

Lopez v Rep. A8 LLC
2014 NY Slip Op 32602(U)
October 3, 2014
Supreme Court, Suffolk County
Docket Number: 10-36870
Judge: Peter H. Mayer
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-2-14
MOTION DATE 4-15-14
ADJ. DATE 6-17-14
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

HEARING SCHEDULED FOR DECEMBER 17, 2014 @ 9:30 AM

-----X	
EVELIA LOPEZ,	CANNON & ACOSTA, LLP
	Attorney for Plaintiff
Plaintiff,	1923 New York Avenue
	Huntington Station, New York 11746
- against -	
REP. A8 LLC and RECHLER EQUITY	STEWART H. FRIEDMAN, ESQ
PARTNERS,	Attorney for Defendants/Third-Party Plaintiffs
	100 William Street, 9th Floor
Defendants.	New York, New York 10038
-----X	
REP. A8 LLC and RECHLER EQUITY	JOHN C. BURATTI & ASSOCIATES
PARTNERS,	Attorney for Third-Party Defendant Nova
	100 Duffy Avenue, Suite 500
Third-Party Plaintiffs,	Hicksville, New York 10801
- against -	
ALL COUNTY BLOCK AND SUPPLY CORP.	
and NOVA SCIENCE PUBLISHERS,	
Third-Party Defendants.	
-----X	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants/third-party plaintiffs, dated February 24, 2014, and supporting papers 1 - 18; (2) Notice of Motion by the third-party defendant, dated March 25, 2014, and supporting papers 23 - 30; (3) Affirmation in Opposition by the third-party defendant, dated March 25, 2014, and supporting papers 19 - 22; (4) Affirmation in Opposition by the plaintiff, dated June 4, 2014, and supporting papers 31 -37; (5) Reply Affirmation by the defendants/third-party plaintiffs, dated June 17, 2014, and supporting papers 38 - 39; ~~(and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants/third-party plaintiffs REP. A8 LLC and Rechler Equity Partners for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them and granting summary judgment in their favor against third-party defendant Nova Science Publishers is granted to the extent that the plaintiff's complaint is dismissed and summary judgment against Nova is granted to the extent that Nova is obligated to indemnify the defendants/third-party plaintiffs regarding the legal fees and other charges incurred by them in defending the plaintiff's action, and is otherwise denied; and it is further

ORDERED that the motion by the third-party defendant Nova Science Publishers for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and the third-party complaint is denied as untimely; and it is further

ORDERED that the defendants/third-party plaintiffs REP. A8 LLC and Rechler Equity Partners and the third-party defendant Nova Science Publishers are directed to appear for a hearing as set forth herein.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Evelia Lopez (Lopez) as a result of a slip and fall on snow and ice on the sidewalk in front of the entrance to 400 Oser Avenue, Suite 1800, Hauppauge, New York (the premises). The incident occurred on March 2, 2009, at approximately 11:30 a.m., as Lopez was leaving the premises. Lopez was employed by the the third-party defendant Nova Science Publishers (Nova), which leased the premises from the defendants/third-party plaintiffs REP. A8 LLC and Rechler Equity Partners (Rechler). In her complaint, the plaintiff alleges, among other things, that Rechler failed to properly operate, manage, control, inspect, repair, and maintain the sidewalk, and permitted snow and ice to accumulate "on the handicapped persons ramp (ramp) located between the doorway and the parking lot ... [at the premises]." After joining issue, Rechler commenced a third-party action against Nova and the third-party defendant All County Block and Supply Corp. (All County) alleging that Nova was obligated to clear snow and ice from the sidewalk pursuant to the lease between the parties, and that it is entitled to be indemnified by All County which had been hired to conduct snow removal at the premises. By stipulation dated July 17, 2013 and filed with the Clerk of the Court on October 8, 2013, Rechler discontinued the third-party action against All County.

