Garcia v 184th W. 10th St. Corp.
2019 NY Slip Op 30745(U)
March 20, 2019
Supreme Court, New York County
Docket Number: 153436/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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LETICIA GARCIA,

Plaintiff,

- v -

184TH WEST 10TH STREET CORP. and EMPELLON LLC,

Defendants.

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184TH WEST 10TH STREET CORP.,

Third-Party Plaintiff,

-v-

EMPELLON LLC and SADA ONE LLC,

Third-Party Defendants.

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INDEX NO. 153436/2016

MOTION SEQ. NO. 003, 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 125, 131, 132, 133, 134, 135

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 110, 111, 123, 124, 126, 127, 128, 129, 130

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, it is ordered that the motions are decided as follows.

In this personal injury action commenced by plaintiff Leticia Garcia, defendant/third-party plaintiff 184th West 10th Street Corp. ("184") moves (motion sequence 003), pursuant to CPLR 3212, for summary judgment: 1) dismissing the complaint; and 2) on its claim for contractual indemnification against defendant/third-party defendant Empellon LLC ("Empellon") and third-

party defendant Sada One LLC ("Sada"). Plaintiff, Sada and Empellon oppose the motion. Empellon and Sada move (motion sequence 004), pursuant to CPLR 3212, for summary judgment dismissing all claims asserted against them. Plaintiff and 184 oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured on July 19, 2014 when she fell on a slippery step at her place of employment, Empellon Taqueria ("the restaurant"), located at 230 West 4th Street New York, New York ("the premises"), in a building owned by 184. Docs. 1, 83.[1] The ground floor and basement of the premises were leased by 184 to Sada on October 1, 2010 for use as a restaurant. Doc. 93.

The lease provided, inter alia, that: 1) Sada was to "preserve [the premises] in good order and condition" (Doc. 93 at par. 2); 2) 184 had the right to reenter to inspect the premises, to show the premises for the purpose of sale or rental, or to make repairs (Doc. 93 at par. 2; Rider, at par. 66); 3) tenant agreed to procure general liability insurance with limits of no less than $3 million naming 184 as an additional insured (Doc. 93, Rider, at par. 42[a]); and 4) 184 "shall not be obligated to make any improvements or alterations to the [p]remises", which were accepted "[a]s [i]s." Doc. 93, Rider, at par. 57. Paragraph 42(a) of the Rider further provided that:

> Unless caused by or due to the negligence or willful misconduct of [184], its agents, employees, licenses [sic], tenants, invitees or contractors . . . [Sada] shall indemnify and save harmless [184] from all liabilities, obligations, damages, penalties, claims and reasonable costs and expenses form [sic] which [184] shall not be reimbursed by insurance, including reasonable attorneys' fees, paid, suffered or incurred as a result of any breach by [Sada], [Sada's] agent, contractors, employees, invitees, or

[1] All references are to the documents filed with NYSCEF in this matter.

> licensees, of any covenant or condition of this Lease, or the carelessness, negligence or improper conduct of [Sada], [Sada's] agents, contractors, employees, invitees or licensees.

Doc. 93 at par. 42(a).

This action was commenced by the filing of a summons and verified complaint on July 8, 2015. Docs. 1, 83. In her complaint, plaintiff alleged that the premises were owned, maintained, operated, and/or controlled by 184, and that she was injured due to the negligence of that entity. Docs. 1, 83. 184 joined issue by service of its answer filed July 11, 2016. Docs. 6, 84.

On July 5, 2016, plaintiff filed a bill of particulars alleging, inter alia, that she fell on steps located between the main floor and basement of the premises due to an unspecified "ongoing dangerous condition". Docs. 4, 85. Plaintiff claimed that defendant created and had actual and constructive notice of the condition. Id. Plaintiff alleged that 184 violated sections 50 (entrance halls) and 52 (stairs) of the Multiple Dwelling Law, as well as New York City Building Code ("Building Code") sections 1009.10.1 and 1012 (handrails), 1024.2.1 (steps), 1024.2.3 (handrails), and 1024.5 (illumination), as well as the NFPA Life Safety Code.[2]

On or about September 12, 2016, 184 commenced a third-party action against Empellon and Sada which, it alleged, were the tenants at the premises. Docs. 7, 10, 86. The third cause of action in the third-party complaint was for contractual indemnification against Empellon and Sada based on the lease. Doc. 86 at pars. 39-44. Empellon and Sada joined issue by answer to the third-party complaint filed January 20, 2017. Docs. 21, 87.

