Gelbuda v Opera Owners, Inc.
2012 NY Slip Op 31808(U)
July 6, 2012
Supreme Court, New York County
Docket Number: 101017/2009
Judge: Saliann Scarpulla
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SCANNED ON 7/11/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 101017/2009
GELBUDA, DAVID
vs.
OPERA OWNERS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | **No(s).** ______

Answering Affidavits — Exhibits ______ | **No(s).** ______

Replying Affidavits ______ | **No(s).** ______

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated ______ which disposes of motion sequence(s) no. 003, 004, 005, 006, 007

FILED

JUL 11 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/6/12 ______, **J.S.C.**

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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DAVID GELBUDA,

Plaintiff,

Index No. 101017/2009

-against-

THE OPERA OWNERS, INC., BROADWAY PHOENIX COMPANY LLC, LAWRENCE PROPERTIES, INC., TOWN SPORTS INTERNATIONAL, INC., SECOND STAGE THEATER, INC., VITAL THEATER COMPANY, INC. and ABS PARTNERS REAL ESTATE, LLC,

Defendants.

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DECISION AND ORDER

FILED
JUL 11 2012
NEW YORK COUNTY CLERK'S OFFICE

For Plaintiff:
Gersowitz Libo & Korek, P.C.
111 Broadway, 12th Floor
New York, NY 10006

For Defendant Vital:
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New York, NY 10017

For Defendants Broadway Phoenix and Opera
Vincent P. Crisci
17 State Street, 8th Floor
New York, NY 10004

For Defendant ABS:
Levy Davis & Maher
39 Broadway
New York, NY 10006

For Defendant Second Stage:
Gordon & Silber
355 Lexington Avenue, 7th Floor
New York, NY 10017

For Defendant Town Sports International Inc.:
Wilson Elser Moskowitz & Edelman
Three Gannett Drive
White Plains, NY 10604

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant ABS Partners Real Estate, LLC ("ABS") moves (motion seq. no. 003) for summary judgment dismissing plaintiff David Gelbuda's ("Gelbuda") complaint and the cross claim of codefendants The Opera Owners Inc. ("Opera"), Broadway Phoenix Company LLC

("Broadway Phoenix"), and Lawrence Properties, Inc. ("Lawrence"); Opera, Broadway Phoenix, and Lawrence move (motion seq. no. 004) for summary judgment dismissing the complaint and all cross claims, and striking Gelbuda's demand for punitive damages; Broadway Phoenix moves for summary judgment on its contractual indemnification cross claim against codefendant Town Sports International, Inc. ("TSI"); TSI moves (motion seq. no. 005) for summary judgment dismissing the complaint; defendant Second Stage Theater, Inc. ("Second Stage") moves (motion seq. no. 006) for summary judgment dismissing the complaint and all cross claims; defendant Vital Theater Company, Inc. ("Vital") moves (motion seq. no. 007) for summary judgment dismissing the complaint and any cross claims; and Gelbuda, who opposes the applications of all defendants, except those of Vital and Lawrence, cross moves for an order granting it spoliation sanctions against the remaining defendants. Motion sequence numbers 003, 004, 005, 006, and 007 are consolidated for disposition.[1]

On August 8, 2007, Gelbuda was injured shortly before 9:30 A.M. when he rested his hand on the frame of a light box affixed to the exterior of a building, located at 2162 Broadway, and received an electrical shock. The building had two addresses; one was 2162 Broadway, which related to commercial space which, in essence, occupied several lower floors and the other was 2166 Broadway, the building's 113 cooperative apartments, which principally occupied about 20 upper floors. The two addresses had

[1]For the reasons stated at oral argument, ABS, Vital, and Lawrence's motions are granted and the complaint and any cross claims asserted against them are dismissed.

separate management, lobbies, entrances, and electrical systems. The whole building was owned by Opera, the co-op corporation, which, in 1979, leased the entire commercial premises to Broadway Phoenix's predecessor in interest.[2] Keith Lipstein ("Lipstein") was 2162 Broadway's property manager since the time Broadway Phoenix acquired the premises, which Lipstein believed was in 1993.

According to Lipstein, in about December 2006, one of Broadway Phoenix's commercial tenants, the Promenade Theater ("Promenade"), which had been on the premises since an unspecified date in the late 1970's, vacated its space, so that a new tenant, Sephora, could move in. When Promenade vacated, it did not remove a light box fixture, which was located on the building's exterior wall next to the southern entrance to the commercial space's lobby. Promenade had used that light box to advertise its productions. Lipstein testified that if anyone wanted to use that fixture after Promenade vacated, they would have had to contact him. Lipstein could not recall whether, after Promenade vacated, anyone contacted him using that fixture.

Under a 1999 lease between Promenade and Broadway Phoenix, Promenade was permitted, with Broadway Phoenix's permission, to erect exterior signage and was required to keep that signage in good repair. Broadway Phoenix consented to signs and marquees placed by Promenade under its prior lease. Signs included lights or other advertising objects. Under that 1999 lease, all fixtures, except trade fixtures, were the

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[2]Broadway Phoenix, as a result of a foreclosure proceeding, became the tenant under the master lease.

property of Broadway Phoenix, irrespective of who installed them, but trade fixtures were the property of Promenade. If Promenade vacated and left a trade fixture, Broadway Phoenix could opt to keep it as its own or remove it at Promenade's expense.