Rechler now moves for summary judgment dismissing the complaint on the ground that they did not have a duty to remove snow and/or ice while a storm is in progress. In support of the motion, Rechler submits, among other things, the pleadings, the depositions of the parties, and a copy of the Nova's lease of the premises. Initially, the Court notes that the deposition transcripts submitted are certified but unsigned, and that the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). However, the Court may consider the

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unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; see also *Bennet v Berger*, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; *Zabari v City of New York*, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]), and they have been adopted by the party deponents (*Rodriguez v Ryder Truck, Inc.*, *supra*; *Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; *Wojtas v Fifth Ave. Coach Corp.*, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

At her deposition, Lopez testified that she arrived at work at the premises at approximately 8:30 a.m. on the day of her accident. She stated that she went in the front door, that it was not snowing at the time, and that she did not see any snow or ice near the front entrance. She indicated that it began to snow after she arrived at work, that her employer let the employees go early because it began to snow, and that she left the premises at approximately 11:30 a.m. Lopez further testified that the snow was “coming down hard” when she left the premises, and that there were a couple of inches of snow on the ground. She stated that she took approximately four steps straight out from the front door and “slipped on snow.” She indicated that she lay on the ground for “about ten minutes,” and that she looked at the ground where she had slipped and observed “a lot of snow.” Lopez further testified that the area where she fell was flat, that she was walking “fast” when she fell, and that she did not see what caused her to fall before she fell. She acknowledged that a photograph marked as “Defendant’s Exhibit B” shows the location of her fall and where she entered the premises, and she marked the location with an “X.” She reiterated that there was no accumulation of snow or ice at the location where she had marked the photograph at the time she entered the premises. Lopez further testified that, after her accident, she told her “boss” and the personnel at the hospital she was taken to that she had fallen as a result of snow, and that the parking lot was not plowed when she left the premises.

Mark O’Loughlin (O’Loughlin) was deposed on September 9, 2013, and testified that he is employed by Rechler as its director of property operations. He stated that the premises is one property of approximately 40 properties in the Hauppauge Industrial Park (HIP), that Rechler has a “building engineer” who has two assistants to maintain HIP, and that he and the building engineer oversee that the contractors hired to perform snow removal at HIP “[do] their jobs.” He indicated that, according to the lease for the premises, Rechler was responsible to remove snow and ice from the parking lot, and that each tenant is responsible for maintaining the walkway from the parking lot to their front door. O’Loughlin further testified that the rules and regulations in the lease between Rechler and Nova govern Nova’s obligation regarding snow and ice removal at the premises, that All County was hired by Rechler to remove snow and ice from the parking lot at the premises, and that it was not Rechler’s responsibility to clear sidewalks and ramps. He stated that the handicapped persons ramp (ramp) at the premises was installed in approximately 2003 by an independent contractor, and that the ramp and the place where the plaintiff marked the location of her fall are part of the sidewalk.

Nadya Columbus (Columbus) was deposed on October 21, 2013, and testified that she is the president of Nova. She stated that, in March 2009, Nova did not have a contract with anyone to shovel snow or clean the outside of the premises, that she believed that the lease provided that the landlord was responsible to keep the sidewalk or curb free from ice, snow, dirt and rubbish, and that Nova “voluntarily” asked its employees to keep a path directly from the front door to the parking lot free of ice and snow. She acknowledged that she did not recall seeing the rules and regulations contained in the

lease, and that she did not know if Nova's employees had cleared a path on the day of the plaintiff's accident. Columbus further testified that the location of the plaintiff's fall as marked on "Defendant's Exhibit B" is within the area that Nova would remove snow and ice. She indicated that, after snowfalls ended, the area around the premises, including the area shown in "Defendant's Exhibit B," would be cleared of snow and ice, but that she did not see Rechler clear the areas, and that she does not know who did the clearing of the sidewalk and curbs.

The lease between Rechler and Nova dated February 2, 2002 provides in paragraph 1 of the section entitled "Rules And Regulations Attached To And Made Part of This Lease In Accordance With Paragraph 36" that "[t]enant, shall further, at Tenant's expense, keep the sidewalks and curb in front of said premises clean and free from ice, snow, dirt and rubbish."

