Owens v Morris Park Ave.
2013 NY Slip Op 33707(U)
November 25, 2013
Sup Ct, Bronx County
Docket Number: 305635/2009
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 04

Case Disposed ⌟
Settle Order ⌟
Schedule Appearance ⌟

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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OWENS,MICHAEL

-against-

MORRIS PARK AVENUE

----------X

Index №. **0305635/2009**

Hon. **HOWARD H. SHERMAN** ,

Justice.

The following papers numbered 1 to _____ Read on this motion, **REARGUE/RENEW/RESETTLE/RECONSI**
Noticed on **February 01 2013** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion by defendant for an order pursuant to CPLR §2221 deemed one for renewal is decided in accordance with the accompanying decision filed herewith

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

NOV 27 2013

Dated: 11/25/13

Hon. _____
HOWARD H. SHERMAN, J.S.C.

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

----------x

Michael Owens

Index No. 305635-2009

Plaintiff,

DECISION/ORDER

-against-

Morris Park Avenue Properties , LLC ,
Subcon, Inc., and Nezam A. Immamalee,
individually, d/b/a NBC Foods, Inc.,

Howard H. Sherman
J.S.C.

Defendants

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Facts and Procedural Background

Michael Owens seeks recovery for injuries allegedly sustained on December 13, 2007 , when in the course of a delivery, he fell to the basement level of commercial premises located at 966-970 Morris Park Avenue , Bronx County, New York.

This action, which alleges the breach of the duty to maintain the stairway in a reasonably safe condition, was commenced as against the out-of-possession owner of the premises , Morris Park Avenue Properties , LLC ("Morris Park"), as well as the "fast food" restaurant [1] to which the delivery was being made , and the individual franchisees and their corporation.

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[1] Part of the commercial premises was being operated as a "Subway " franchise, after a five-year "master lease" had been executed in February 2004 between 966 Morris Park Avenue LLC and Subway Real Estate Corp., and a sublease then entered into between Subway and Steven Alfano . By assignment dated May 9, 2007 , Nezam Immamalee and Bedelia Immamalee took over the remainder of the sublease.

By decision and order of this court dated November 9, 2012, the unopposed motion of Morris Park for an award of summary judgment dismissing the complaint and all cross-claims asserted against it, was denied upon a finding that the defendant failed to sustain its initial burden.

The Note of Issue was filed on March 8, 2013 .

Motions

1) Defendant **Morris Park** moves to renew and reargue the court's determination on its dispositive motion contending that there is no evidence in the record that at the time of the incident the out-of -possession landlord possessed either actual or constructive knowledge of the causative defect alleged here.

With respect to the prior decision, Morris Park argues that it was plaintiff's burden to prove prior notice of the alleged dangerous condition, and plaintiff failed to so, and "the burden does not shift to defendant to disprove the absence of proof in plaintiff's case in chief, nevertheless, for this court's reconsideration of its prior Decision/Order, Morris Park now submits proof by way of affidavits from its two principals and the lease agreement detailing the contractual obligations between Morris Park and Subway." [Affirmation in Support of Motion ¶ 7]

In **opposition,** plaintiff contends that the motion is procedurally defective as it fails to seek leave of the court for reargument/renewal, and fails to separately identify and

support each of the items of relief sought (see, CPLR 2221 (f)).

Plaintiff argues that to the extent it seeks renewal, the motion fails as lacking any justification for the failure to present the newly submitted facts on the original motion. To the extent reargument is sought, plaintiff contends that the court neither overlooked facts nor misapplied law in reaching the determination.

Finally, concerning that branch of the motion seeking dispositive relief, plaintiff argues that there are unresolved issues of fact as to whether Morris Park failed in its duty to conduct periodic inspections of the subject staircase, and whether defendant was liable under the doctrine of *res ipsa loquitur.*

2) **Subcom , the individual defendant and NBC Foods** , Inc. move for summary judgment dismissing the complaint and the cross-claim on the grounds that : 1)the tenant did not have a duty to maintain or to repair the stairway because it was not located within the premises as leased to the moving defendants, i.e., the Subway restaurant and the basement beneath it; 2) the causative defect, i.e., a broken step, was structural in nature, and its repair, the responsibility of the building's owner , and 3) prior to the accident , the moving defendants had no notice of a dangerous condition on the stairway.