After Sephora signed a lease and took possession of its premises, it began an extensive renovation project. Meanwhile, on May 30, 2006, in anticipation of Sephora's signing the lease, Broadway Phoenix and TSI, a Broadway Phoenix tenant which operated a New York Sports Club ("NYSC") in part of the commercial space's basement, entered into a fifth lease amendment. That amendment required NYSC, if the Sephora deal came to fruition, to temporarily suspend its operations to permit renovations to be carried out, which renovations including the moving of NYSC's entryway in a southerly direction. That lease amendment also required Broadway Phoenix to remove NYSC's light box fixture, which was on the northern side of the commercial space's lobby entrance, which was near where the new Sephora space was to be. The amendment also permitted TSI to install that light box or a new one on the southern side of the entrance, the locale of the light box used by Promenade. Promenade was permitted to use the southerly light box until it vacated the premises in about December 2006. Lipstein testified that, when Promenade vacated, it removed its poster from the light box. Lipstein did not know when the light box used by Promenade was installed prior to his involvement with the property.

Under its original lease with Broadway Phoenix's predecessor,[3] TSI was required

[3]Broadway Phoenix was not the original landlord under that lease and became such as a result of the foreclosure proceeding. TSI became the tenant under that lease as a result of various assignments.

to maintain any outside signs it installed. TSI was further required to take good care of fixtures and make non-structural repairs to preserve them in good working order, "reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted." Damage to the demised premises, the remainder of the building, and fixtures caused by the tenant's negligence, carelessness, or improper conduct was to be repaired by the tenant. During the renovations, NYSC was not in operation from about December 2006 until about March 2007.

Second Stage was a commercial tenant since the early 1980s and operated a theater on several lower floors of the building. During the time in issue, it occupied its space from May until September. Second Stage subleased its premises to Vital, another theater company, from September through April. (The sublease indicates that Second Stage's subtenant was in the space from November 1 through May 31 each year). According to Stephen Sunderlin ("Sunderlin"), Vital's president, after Promenade vacated, Vital allegedly obtained Lipstein's permission to use the light box, which had been used by Promenade. Vital used that light box for at least one production, *Game Boy*, which ran between March 10 and April 22, 2007. Sunderlin testified that it was his recollection that Promenade's poster was still in the light box, which he believed is what had prompted him to ask Lipstein whether Vital could use the box. Sunderlin was not quite sure when the *Game Boy* poster was removed, but assumed that it was removed by April 22, 2007. He further testified that, by May 1, no one would have known that Vital had ever existed

there. According to Lipstein, Sunderlin, and Second Stage's building manager, Jason Walters ("Walters"), the light box in issue was constructed without any front panel, so that when advertising was removed, the box's interior, which included bulbs and wiring, would be exposed.

Photographs taken of the light box containing the *Game Boy* poster, show that the light box had intact side panels inscribed with Promenade's name. A wire appears on the outside of the box on the right side, near the top. Although the box was designed to illuminate the signage from behind, Vital did not use the type of sign through which light could penetrate, so, Sunderlin was unaware of whether the light box's lighting was operational during the time Vital used the box.

After Vital left, at the end of April 2007, Second Stage used the light box for one production, *The Butcher of Baraboo*, which ran from May 24 through July 30, 2007. Undated photographs of the light box with the poster for that production again showed intact side panels with Promenade's name, and some wiring coming out of the right side near the box's top. There is no evidence that Second Stage ever secured Lipstein's permission to use the light box, and Walters, who was unsure of whether permission had ever been obtained, surmised that Second Stage may have used the box because Vital had used it. Hector and Nathan, two Second Stage marketing personnel, placed *The Butcher of Baraboo* poster, which came with a lexan cover, into the light box. While it is not entirely clear, it seems that at some point Second Stage removed the light box's side

panels, which were imprinted with Promenade's name, and inserted side panels with its name.

Walters, who could not recall whether the light box was illuminated when Second Stage first used it for its play, was, at some point, informed by Hector that the light box was not illuminating. Consequently, on June 13, 2007, Walters sent Lipstein an e-mail regarding "the marquee sign on the right side of the entrance way." Walters testified that this e-mail referred to the southerly light box. Walters advised Lipstein that the sign was not working, that wiring was hanging from the light box, and that the Fire Department had performed an inspection and was unhappy with that sign and an exit sign in the lobby, which also was not working. Walters asked Lipstein to have an electrician fix both to avoid a violation, and advised that, because the power in the lobby was only working at 50% capacity, that might be the cause of the problem. Walters testified that only half of the lobby's lights were working. Lipstein replied to Walters' e-mail the same day, indicating that the electrician he had been using had been unresponsive, and that he was going back to another electrician he had used, Hub Electric. Walters testified that, following that e-mail, the light box was never illuminated while Second Stage's sign was in it, and that he never saw anyone repairing the box. Lipstein testified that he never received any complaints about the light box, and only received a complaint about the marquee.