As the proponents of the motion for summary judgment, Rechler must establish, prima facie, that they neither created the snow and ice condition nor had actual or constructive notice of the condition (see *Cruz v Rampersad*, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; *McCurdy v Kyma Holdings, Inc.*, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; *Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 877, 925 NYS2d 607 [2d Dept 2011]; *Persaud v S & K Green Groceries, Inc.*, 72 AD3d 778, 779, 898 NYS2d 255 [2d Dept 2010]). A defendant's burden may be sustained by presenting evidence that there was a storm in progress when plaintiff slipped and fell (see *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012] *Meyers v Big Six Towers, Inc.*, *supra*; *Sfakianos v Big Six Towers, Inc.*, 46 AD3d 665, 665, 846 NYS2d 584 [2d Dept 2007]). The "storm in progress" defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean walkways (*Sie v Maimonides Med. Ctr.*, 106 AD3d 900, 965 NYS2d 562 [2d Dept 2013]; *Abramo v City of Mount Vernon*, 103 AD3d 760, 959 NYS2d 725 [2d Dept 2013]; *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 941 NYS2d 211 [2d Dept 2012]; *Grau v Taxter Park Assocs.*, 283 AD2d 551, 724 NYS2d 497 [2d Dept 2001]). "The rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless." (*Powell v MLG Hillside Assoc.*, 290 AD2d 345, 737 NYS2d 27 [1st Dept 2002]). Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may avail themselves of the rule as a matter of law (*Powell v MLG Hillside Assoc.*, 290 AD2d at 345, 737 NYS2d at 28). Also, there is no duty to warn of icy conditions during a storm in progress (see *Wheeler v Grande'vie Sr. Living Community*, 31 AD3d 992, 993, 819 NYS2d 188 [3d Dept 2006]).

In light of the plaintiff's testimony, Rechler met its burden on the motion with evidence of an ongoing winter storm at the time of plaintiff's accident (see *McCurdy v Kyma Holdings, LLC*, 109 AD3d 799, 971 NYS2d 137 [2d Dept 2013]; *Meyers v Big Six Towers, Inc.*, *supra*; *Mazzella v City of New York*, 72 AD3d 755, 899 NYS2d 291 [2d Dept 2010]; *Skouras v New York City Tr. Auth.*, 48 AD3d 547, 852 NYS2d 206 [2d Dept 2008]). Based on Rechler's prima facie showing that the accident occurred while a storm was in progress, the burden shifted to the plaintiff to raise a triable issue of fact concerning whether the precipitation from the storm in progress was not the cause of her accident (see *Meyers v Big Six Towers, Inc.*, *supra*; see also *Ali v Village of Pleasantville*, 95 AD3d 796, 943 NYS2d 582 [2d Dept 2012]). "To do so, the plaintiff was required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that

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existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition” (see *Meyers v Big Six Towers, Inc.*, 85 AD3d at 878, 925 NYS2d at 608).

In opposition to Rechler’s motion, the plaintiff submits her affidavit, the affirmation of her attorney, a copy of the note of issue, the transcript of her deposition testimony, and the report of her expert witness. In her affidavit, the plaintiff swears that, on March 2, 2009, she “slipped and fell in the area of the parking lot as I was leaving work,” that “[i]t was snowing at the time of the accident, and I slipped on ice that was covered by snow,” and that she “first became aware of the ice when I felt it underneath the snow after my fall.” She states that “[a]fter my fall, I looked underneath the snow at the ice and saw it was thick, uneven and dirty. I believe that I did not see it on my way into work because it blended in with the concrete.”

Here, the plaintiff has failed to raise an issue of fact requiring a trial in this action against Rechler. A party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (*Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; *Andrew T.B. v Brewster Cent. School Dist.*, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; *Knox v United Christian Church of God, Inc.*, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]; *Abramov v Miral Corp.*, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). The plaintiff was asked, and she answered, specific questions about what she saw both before and after her fall. Her explanation that she “believes” that she did not see the ice before her fall because it “blended in with the concrete” is irrelevant in light of her deposition testimony that she did not see any ice after her fall, and that she “slipped on snow.”