In opposition, plaintiff argues that defendants have failed to sustain their burden to prove as a matter of law that they had no duty to keep the staircase in good repair and to perform regular inspections in order to ensure that it was. It is argued that pursuant to the

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terms of the lease, Subcom was "responsible through its permissive use of the ladder/staircase to repair any damage to [it] that it created or was created by third party invitees. " [Affirmation in Support ¶ 20].

It is argued that there are questions of fact as to whether defendants' negligence may be inferred by application of the doctrine of res ipsa loquitur to the circumstances of this case, including the testimony of the owner's managing agent concerning Subway's exclusive use of the staircase and the defendant franchisee's sole possession of the key that unlocked the sidewalk door.

In reply, defendants reassert their contention that they had no prior notice of the causative defect, and argue that the *res ipsa loquitor* claim first raised in an amended bill of particulars dated nearly two months after the return date of their motion, should not be considered to defeat defendants' prima facie showing.

In addition, defendants argue that the theory is inapplicable here as "there can be no finding that this alleged accident could not have happened without negligence, which requires notice of some kind on the part of the defendant to be proven " , nor could there be a finding that the stairs were under the exclusive control of the Subcom defendants in light of the fact that the owner acknowledged by testimony and by conduct, i.e., replacing the structure at its own expense, that the repair of any dangerous condition on the staircase was the landlord's responsibility.

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3) **Plaintiff cross-moves for an order pursuant to CPLR 3216** precluding defendants from offering any proof on liability issues at the trial of this action based alternatively, upon the intentional , or negligent destruction of, and failure to preserve crucial evidence, i,e, the wooden cellar staircase on which plaintiff fell.

In opposition, the owner maintains that the replacement of the staircase was precipitated by the observation of a broken portion of a riser on a bottom step[2] made on an inspection in September 2008 that was conducted at the request of the defendant franchisee . This event preceded by nearly a year, the first notice of plaintiff's accident upon receipt of service of the pleadings in this action.

Also in opposition, the co-defendants argue that there is no basis to grant the relief requested as against Subcom and the individual defendants as they neither removed nor destroyed the staircase, nor, at the time of the installation of the new staircase, were they on notice of any claim involving the old. With respect to the latter contention, defendants point to the undisputed facts that the unwitnessed accident occurred at 2:00 AM, when the Subway location was closed, and that plaintiff never reported the incident to anyone at the restaurant nor did he return to the location. Nor at anytime were defendants notified of the accident by plaintiff's employer.

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[2] It was described as the second step from the bottom (see, L.TORCO EBT: 64-65).

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Testimony

As pertinent here, **plaintiff** testified that on the date of the accident his job entailed the delivery of pre-loaded foodstuffs to Subway restaurants. The route, which he had been working for the previous three to four months, included the subject location to which he had delivered goods on approximately ten to twelve previous occasions [OWENS EBT: 17-20].

Arriving at the location at approximately 2:00 AM, plaintiff parked his truck and unlocked the sidewalk cellar door[3] , and then descended the vaulted stairway to the basement where he turned on the lights [Id. 23-26]. He went back upstairs to commence the loading of the goods onto the "shoot" adjacent to the left-side of the steps . After all the goods had gone down to the basement floor, plaintiff began to walk down the stairs to pick them up and place them in the restaurant's basement .[4] When he reached either the second or the third step from the top, the step "broke" and plaintiff "fell through the step." [Id. 28: 10;16]. Nails "came out from the side " of the wooden step, and it "had fallen down on the step below it." [Id. 29]. He fell straight down , "hitting the step below and slipped off" falling down to the bottom of the stairs [Id. 30:4-32]. Plaintiff climbed back out of the basement after completing the delivery , and returned to his truck to

[3] Plaintiff testified that keys required for the deliveries were maintained by his employer .

[4] Again , a key suppled by plaintiff's employer would be used to open the door leading from the basement corridor to Subway's basement storage area [Id. 22-23].