In late June 2007, Lipstein was under pressure from Sephora to have NYSC

remove its illuminated sign box on the entrance's north side, and sent Ray Rodriguez ("Rodriguez"), NYSC's general manager at the location, and/or Dan Starr of NYSC's corporate office, a series of e-mails, asking TSI to remove that fixture. In one, Lipstein indicated that "[w]e have agreed to let [NYSC] use the signage on the southerly side," and asked whether Rodriguez was going to be moving his illuminated sign there. In another, Lipstein stated, as per "our agreement with" NYSC, we need you to move your sign (meaning its fixture) to the right (south) side of the entrance. Rodriguez testified that the northerly fixture was to be moved to the south side, and that it was to be removed from the north side and then replaced with a new fixture for which measurements had been taken by a sign company. He allegedly requested a new fixture from corporate headquarters. Lipstein, who was not involved in the lease negotiations between TSI and Broadway Phoenix, took the position that, under the lease, the maintenance of the southerly light box became TSI's responsibility.

In early July 2007, Lipstein sent e-mails to Vital and Second Stage asking them to remove their signs from the southerly light box and informing them that only NYSC had permission to use that light box and/or that it belonged to NYSC. Hector and Nathan removed Second Stage's advertising from the box on July 13, 2007, according to an e-mail. Walters watched them remove the poster and lexan covering for a short while, and testified that, as a result, the box's wiring and bulbs were exposed. Walters testified that, at that time, the side panels with Promenade's name were present, but that he did not

know whether those panels were intact. Under its lease with Broadway Phoenix's predecessor, Second Stage was required to make repairs to any part of the building, including the landlord's fixtures, which were damaged as a result of Second Stage's neglect or carelessness. During the course of the lease, Second Stage was to take good care of the demised premises and fixtures and make non-structural repairs, reasonable wear and tear and certain casualties excepted.

According to Rodriguez, at some unspecified time after Second Stage's sign was removed from the box, and allegedly while waiting for the new light box to be installed, he advised Starr of the southerly light box's open condition. He also indicated that the box should be sealed, because a worker on the Sephora project had mentioned that he thought that the exposure of the box's interior wires connected to illuminated bulbs created a dangerous condition. Rodriguez concurred that the box posed a danger to anyone walking past it. He testified that the light box contained no poster, was missing its front covering, and that NYSC had never used that light box, including on and up to August 8, 2007, the day of Gelbuda's accident. Lipstein had no recollection of having had any conversation with Rodriguez, before August 8, regarding usage of the southerly light box. Lipstein further testified that NYSC never asked him for permission to use that light box. He could not recall whether NYSC had ever installed signage in that box.

According to Rodriguez, when the person came to take measurements for the new light box, the old southerly light box was illuminated day and night, and was illuminated

whenever he walked past it prior to August 8. The only exposed wires that Rodriguez had recalled seeing were those within the open box. Rodriguez did not recall whether he had contacted Lipstein about the condition of the light box. Rodriguez testified that, before August 8, 2007, he had never seen any damage to the sides of the southerly light box, but did not recall when he had last seen the side panels.

On the evening of August 7, 2007, it rained heavily. The next morning, Gelbuda who was at NYSC to help with a class, went upstairs and outside the entrance shortly before 9:30 A.M., placed his hand on the southerly light box, and received an electrical shock. According to him, the light box contained a NYSC logo and poster and had a front cover. He could not recall whether the light box was illuminated. The police and Fire Department were called, as was an ambulance. The police allegedly showed him a hole in the light box's left side panel, which caused its interior wires to be exposed. He also saw that water had pooled in the light box's interior. Gelbuda could not remember whether that side panel had Promenade printed on it.

While Fire Department personnel were at the scene, they had the doorman of the residential portion of the building contact the superintendent, Jay Tacooram ("Tacooram"), to see if he could turn off the light box's power. Tacooram, the superintendent for the residential part of the building, was first employed by Opera in 2000, and reported to the management of that part of the building. His connection with the commercial part of the building was tangential, in that certain limited aspects of the

two parts of the building might be connected, such as pipes, but not electric. The circuit breaker for the light box could not be found on NYSC's premises or other places where a search was conducted. Ultimately Tacooram found a switch on top of the light box and turned it off. The light box was immediately taken down either by Tacooram and/or by Fire Department personnel. Later that morning, after the light box was taken down, Rodriguez, Walters, and Lipstein arrived at the commercial premises, were informed of the incident, and learned that the light box had been taken down.

Walters testified that he arrived at the scene at about 11:00 A.M. and was informed of the accident by the stage manager and was also told that the light box was taken down. Tacooram issued a memorandum that day to his supervisor, Barbara Schmidt, a property manager, since about 2006, for Lawrence Properties, Opera's management company. The memorandum, entitled "Electrical short circuit," summarized the incident, but did not mention that the light box had been taken down. Also, the Fire Department, which arrived at the scene at about 9:50 A.M. and left by about 10:15 A.M., issued a report that day which indicated that they had taped off the area, and that Tacooram had informed them that he had an electrician on the way "to fix the problem." According to Schmidt, Tacooram was only involved because there was an emergency situation. Schmidt came to the site on August 9 to ascertain how someone could receive a shock from a box which she had never seen illuminated. However, when she arrived, the box was no longer on the wall. She asked Tacooram where the box was, but she could not remember his

response.