Nonetheless, counsel for the plaintiff contends that the report of the plaintiffs’ expert establishes that there is an issue of fact “whether the plaintiff’s accident was due to a pre-existing ice condition in the area of the subject ramp.” In his affidavit, Robert L. Schwartzberg, P.E. (Schwartzberg) swears that his attached report and curriculum vitae are “true correct and accurate,” that the photographs attached were taken by him personally, and that the photographs are “a true and accurate representation of the conditions in place at/on the date and time thereof.” In his curriculum vitae, Schwartzberg indicates that he is a licensed and registered Professional Engineer in the State of New York, and he sets forth his education and experience.

In his report dated June 14, 2010, Schwartzberg states, under the section heading entitled “History”, that “[w]e were informed that ... [Lopez] ... started to descend the handicapped persons ramp located between the doorway and the parking lot and roadway at the rear of the building. While walking atop the ramp and at the lower portion thereof Ms. Lopez was caused to lose her balance and to fall owing to the slick and slippery conditions thereat. We were further advised that after falling Ms. Lopez noted that there was a patch of ice located at the bottom of the ramp at the location where the concrete of the ramp interfaces with the blacktop of the roadway/parking lot.” He indicates that he inspected the premises on June 12, 2010 for the purpose of examining the location, establishing orientation, taking measurements and taking photographs. Schwartzberg opines that, based on his observations, “hazardous conditions were created and allowed to remain in place. We observed that the handicapped persons ramp ... does not conform to or comply with the requirements of the Americans with Disabilities Act (ADA) and does not comply with the requirements of the New York State Building Code. Additionally,

we noted that the roadway was at a higher elevation than the concrete at the lower portion of the ramp which has created a low spot wherein water will pond and accumulate and at times of colder weather can turn to ice thereat.”

It is well settled that the opinion testimony of an expert “must be based on facts in the record or personally known to the witness” (see *Hamsch v New York City Tr. Auth.*, 63 NY2d 723, 480 NYS2d 195 [1984] citing *Cassano v Hagstrom*, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; *Santoni v Bertelsmann Property, Inc.*, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert “may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion” (see *Shi Pei Fang v Heng Sang Realty Corp. supra*). “Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment” (see *Zuckerman v City of New York supra*; *Leggis v Gearhart*, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; *Levitt v County of Suffolk*, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]). Here, to the extent that Schwartzberg attempts to render an expert opinion that Rechler is liable for failing to clear ice from the sidewalk, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (see *Mestric v Martinez Cleaning Co.*, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

In addition, to the extent that Schwartzberg’s opinion can be read to assert that the design of the ramp created a defective condition at the premises, is irrelevant. It is well settled that the violation of a municipal ordinance or regulation, including a violation of a local code, constitutes only some evidence of negligence and does not constitute negligence as a matter of law (see *Bauer v Female Academy of the Sacred Heart*, 97 NY2d 445, 741 NYS2d 491 [2002]; *Elliot v City of New York*, 95 NY2d 730, 724 NYS2d 397 [2001]; *Major v Waverly & Ogden, Inc.*, 7 NY2d 332, 197 NYS2d 165 [1960]; *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 857, 888 NYS2d 100 [2d Dept 2009]). In addition, it must be established that the alleged violation was a proximate cause of the plaintiffs’ injuries (see *Noller v Peralta*, 94 AD3d 833, 941 NYS2d 703 [2d Dept 2012]; *Lubitz v Village of Scarsdale*, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]; *Deutchsh v Davis*, 298 AD2d 487, 750 NYS2d 84 [2d Dept 2002]; *Woznick v Santora*, 184 AD2d 692, 585 NYS2d 97 [2d Dept 1992]). Here, the plaintiff indicated that the location where she fell was flat, not sloped or ramped. Thus, any contention that Rechler’s alleged negligence regarding the design and condition of the ramp could be the proximate cause of the plaintiff’s injuries is based on speculation (see eg. *Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; *Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 909 NYS2d 543 [2d Dept 2010]; *Louman v Town of Greenburgh*, 60 AD3d 915, 876 NYS2d 112 [2d Dept 2009]).”

