demised premises, since liability is an incident of occupation and control." Hinds v. CONRAIL, 263 A.D.2d 590, 591 (3d Dept. 1999).[37]

Therefore, the Motion by Defendants NWOSISI, ALAPO, NNAH, and the CHURCH, is granted, as set forth herein; and this case is dismissed as against said Defendants. This constitutes the decision and order of this Court.

Dated: March 6, 2012

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Robert E. Torres, JSC

[37] In Hinds, a lease – which had expired at the time of an accident – had placed responsibility for snow removal upon the tenant and exempted the lessor from liability for personal injury resulting from a snow condition. The Court, unpersuaded by the tenant's contention that the expired lease was not in effect, found that the out-of-possession landlord was not liable for a plaintiff's slip and fall on a snow condition. Hinds v. CONRAIL, supra, 263 A.D.2d at 591.