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complete his route . When he got back to his employer's Pennsylvania office, he advised his manager that he had fallen when the step broke [Id. 35-36]. The manager's secretary filled out an accident report, however, plaintiff could not recall whether he had ever looked at it [Id. 36].

Laura Torco testified that she and her sister were the members of Morris Park Avenue Properties , LLC and she, the property manager of the two commercial properties the L.L.C. owned that were located on adjacent corners of Morris Park Avenue.

At the time of the accident , the subject property, 966-970 Morris Park Avenue , had four tenants: the Subway franchise; offices for a contractor , and one for a property manager , and a second-floor "Xerox" office [TORCO EBT: 8- 11; 15-16 ;102]. Each of the three store-front locations also had a self-contained storage area in the basement accessed through stairs in the individual unit, as well as through the use of a sidewalk vault located in front of the middle unit , i.e, the Subway restaurant [EBT: 21-22]. The vault "had always been there." [5][Id. 27:5]. The door to the vault had a lock on it , and it was Torco's understanding that it was to be used only for Subways' purposes [Id. 22-23;95;113], and the franchisee the only tenant who has the key to the sidewalk door [Id. 113]. The basement units for each lessee were separated by walls , and the door leading to the basement corridor of each unit was padlocked [Id. 22-24].

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[5] The building had been owned by the LLC since approximately 1999, and had been owned by the members parents for at least ten years before that [Id.29].

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Since assuming ownership of the building, and until Subway entered into the master lease, the owner never made any repairs to the sidewalk stairs, nor did the owner receive any violations with respect to them [Id. 30]. In addition, until the time of the incident no one on behalf of Subway ever made a complaint about the condition of the stairs, or of the basement [Id. 39]. At no time prior to the commencement of this litigation was the owner aware of a claim of an accident on the stairs [Id. 66].

Torco testified as follows concerning the owner's obligation for repairs of the staircase .

Q. If there was a problem with that particular stairway , who would make the repairs ?

• • •

A. If there was a problem , I would .

Q. And it is your understanding that based on the lease that you had with Subway that you as a landlord were responsible to make repairs of those stairs ?

• • •

A. Based on the lease , you're saying ? Say that again. Based on the lease was it my responsibility ?

Q. Yes.

A. I would have to reread the lease, but I would just make the repairs.

Id. 39:15-40:8

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Torco also testified that the owner was responsible for structural repairs, and that the stairway was something that "I would fix." [Id. 41].

The wooden staircase was removed and a steel one installed in September or October, 2008, a month after Ms. Torco received a complaint from Mr. Immamalee concerning their condition. A day after the phone call, Ms, Torco inspected the staircase, and observed "[n]ormal wear on wood as it would be on a deck." [Id. 64: 4-5]. She also observed that the second step from the bottom "was broken on one edge [ ] " [Id. 17], but she observed no cracks , nor were any portions of other steps missing. [Id. 65]. Upon consulting a contractor who suggested "how to do a state of art better", the staircase and the delivery "slide" were replaced with steel ones [Id. 70]. Torco inspected the new staircase after the installation [Id. 68].

Torco testified that she performed inspections of the building approximately twice a month to check, among other things, that the tenants were cleaning the streets, and that there were no complaints . However, as the sidewalk door was "always locked", she never walked the vaulted stairs. While believing that she had the right under the terms of the lease to do so, she only viewed the stairs "[i]f by chance they had it opened." [Id. 36-37:5] She did have occasion to inspect the basement in connection with "little problems here and there [ ] " [Id. 37:12], at which time she observed that the stairs "were always

fine." [Id. 39: 6]

Nezam Immamalee testified that he took over the lease from the original franchise owner , and before doing so, he had occasion to walk down the staircase when the prior tenant opened the sidewalk door for him [IMMAMALEE EBT: 21-24;66].

He used the same supplier as the prior tenant , one designated by Subway , and he placed weekly orders with that supplier [Id. 42] . The deliveries were "night drops" that were made after the store closed for business at 9:30 PM. The vendor had the two padlock keys necessary for the delivery, one for the sidewalk door, and one for Subway's basement area containing a refrigerator for cold storage [Id. 86;181].