Moreover, the plaintiff has failed to raise a triable issue of fact as to whether she slipped on a patch of ice and snow that was present from a prior storm as opposed to precipitation from the storm in progress, and whether defendants had actual or constructive notice of the preexisting condition (see *Smith v Christ's First Presbyt. Church of Hempstead, supra*; *Meyers v Big Six Towers, Inc., supra*). Counsel for the plaintiff contends that there was a snowfall of 3.8 inches and precipitation of .29 inches the day before the plaintiff’s accident. In support of his contention, counsel for the plaintiff submits unauthenticated climate reports downloaded from the internet, which are not in admissible form (*Pu v Bruni*, 24 Misc 3d 1245[A], 899 NYS2d 62 [Sup Ct, New York County 2009]; *Morgan, Lewis & Bockius v IBuyDigital.com, Inc.*, 14 Misc 3d 1224[A], 836 NYS2d 486 [Sup Ct, New York County

2007]). Regardless, the plaintiff's testimony reveals that there was no snow or ice at the premises upon her arrival at work the morning of her accident.

Accordingly, that branch Rechler's motion for summary judgment dismissing the complaint against it is granted.

The Court now turns to that branch of Rechler's motion which seeks summary judgment against Nova. A review of the third-party complaint reveals that Rechler has asserted causes of action sounding in contractual indemnification, common-law indemnification and contribution against Nova. The "critical requirement" of a valid claim for contribution is that "the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997] quoting *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]; see also *Nelson v Chelsea GCA Realty*, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). Similarly, the key element of a common-law cause of action for indemnification is a duty owed from the indemnitor to the indemnitee arising from the principle that "every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (*Raquet v Braun*, 90 NY2d 177, 659 NYS2d 237 [1997]; quoting *Oceanic Steam Nav. Co. (Ltd.) v Compania Transatlantica Espanola*, 134 NY 461 [1892]; see also *Charles v William Hird & Co., Inc.*, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; *Arrendal v Trizechahn Corp.*, 98 AD3d 699, 950 NYS2d 185 [2d Dept 2012]; *Nelson v Chelsea GCA Realty*, 18 AD3d 838, 796 NYS2d 646 [2d Dept 2005]). In light of the determination herein that the plaintiff is barred from recovering based on the storm-in-progress doctrine, neither Rechler nor Nova can be found responsible for the plaintiff's injuries. The Court finds that the dismissal of the complaint against Rechler renders its causes of action for common-law indemnification and contribution academic (*Boone v 100 Marcus Drive Assocs.*, 61 AD3d 798, 877 NYS2d 433 [2d Dept 2009]; *Zabbia v Westwood, LLC*, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; *Hajdari v 437 Madison Ave. Fee Assocs.*, 293 AD2d 360, 740 NYS2d 328 [1st Dept 2002]).

The right to contractual indemnification depends upon the specific language of the contract between the parties (see *Kielty v AJS Constr. of L.I., Inc.*, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; *Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; *Torres v LPE Land Dev. & Constr. Inc.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Canela v TLH 140 Perry St.*, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

A review of the lease between Rechler and Nova reveals that it includes a contractual indemnification provision. It is undisputed that the lease includes a clause in paragraph 68 of the rider attached thereto that provides, in pertinent part: "[t]enant shall indemnify and hold Owner harmless against any and all claims, suits, damages or causes of action for damages ... resulting from any injury to

person and/or property or loss of life sustained in or about the demised premises ...and from any and all legal fees and other charges to which the Owner may be put in defending the same.” However, “a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1; see *McAllister v Constr. Consultants L.I., Inc.*, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]; *Reynolds v County of Westchester*, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]). Here, Rechler has established that it is free from negligence.