Rodriguez filled out an incident report that day, indicating that a member got "shocked, since the light box was exposed." Rodriguez, who testified that he was unfamiliar with the terms of TSI's lease, also sent an e-mail to Starr that day reporting the incident and that the light box had been taken down by the Fire Department, because of exposed wires. Rodriguez further advised Starr, "I had e-mailed you prior to this so that the box could be sealed so that something like this would not happen. Just letting you know that the box is no longer there." Rodriguez testified that Tacooram had informed him that the Fire Department personnel had taken the sign down and that they had either thrown it out or had taken it with them.

Tacooram did not know who owned the commercial premises, who installed the light box, or when it was installed. He testified that he did not remove the light box and did not know who did. He also testified that the box was illuminated, but had no facing at the time. Tacooram could not recall whether the box contained any advertisement or identifier, or whether any of its sides were open or broken. He further testified that he was not responsible for taking care of the light box, that he did not know who bore that responsibility, and that he had not informed the Fire Department that he had an electrician en route to fix the problem. Tacooram saw wires in the box, did not notice any wires hanging from it, and could not recall whether it contained water. By e-mail of September 6, 2007, Walters advised two individuals from Second Stage that its only involvement

with the light box had been its removal of its sign in July, and that, subsequently, the power had been fully restored to the lobby making the light box a hazard because it had been improperly wired. Walters testified that the problem was the wiring sticking out of the side.

Lipstein learned of the incident on the morning on which it occurred, and contacted Tacooram, who informed him that the sign had already been removed, and discarded, but did not know whether it had been discarded on the day of the incident or later. Lipstein believed that the Fire Department and Tacooram had removed the sign. Lipstein did not know whether the light box had a cover or was illuminated in August 2007. He never noticed any damage to the light box's side panels.

Soon after the southerly light box was removed, TSI installed, in that space, a new light box with NYSC advertising. Within about a week of the accident, Gelbuda retained counsel who wrote to TSI's insurance carrier, asking that the light box be preserved. By letter dated August 28, 2007, the insurance company representative reiterated what she had told counsel earlier, namely that the sign had been discarded on the day of the incident and that the carrier had no knowledge of who had taken it or where it was.

In January 2009, Gelbuda commenced this action, as is now relevant, against Opera, Broadway Phoenix, Second Stage, and TSI. Gelbuda alleged that these defendants were negligent in failing to properly ground and wire the light box, shut off its power, and account for wet weather conditions; in directing that the light box's covering be removed;

in failing to make sure that the box was properly protected and covered; and in leaving wiring exposed to the elements, including rain. Gelbuda's amended complaint alleged that the defendants violated unspecified New York State rules, regulations, statutes and ordinances, and unspecified provisions of New York City's Building and Electrical Codes.

Opera, Broadway Phoenix, Second Stage, and TSI answered and asserted various cross claims, and as is relevant here, Broadway Phoenix asserted a cross claim against TSI for contractual indemnification. In their demands for bills of particulars, Opera and Broadway Phoenix allegedly requested that Gelbuda cite the statutes, regulations, codes, and ordinances which were allegedly violated but again, Gelbuda failed to cite any particular provision.

Gelbuda's pleadings also alleged that the defendants' negligence was willful and wanton and demonstrated a gross disregard for the public's safety, and that Gelbuda would rely on the doctrine of res ipsa loquitur. The amended complaint added that the defendants destroyed, discarded, and failed to safeguard the light box and its wiring, and that such actions were grossly negligent and willful and wanton. In addition to compensatory damages, Gelbuda sought punitive damages.

In response to a discovery demand, Gelbuda, in June 2011, served a CPLR 3101(d) statement, which indicated that he intended to call an engineering expert, Lawrence Sacco ("Sacco"), at trial who was expected to testify, based on his inspection of the premises,

the pleadings, photographs of the light box, the deposition transcripts, and unspecified statutory authority, that the shock which Gelbuda sustained was caused by a broken and defective light box and wiring. Sacco was further expected to testify that the light box was improperly installed, repaired, and maintained, that its wiring was improper or defective, and that the box and its wiring were improperly grounded.

Opera and Broadway Phoenix now move for summary judgment dismissing the complaint and all cross claims asserted against them on the ground that they were not negligent. Opera further asserts that there is no evidence that it was responsible for the repair or maintenance of the light box. Additionally, Broadway Phoenix seeks an order granting it contractual indemnification against TSI, claiming that the use of the light box passed to TSI under the lease, and that there is no showing that Broadway Phoenix was negligent. Broadway Phoenix and Opera further seek summary judgment dismissing Gelbuda's punitive damages claim on the ground the requisite degree of moral turpitude has not been demonstrated.

Second Stage moves for summary judgment dismissing the complaint and all cross claims asserted against it on the ground that Gelbuda will be unable to demonstrate that Second Stage owed Gelbuda a duty to maintain, repair, or remove the light box and will be unable to prove his case because his expert could not examine the light box. TSI moves for summary judgment dismissing the complaint.