Immamalee testified that he used the stairs "sometimes" for garbage removal, when the private carting company failed to pick it up, estimating the frequency to be about once a month [Id. 105]. He also testified that other tenants also used the stairs [Id. 105; 59;88].

He called the owner when he observed that the base of the stairs at the bottom was not sturdy [Id. 75], and within a week, she sent workers to inspect [Id. 108-11]. She also inspected the newly installed staircase after it was completed [Id. 129], a time prior to the commencement of this action.

At no time prior to his complaint, had Immamalee encountered any problem with footing , or slipping when using the staircase [Id. 130].

Master Lease

The lease as executed by the owner LLC and Subway Real Estate Corp. provides that 968 Morris Park and its appurtenances is to be used as a restaurant and states in pertinent part that the " tenant shall keep the premises in good order and upon failure to do so, the landlord may do and perform all repairs which may be necessary in and about said demised premises and add the amount of the costs of such repairs to the rent due...." [Lease ¶ 12].

The paragraph following requires the tenant to give prompt notice of "fire, accident, damage , or *dangerous or defective condition* [emphasis added] " and states that the "[L]andlord need only repair the damaged *structural* parts of the Premises [emphasis added] ."

Paragraph 20 provides the landlord with the right to enter in and upon the premises upon 24-hour notice to "ascertain if said premises are kept in proper repair and condition ."

Paragraph 12 of the Rider acknowledges that the tenant has inspected the demised premises as well as its appurtenances and fixtures , if any, and accepts the same in "as is" condition, while ¶ 21 , by which the tenant covenants to comply with applicable laws and codes relating to use and occupancy or to the making of repairs, also provides that "[n]othing in this paragraph shall be construed to impose the obligation in TENANT to

make structural repairs to the premises unless due to TENANT'S acts or failure to act."

The Rider provides for the landlord's access to the premises at any reasonable time for the purposes of inspection , or making repairs thereto , or to comply with statutes/codes [Id. ¶ 25].

Finally, Paragraph 34 of the rider provides that the landlord "shall maintain in good working order and repair the exterior and the structural portions of the building , including the structural portions of the demised premises , and the public portions of the building interior."

Discussion and Conclusions

Defendant Morris Park Avenue Properties ,LLC.,

Upon review of the moving papers, it is submitted that although motions for renewal, generally should be based on newly discovered facts that could not be offered on the prior motion ,to the extent that the defendant's motion is based on the lease not presented on the original motion, this court chooses to exercise its discretion to "relax this requirement" and to grant renewal in the interest of justice for consideration of the commercial lease agreement between the moving defendant and Subway (see, Tuccillo v. Bovis Lend Lease , Inc., 101 A.D.3d 625, 958 N.Y.S. 2d 86 [1st Dept. 2012]) .

Upon consideration of the subject lease and riders, defendant demonstrates that it is an out-of possession landlord without contractual obligation to make non-structural repairs in the demised premises.

A landowner's duty of care to maintain his or her property in a reasonably safe condition is "premised on the landowner's exercise of control over the property, as 'the person in possession and control is best able to identify and prevent harm to others. '" (Gronski v. County of Monroe, 18 NY 3d 374, 379 , 963 N.E. 1219 ,1222 [2011] , quoting Butler v. Rafferty , 100 NY2d 265,272 , 792 NE2d 1055 [2003]). As such, " '[i]t has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property .' " Id., citing Ritto v. Goldberg, 27 NY2d 887, 889, 265 NE2d 772 [1970].

Having transferred possession and control to a tenant, an out-of-possession landlord is not generally liable for negligence with respect to the condition of property unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (see, Babich v. R.G.T. Rest. Corp., 75 A.D.3d 439, 906 N.Y.S.2d 528 [1st Dept. 2010] citing authority of Johnson v Urena Serv. Ctr., 227 AD2d 325, 326, 642 NYS2d 897 [1996], lv denied 88 NY2d 814, 673 NE2d 1243,

651 NYS2d 16 [1996]; see McDonald v Riverbay Corp., 308 AD2d 345, 764 NYS2d 185 [2003]; Quinones v 27 Third City King Rest., 198 AD2d 23, 603 NYS2d 130 [1993]; see also, Chapman v. Silber, 97 NY2d 9, 19, 760 NE2d 329 [2001]).