In opposition to this branch of Rechler’s motion, Nova submits the affirmation of its attorney, who contends, among other things, that Rechler has failed to establish a breach of a separate provision of the lease between the parties, and that the testimony of Nova’s president raises an issue whether Rechler could be found liable to the plaintiff for negligence. The first contention is not relevant as Rechler has not asserted a cause of action for breach of the lease agreement, and the second is without merit in light of the findings herein. It is determined that the only remaining issue is whether the subject indemnity provision violates General Obligations Law § 5-322.1 which provides, in pertinent part: “1. A covenant, promise, agreement or understanding in ... a contract or agreement relative to the ... maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee ... in whole or in part, is against public policy and is void and unenforceable.”

An indemnification agreement provision does not violate General Obligations Law §5-322.1 where it does not require the subcontractor to indemnify the contractor for its own negligence (*Brooks et al v Judlau Contracting, Inc.*, 11 NY3d 204, 869 NYS2d 366 [2008]). Here, said provision does not require Nova to indemnify Rechler for Rechler’s negligence in whole or in part, and it has been established that Rechler was not negligent herein as a matter of law.

Accordingly, that branch of the Rechler’s motion for summary judgment against Nova is granted to the extent that Nova is obligated pursuant to contract to indemnify Rechler regarding the legal fees and other charges incurred by Rechler in defending the plaintiff’s action.

Nova now moves for summary judgment dismissing the complaint and the third-party complaint in this action. It is noted that the plaintiff’s complaint does not assert a cause of action against Nova. In addition, in light of the determinations made herein, the motion is deemed academic. Similarly, that branch of the motion which seeks summary judgment dismissing the third-party complaint is deemed academic. Regardless, the motion is procedurally defective in that it was not made within the time limitations prescribed by CPLR 3212 (a) which states, among other things, that motions for summary judgment “shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.” The Court’s computerized records indicate that the note of issue was filed in this matter on November 4, 2013. The instant motion was made on March 25, 2014, the date it was served (CPLR 2211). Inasmuch as this motion was not interposed prior to the expiration of the 120-day time limitation set forth in CPLR 3212 (a), it is untimely (see *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). In addition, the defendant has not provided any explanation for late

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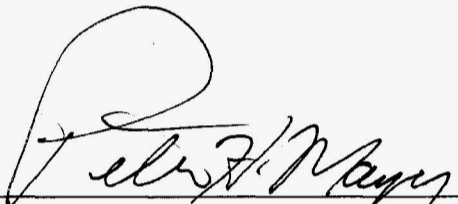
service of the motion or established any "good cause" to permit said late service (*see Brill v City of New York, supra: Bicoounty Brokerage Corp. v Burlington Ins. Co.*, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]; *Bivona v Bob's Disc. Furniture of NY, LLC*, 90 AD3d 796, 935 NYS2d 605 [2d Dept 2011]; *Teitelbaum v Crown Hgts. Assn. for the Betterment*, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]; *Greenpoint Props., Inc. v Carter*, 82 AD3d 1157, 919 NYS2d 370 [2d Dept 2011]; *John P. Krupski & Bros., Inc. v Town Bd. of Town of Southold*, 54 AD3d 899, 864 NYS2d 149 [2d Dept 2008]).

Accordingly, Nova's motion is denied as untimely.

The parties are directed to appear for a hearing at the Supreme Court Building, One Court Street, Part 17, Riverhead, New York at 9:30 a.m. on **December 17, 2014**, and to produce appropriate documentation to support the amount of costs and attorney's fees sought by the respective claimants as reimbursement from the other party.

The parties are directed to settle judgment in accordance with this order. However, the Court directs that settlement of said judgment be held in abeyance pending the outcome of the hearing to determine the amount of reimbursement due to Rechler herein.

Dated: October 3, 2014



PETER H. MAYER, J.S.C.