Gelbuda opposes Opera, Broadway Phoenix, Second Stage, and TSI's motions for

summary judgment, and cross moves for an order imposing spoliation sanctions on these defendants. TSI opposes Broadway Phoenix's application for contractual indemnification, arguing that the lease's contractual indemnification clause is void and unenforceable under public policy.

Discussion

Opera and Broadway Phoenix argue, as a preliminary matter, that TSI's summary judgement motion should be denied as untimely, because there is no proof that it was made within 60 days of June 30, 2011, the date on which Gelbuda filed his note of issue. That assertion is without merit because TSI's notice of motion bears the County Clerk's stamp indicating that the fee was paid on August 29, 2011.

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. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 N.Y.2d at 853. Where a moving party makes the requisite showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009).

Liability arising out of a perilous condition on property is usually based on

ownership, control, occupancy, or a special use of that property. *Nappi v. Incorporated Vil. of Lynbrook*, 19 A.D.3d 565, 566 (2nd Dept. 2005). Here, Second Stage argues that it was no longer occupying, or in control of the light box at the time Gelbuda was injured, and cannot be liable for any defect arising after it ceased to use the light box, when it was ordered to vacate by Lipstein. Additionally, Second Stage cannot be liable for improperly grounding the light box at the time it was affixed to the building's facade, because it was affixed and grounded by someone else, possibly Promenade. Moreover, under the lease, Second Stage had no duty to repair the light box, unless it caused damage to it through its carelessness or negligence. Nor is it clear whether Second Stage had any authority to correct any dangerous condition which it did not create. Lipstein's response to Walters' June 13, 2007 email suggests that Second Stage did not have such authority. Presumably, Second Stage either used the light box without permission or simply had a license to put its sign in the box. *See Kohman v. Rochambeau Realty & Dev. Corp.*, 17 A.D.3d 151, 153 (1st Dept 2005) (license is a revocable privilege to perform an act on land "without possessing any interest therein" [internal quotation marks and citation omitted]).

Nonetheless, Second Stage's summary judgment motion is denied, because it has failed to eliminate all material issues raised by the pleadings. In particular, Gelbuda's pleadings allege a failure to ensure that the light box was properly covered and protected from the elements. According to Gelbuda, at the time in issue, i.e., a few weeks after Second Stage removed its sign, the box's side was broken, which allegedly allowed the

rain water to enter and pool. Walters was unaware whether the box's sides were intact when Hector and Nathan were removing Second Stage's signage, and no affidavits have been provided from Hector and Nathan, the Second Stage employees who were involved in placing and removing signs, indicating that they had not damaged the side panels or any of the wiring in the process. As previously noted, Second Stage had the duty, under its lease, to repair fixtures, even if they were not part of the demised premises, if Second Stage carelessly or negligently damaged them. Nor has Second Stage, or for that matter any of the remaining moving defendants, provided an expert's affidavit on the material issues raised by the pleadings, much less one indicating that an open panel which exposed the light box's bulbs and wiring to rain was not a factor in Gelbuda's accident. That Sacco's affidavit is less than clear on this point is unavailing, because the burden of prima facie establishing its entitlement to summary judgment by refuting the pleadings' allegations is on the movant.

As to TSI, the mere fact that Rodriguez, who was unfamiliar with the lease terms, allegedly contacted Starr to report what he viewed as a dangerous condition, namely the southerly light box being open, would be irrelevant, if TSI did not assume or agree to assume control over the light box. The lease did not give TSI custody and control over that light box; it only permitted it to place its northerly light box or a new light box where the southerly light box had been. Lipstein had no firsthand knowledge of the lease negotiations, and he testified that NYSC never asked him for permission to use the light

fixture. However, while TSI takes the position that it never used the southerly light box, that it was never part of the property demised to it under the lease, and that it belonged to Broadway Phoenix and was its responsibility at the time in issue, Gelbuda has, through his deposition testimony, raised an issue of fact as to whether TSI was using and had assumed control over it at the time in issue. Rodriguez could not recall when he had last seen the light box's side panels. It is unclear when or if the side panel was broken. In addition, there is conflicting testimony as to whether the front panel was missing. Whether TSI assumed control of the box and, if so, damaged its side panel or wires while using it, or should have covered up or replaced any damaged panel to prevent any rain from pooling up inside should be left for trial, in light of the conflicting evidence. Thus, TSI's summary judgment motion is denied.