Here , as in Babich, op.cit., the lease between the owner and Subway imposes no obligation on the landlord to make non-structural repairs , or to maintain the demised premises. Additionally, although the LLC retained the right to reenter, inspect, and make repairs, there is here no triable issue of fact that the alleged causative condition, an insufficiently secured step, involved a significant structural or design defect contrary to a specific statutory safety provision such that constructive notice could be presumed and liability imposed (see, Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 565, 509 N.E.2d 51, 516 N.Y.S.2d 451 [1987]; Landy v 6902 13th Ave. Realty Corp., 70 AD3d 649, 894 N.Y.S.2d 497 [2d Dept 2010]; see also, Centeno v. 575 E. 137th St. Real Estate, Inc., 2013 NY Slip Op 07689 [1st Dept. 11/19/13]).

While the co-defendants contend that the staircase in question was not part of the demised premises specifically delineated in the lease , it is well settled that

> [l]eases, like other agreements, are to be construed so as to carry out the intention of the parties , [and] [w]hen premises are leased for an expressed purpose, everything necessary to the use and enjoyment of the demised premises for such expressed purposes must be implied where it is not expressed in the lease.

Second on Second Café , Inc.v. Hing Sing Trading, Inc., 66 A.D.3d 255,270, 884 NYS 2d 353 [1st Dept. 2009], quoting Kelsey v. Durkee, 33 Barb 410 [Sup Ct, NY County 186

It is clear "[u]nder a lease , the tenant acquires not only rights to the premises specifically leased , but also rights outside the demised premises that pass to the tenant whether or not mentioned ." Second on Second Café, Inc., *supra* at 267 The latter rights "are known as appurtenances and are generally defined as 'incorporeal easements or rights and privileges which are essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed or leased. ' " Id., quoting authority of 1 Dolan , Rasch's Landlord and Tenant –Summary Proceedings § 7:5, at 3-4-305 [4th ed][6].

The Master Lease covers the demised premises and "appurtenances" while not specifically delineating what the latter are . Nevertheless on this record, there is no issue of fact that the vaulted staircase used by the original and subsequent franchisee, and by their vendor as the exclusive method of accessing the storage area, qualified as an appurtenance to the demised premises as it was routinely used for food deliveries , and as such, reasonably necessary, if not essential to the full beneficial use of the

[6] It is noted that use of an area outside demised premises that is neither essential nor reasonably necessary to the beneficial use and enjoyment of the demised premises will not give rise to an appurtenance (see, Prospect Owners Corp.v. Sandmeyer, 62 A.D.3d 01, 603, 881 N.Y.S. 2d 40 [1st Dept. 2009]).

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restaurant (see, Blenheim LLC v Il Posto LLC, 14 Misc 3d 735, 740, 827 NYS2d 620 [Sup,Ct, NY Cty, 2006]). It is submitted that Subway's appurtenant rights to use of the stairway as implied under the lease would be enforceable in equity (see, Second on Second, op.cit., at 268).

It is submitted that Subway's use of the vaulted staircase and its delivery chute was contemplated by the parties upon execution of the lease, and there is nothing in this record to raise an issue of fact that the landlord, by any course of conduct during the lease period, retained control of the staircase sufficient to give rise to a duty to repair an inadequately attached tread (compare, Melendez v. American Airlines, Inc., 290 A.D.2d 241, 735 N.Y.S. 2d 128 [1st Dept. 2002]; see Ritto v Goldberg, 27 NY2d 887, 889, 265 NE2d 772 [1970]; Cherubini v Testa, 130 AD2d 380, 382, 515 NYS2d 29 [1st Dept. 1987]); Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 878 N.Y.S.2d 3 [1st Dept. 2009]). Indeed, while it is undisputed that Subway's franchisee and supplier had a key to the sidewalk entrance, it is unclear on this record whether the owner did.

It is also submitted that the post-accident decision by the landlord to install a new staircase in response to the franchisee's complaints about lower step "sturdiness" does not impute retroactively an obligation for the owner to have made a non-structural repair to the step prior to the accident .