The branch of Opera and Broadway Phoenix's motion for an order granting Broadway Phoenix summary judgment is also denied. Assuming that the light box was installed by Promenade and was its property, there is no evidence that Broadway Phoenix ever tried to remove that light box and charge Promenade for that expense after Promenade vacated the premises. It, therefore, appears that, under the lease between Broadway Phoenix and Promenade, the sign likely became Broadway Phoenix's property, if it was not already its property. As previously discussed, there are issues of fact as to whether TSI ever assumed control over the light box. Broadway Phoenix's agent, Lipstein ordered Vital and Second Stage to remove their signs, which was done. Lipstein

was aware that the light box's interior would then be exposed, as he claimed it had been after Promenade vacated. Also, while Rodriguez's testimony was contradictory, he claimed to have advised Lipstein of the box's open condition and the danger which it posed. Further, there is an issue of fact as to whether Lipstein understood, or should have understood, Walters' June 13, 2007 e-mail regarding the hanging wires and power problem as referring to the light box. There is no evidence here that there was any marquee sign to the right of the entrance way, and all the photos attached as exhibits show a marquee only over the doorway, not to the right of it. Also, Lipstein does not indicate that his electrician Hub ever investigated a problem involving hanging wires or repaired the light box. In addition, Lipstein fails to reveal that he conducted any inspections of the light box to ascertain its condition, including the condition of its wiring and grounding (*see generally Singh v. United Cerebral Palsy of N.Y. City, Inc.*, 72 A.D.3d 272, 276 [1st Dept 2010]) after Promenade's departure. Accordingly, Broadway Phoenix's motion seeking summary judgment dismissing the entire complaint is denied.

Further, the branch of Opera and Broadway Phoenix's motion for an order granting Opera summary judgment is denied as well. Opera argues that it did not owe any duty to Gelbuda, because there is no evidence that it was responsible for the light box, and because the testimony provided by Tacooram and Schmidt shows that Opera was only responsible for the residential portion of the building and had no duty with respect to the commercial part of the premises. Opera maintains that an out-of-possession owner is not

liable for injuries which occur on the premises unless it retained control over the premises or was contractually obligated to repair or maintain the premises. Additionally, Opera asserts that there is no evidence that it created or had notice of any defect relating to the light box.

In response, Gelbuda maintains that where an out-of-possession owner reserves the right to enter the premises to inspect and repair, it will be liable for injuries caused by a dangerous condition, where the condition constitutes a statutory violation. Gelbuda claims that Opera does not dispute that it reserved the right to reenter, and that there were statutory violations. With respect to the latter, Gelbuda points to Sacco's affidavit in which he claims that the New York City Electrical Code 27-3024 adopted the NFPA 70 National Electrical Code's (NFPA) standards for wiring. Sacco maintains that Article 600 of the NFPA sets forth the requirements for signs, that Article 110 sets forth the requirements for proper electrical insulation, and Article 250 sets forth the requirements for a proper grounding system. Sacco urges that the light box was broken, and that its wires were exposed and open to the rain. He further claims that the light box was improperly grounded, and that its wires were improperly insulated, and that, as a result, Gelbuda was shocked. He claims, without detailing or pointing to any particular NFPA provision, that the light box violated the standards of insulation and grounding contained in those articles. Additionally, Gelbuda claims that, because the commercial premises were a place of public assembly, Opera had a nondelegable duty to maintain the premises.

The law is well settled that an out-of-possession owner will usually not be liable for a perilous condition which exists on leased premises. However, liability can attach where that owner has created that condition, retained control of the property, or has contractually obligated itself to maintain or repair the premises. *Stickles v. Fuller*, 9 A.D.3d 599, 600 (3d Dept 2004); *see also Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d 439, 440 (1st Dept 2010). The out-of-possession owner may also be liable if it has a contractual "right to reenter, inspect and make repairs," and the dangerous condition "involve[s] a significant structural or design defect contrary to a specific statutory provision." *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d at 440; *Heim v .Trustees of Columbia Univ. in the City of N.Y.*, 81 A.D.3d 507 (1st Dept 2011). In addition, an out-of-possession owner that gives up control of the property can be liable to a person injured on the property where that owner leases the property for a public use and knows, or should know, at the time of the making of the lease, that a dangerous condition exists. *Landau v. Beach Haven Shopping Ctr.*, 276 A.D.2d 752 (2d Dept 2000).

Here, assuming that the master lease provided only that Opera had a right to reenter, inspect, and repair, the claimed defects in issue do not constitute a significant structural or design defect, because the light box was merely an advertising fixture, which was affixed to the structure. *See e.g. Heim v. Trustees of Columbia Univ. in the City of N.Y.*, 81 A.D.3d at 507 (missing drain cover not a structural defect); *Babich v. R.G.T. Rest. Corp.*, 75 A.D.3d at 440 (stairs' lack of non-slip finish was not structural); *Javier v.*

Ludin, 293 A.D.2d 448 (2d Dept 2002) (injuries caused by light fixture which was missing its cover were not due to a significant structural defect); *Lane v. Fisher Park Lane. Co.*, 276 A.D.2d at 142 (cabinet door which caused injury not structural). Further, there is no claim here that defendants designed the fixture.

Nonetheless, the burden of establishing that it lacked a duty to maintain or repair the premises and that it did not create the defective condition is on Opera. *Servo v. Bank of New* York, _ A.D.3d _, 2012 N.Y. Slip Op 04330, *1 (2nd Dept. June 6, 2012); *Vialva v. 40 West 25th St. Assocs., L.P.*, _ AD3 _, 2012 NY Slip Op 04332, *1 (2nd Dept June 6, 2012). Here, while Opera faults Gelbuda for failing to provide the terms of the master lease, it is Opera which has failed in this regard. A copy of the master lease is absent from Opera's motion papers. While Tacooram and Schmidt indicated that their duties did not involve the maintenance of the commercial portion of the premises, neither discussed, nor set forth, the terms of the master lease or Opera's obligations under it. Further, Opera failed to establish that it did not install the light box used by Promenade, which light box was allegedly improperly grounded. Although the light box was likely installed by Promenade after the effective date of the master lease, Lipstein, Tacooram, and Schmidt have no personal knowledge on this issue, and started working in connection with the premises when the light box had already been installed. Assuming that, under the master lease, Opera had a duty to maintain and repair the light box, it fails to establish that it lacked knowledge of the claimed defects. *See Singh v. United Cerebral Palsy of N.Y.*

City, Inc., 72 A.D.3d at 276. Also, Opera fails to demonstrate that, when it entered into the master lease, the premises were only to be used for purposes which were other than public, and that it lacked knowledge, at that time, that the light box was defective.

However, the branch of Broadway Phoenix and Opera's motion which seeks an order striking Gelbuda's demand for punitive damages is granted, and his punitive damages demand is dismissed as to these defendants. More than mere negligence or carelessness is required to permit a punitive damages claim. *Fordham-Coleman v. National Fuel Gas Distrib. Corp.*, 42 A.D.3d 106, 113 (4th Dept 2007); *Rey v. Park View Nursing Home*, 262 A.D.2d 624, 627 (2d Dept 1999). To justify the imposition of punitive damages, a party's conduct must be "exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness ... or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights [internal quotation marks and citations omitted]." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007). Here, these defendants' alleged negligence does not rise to the requisite level for the imposition of punitive damages, and Gelbuda's opposition papers do not even address the issue of punitive damages.

As to Broadway Phoenix's motion for summary judgment on its contractual indemnification claim against TSI, TSI's assertion that the lease's contractual indemnification clause is void and unenforceable under public policy, because it

allegedly, in violation of General Obligations Law § 5-322.1 [1], requires TSI to indemnify Broadway Phoenix for its and its agents' and employees' negligence, is without merit. First, General Obligations Law § 5-322.1 [1], by its terms, applies to contracts relating "to the construction, alteration, repair or maintenance of a building," and was promulgated "to prevent a prevalent practice in the construction industry of requiring subcontractors to assume liability by contract for the negligence of others." *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 N.Y.2d 786, 794 (1997). The contract at issue here is not a construction contract; it is a lease. Therefore, that statutory provision does not apply. Second, even if this statute applied, the indemnification provision would not violate the statute. Specifically, the clause at issue, which requires the tenant to carry liability insurance for itself and the landlord in amounts satisfactory to the landlord, only requires the tenant, TSI, to indemnify the landlord, Broadway Phoenix, to the extent not covered by insurance, for damages and costs resulting from the lease violations and the "carelessness, negligence, or improper conduct of the [t]enant," the tenant's agents, employees, contractors, invitees, licensees, and subtenants, as well as of the subtenant's agents, employees, contractors, invitees, and licensees. This provision does not require TSI to indemnify Broadway Phoenix "without regard to who or what caused the injury." *Itri Brick & Concrete Corp. v. Aetna Cas & Sur. Co.*, 89 N.Y.2d at 793. Further, the lease's indemnification clause expressly exempts the landlord from liability for damages due to injury to persons, "unless caused by or due to the negligence

of [the l]andlord, its agents, servants or employees." Therefore, the indemnification clause does not contemplate a complete shifting of liability to TSI (*Itri Brick & Concrete Corp. v. Aetna Cas & Sur. Co.*, 89 N.Y.2d at 793; *see also Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204, 208-209 [2008]), and would be valid even if the statute applied.

Nevertheless, in light of the factual issue as to whether Broadway Phoenix and TSI were negligent and the unresolved issue of the amount, if any, of partial or total indemnification to which Broadway Phoenix may be entitled, its application for summary judgment on its contractual indemnification cross claim against TSI is denied. *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 64 (1st Dept 1999) (summary judgment on contractual indemnification claim would be premature since allocation of fault could not be made until issues of indemnitee's negligence and extent of any such negligence were determined).

The court notes that Gelbuda, at trial, will presumably seek to rely on specific provisions of Articles 110, 250 and 600 of NFPA. Defendants have thus far objected to his reliance on statutory provisions in that he failed to specify any provisions in his bill of particulars. Presumably such objection will be raised at trial as well. However, none of the defendants, when served with Gelbuda's bill of particulars, sought to strike his response, or moved for a further bill, so as to afford him the opportunity to supplement his bill of particulars. *See e.g. Ramondi v Paramount Fee, LP*, 30 AD3d 396 (2d Dept 2006); *Alvarado v New York City Hous. Auth.*, 302 AD2d 264 (1st Dept 2003). Further,

Gelbuda has not waited until trial to specify the regulations. *Cf. Barzaghi v Maislin Transp.*, 115 AD2d 679, 684 (2d Dept 1985) If Gelbuda intends to introduce any specific NFPA provision at trial, he is directed, within 10 days of service of a copy of this order with notice of entry, to make any motion he is advised by his counsel to make to amend his pleadings in this regard, or will be precluded from seeking to rely on any such provision at trial.