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Absent a contractual obligation to make non-structural repairs , and upon a prima facie showing that the defendant landlord transferred possession of the premises and appurtenant staircase and ceded to the franchise control over it, it is submitted that the landlord's duty to repair the alleged causative defect "extinguished as a matter of law ." (Butler v. Raftery, op. cit, at 272).

In opposition, plaintiff fails to raise an issue of fact that the defendant owner by a course of conduct assumed such control over the location as to impose liability upon the landlord for the failure to make non-structural repairs to the staircase.

In light of this showing , it is also submitted that even if the landlord by contract retained, or by course of conduct assumed , a duty to make non-structural repairs, any inference of negligence as against the owner under the theory of res ipsa loquitor, even if properly interposed, [7] would be inapplicable , as there is no issue of fact that the accident was caused by an agency or instrumentality within the exclusive control of the out-of-possession landlord (see, Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 226, 492 N.E.2d 1200 [1986]).

Upon the above determination , the court need not address the issue of lack of pre-accident notice of the alleged causative defect, however, the record demonstrates as a matter of law no triable issue of fact that the landlord possessed knowledge of any

[7] It is noted that plaintiff never sought leave of court to amend the verified bill of particulars.

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dangerous condition on the stairway before being advised of a lower step instability more than nine months after the accident.

Subcom , Nezam Immamalee and NBC Foods

Upon consideration of the co-defendant's motion, the court has determined that the vaulted staircase was an appurtenance to the demised premises that the co-defendants used and over which they exercised control, and that the alleged dangerous condition consisted of a non-structural defect, the movants first and seconds grounds for dispositive relief are unavailing.

However, defendants have demonstrated as a matter of law that before the incident, they possessed no knowledge that the tread of the second or third step was not sufficiently attached to the riser.

With respect to the issue of whether defendants should have been aware of the dangerous condition before the accident, it is the finding of this court that because the alleged defect on the step of a dark brown wooden staircase was not visible and apparent , it could not give rise to constructive notice (see, Lance v. Den-Lyn Realty Corp., 84 A.D.3d 470, 922 NYS2d 362 [1st Dept. 2011]). It is significant that plaintiff, who had occasion to use the staircase on his weekly deliveries during the course of several months was unaware of its existence, even after having descended and ascended the stairs immediately prior to the incident.

Finally, with respect to the theory of negligence as implied under the theory of res ipsa loquitur first raised in opposition to the motion, it is submitted that the claim even if properly interposed, would be unavailing under the circumstances here that include a course of conduct , pre-existing the individual defendant's assumption of the sublease, by which the plaintiff's employer had weekly access to the location , thereby precluding a finding that the co-defendants exercised exclusive control of the staircase.

Spoliation

To the extent plaintiff seeks relief, more properly pursuant to the common law doctrine of spoliation , rather than CPLR 3126 , there being no showing of a refusal to comply with a discovery order (see, Strong v. The City of New York, 2013 N.Y. App.Div LEXIS 6601 [1st Dept. 10/15/13]), in light of the above determinations , the motion is denied as academic. However, it is noted that there is no showing that at the time of the installation of the new staircase, defendants here were " ' on notice of a credible probability that [they would] become involved in litigation ' " (see, Suazo v. Linden Plaza Associates , L.P., 102 A.D.3d 570, 571, 958 N.Y.S.2d 389 [1st Dept. 2013], citing Voom HD Holdings LLC v. EchoStar Satellite, L.L.C., 93 A.D.3d 33, 43, 939 N.Y.S. 2d 321 [1st Dept. 2012]).

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Accordingly, it is ORDERED that the motion of the defendant **Morris Park** , deemed one for renewal, is granted, and upon renewal, the motion for summary judgment dismissing the complaint and any cross-claim is granted , and it is

ORDERED that the motion of defendants **Subcom , Inc., Nezam A. Immamalee, individually, d/b/a NBC Foods, Inc.,** for an order awarding summary judgment dismissing the complaint and all cross-claims is granted, and it is

ORDERED that the cross- motion of **plaintiff** for an order pursuant to CPLR 3126 striking the answer of defendants is denied as academic.

This constitutes the decision and order of this court.

Dated : November 25, 2013

Howard H. Sherman