Gelbuda cross moves for an order granting him spoliation sanctions. Where a party loses or destroys key evidence at a time when it is aware that there is pending litigation, spoliation sanctions in the form of an order striking the spoliator's pleadings is appropriate, even in the absence of willfulness or bad-faith. *Squitieri v. City of New York*, 248 A.D.2d 201 (1st Dept 1998). This is also true where the spoliator is aware that the evidence in issue may be needed for future litigation. *Standard Fire Ins. Co. v. Federal Pac. Elec. Co.*, 14 A.D.3d 213 (1st Dept. 2004). To the extent that Gelbuda seeks to strike any of the defendants' pleadings, such application is denied, because he fails to urge in his initial cross moving papers that, absent the light box, he will be unable to establish its defects. Moreover, his expert's affidavit, which relies on evidence, including Rodriguez, Walters, and Gelbuda's deposition testimony detailing the light box's deficiencies, demonstrates that Gelbuda has the means of establishing the light box's defects without his expert having examined it. *See also Dessources v. Good Samaritan Hosp.*, 65 A.D.3d 1008, 1010 (2d Dept 2009) (plaintiff's expert's speculative affidavit

was inadequate to establish that the loss of fetal monitoring tapes was crucial evidence). Thus, Gelbuda has not demonstrated that the light box is key evidence.

As to whether any lesser sanctions should be imposed on Second Stage, TSI, Broadway Phoenix, or Opera, whose agents were aware, on August 8, 2007, of the accident and its connection to the light box, "a less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense." *Denoyelles v. Gallagher*, 40 A.D.3d 1027, 1027 (2d Dept 2007). When a lesser sanction, other than dismissal or preclusion, is imposed, it "is a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time." *Quinn v. City Univ. of N. Y.*, 43 A.D.3d 679, 680 (1st Dept 2007).

On August 8, 2007, each of the remaining defendants were aware, through their agents or employees, that Gelbuda had been shocked when he touched the light box and that the light box had been taken down. There is no evidence that any of the remaining defendants attempted to learn whether the light box was retrievable, and, if so, took any steps to seek to have it preserved. Indeed in Opera's case its employee, Tacooram, may have been the one who took it down, or was evidently at least there when it was taken down. That some of the defendants allegedly were not involved in the light box's disposal and did not own, possess, or have the ability to control the box at that time does not appear to be determinative. *See Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457, 457

(1st Dept. 2003) (a party who was injured by his employer's television can be sanctioned for taking inadequate measures to "assure its preservation"). At trial, aside from the issues of the defendants' possession, ownership, and control over the light box, the issues of whether each defendant had reason to know that it would be sued, should have taken steps to try to preserve the light box, had a good explanation for failing to try to preserve it, and had the ability to have it preserved will likely be explored. Accordingly, Gelbuda's cross motion is denied without prejudice to any request at trial for the imposition of any lesser sanction.

In accordance with the foregoing, it is hereby

ORDERED that ABS Partners Real Estate, LLC's summary judgment motion (seq. no. 003) is granted, and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that Vital Theater Company, Inc.'s summary judgment motion (seq. no. 007) is granted, and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that Lawrence Properties, Inc.'s summary judgment application (seq. no. 004) is granted, and the complaint and all cross claims against it are dismissed; and it is further

ORDERED that Second Stage Theater, Inc.'s summary judgment motion (seq. no. 006) is denied; and it is further

ORDERED that Town Sports International, Inc.'s summary judgment motion (seq. no. 005) is denied; and it is further

ORDERED that Broadway Phoenix Company LLC's applications (seq. no. 004) for an order granting it summary judgment on its contractual indemnification cross claim against Town Sports International, Inc. and dismissing the action is denied, except that David Gelbuda's punitive damages claim is dismissed as to it; and it is further

ORDERED that The Opera Owners Inc.'s application (seq. no. 004) for an order granting it summary judgment is denied, except that David Gelbuda's punitive damages claim is dismissed as to it; and it is further

ORDERED that David Gelbuda's cross motion for an order granting him spoliation sanctions is denied, without prejudice to any application for any appropriate sanction, other than the striking of pleadings or preclusion, that he is advised by his counsel to make at trial with respect to The Opera Owners Inc., Broadway Phoenix Company LLC, Second Stage Theater, Inc., and Town Sports International, Inc.; and it is further

ORDERED that any application that David Gelbuda is advised by his counsel to make to amend his pleadings to allege specific violations of Articles 110, 250, and 600 of the NFPA 70 National Electrical Code shall be made within 10 days of service of a copy of this order with notice of entry, or Gelbuda shall be precluded from relying on such provisions at trial; and it is further

ORDERED that the action is severed and shall continue as to the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
July 6, 2012

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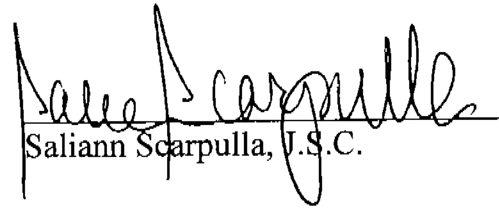

Saliann Scarpulla, J.S.C.

FILED

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