Plaintiff was deposed on May 18, 2017. She testified that, on the date of her accident, she was employed by the restaurant, where she had worked for six months. Doc. 88, at 15, 25. Plaintiff was employed as a food preparer and, 5 days per week from 9 a.m. until 4 p.m., she

[2] In the bill of particulars, plaintiff refers to the Building Code as "FDNY".

prepared salsa, guacamole, and tortillas. Doc. 88 at 17, 19-20, 35. She was supervised by a chef named Jasson. Doc. 88 at 18, 66 – 67.

On the day of the alleged incident, plaintiff arrived at the restaurant and descended the stairs from the kitchen to the basement to turn on the tortilla maker. Id. at 32-36. She began making dough for tortillas and washed and peeled vegetables in order to make salsa. Id. at 38-39, 71-72. She also peeled chiles, brought them upstairs, started to cook them, went back downstairs and, when the chiles were done cooking, she went back upstairs to get them. Id. at 39. That morning, she had gone up and down the stairs twice without incident, and the stairs were not slippery. Id. at 39-40, 73. Additionally, during the six months she had worked at the restaurant, plaintiff had carried cooked vegetables to the basement every day without incident until the date she fell. Id. at 40-41, 101.

At the time the accident occurred, plaintiff was walking down the stairs to the basement carrying a rectangular bowl about 2 feet wide which was full of cooked tomatoes and chiles. Id. at 40, 74-75. The bowl was very hot and required her to use two hands, protected by towels, to hold it. Id. at 40, 75-76, 79.

When she reached the last step right before the basement landing, she slipped and fell. Id. at 48. She could not identify what she fell on but maintained that the penultimate step was slippery. Id. at 48-50. Plaintiff maintained that she was unable to see the slippery substance prior to her fall because the stairs were poorly lit. Id. at 95. Nor did plaintiff see the substance after she fell because she lost consciousness. Id. at 96. Plaintiff attributed her fall to the slippery substance on the step and the poor lighting. Id. at 44-45, 50. About three months before the accident, plaintiff complained to a chef named Max about the poor lighting. Id. at 50-51, 80, 94.

At her deposition, plaintiff identified photographs of the stairway in question, but insisted that the handrail and lights depicted in those images were not present on the date of the incident. Id. at 42-45; 99-101.[3]

Following her deposition, plaintiff moved (motion sequence 002), pursuant to CPLR 3025(b), to amend the complaint to name Empellon and Sada as direct defendants. Doc. 29. By order entered January 17, 2018, this Court granted the motion in part, allowing plaintiff to assert a direct claim against Empellon. Doc. 77. In deciding the motion, this Court noted that, after a hearing conducted on May 31, 2017, the State of New York Workers' Compensation Board issued a notice of decision dated June 5, 2017 awarding plaintiff workers' compensation benefits in connection with the alleged accident and that the award reflected that plaintiff was employed by Sada. Doc. 35. The amended complaint, filed June 5, 2017, alleged, inter alia, that Empellon negligently maintained, managed and operated the premises and that it had actual and/or constructive notice of the condition which caused the accident. Doc. 30.

Lawrence Brue, building manager for 184 at the premises since 2004, testified at a deposition on May 19, 2017. Doc. 89 at 5-6, 48. He stated that, although 184 had a right to reenter the premises, it had no key and could only do so with permission from Sada, the tenant which leased the restaurant space. Doc. 89 at 5-7, 21-26. Brue represented that the stairs were built in 1881. Doc. 89 at 18-19. He also stated that, if the lighting in the area of the stairs was insufficient, or if the stairs needed repair, the tenant would have been responsible for addressing those concerns. Doc. 89 at 60, 70-71. Further, he recalled there was a handrail on the stairs, and

[3] Plaintiff's testimony in this regard was unclear. Although she denied that a handrail was present on the date of the accident (Doc. 88 at 42-45; 99-101), she also testified that she was not holding onto a handrail when she fell because she was carrying the bowl. Doc. 88 at 45. Further, although she testified that she fell on something slippery and that there was "no lighting" on the stairs (Doc. 88 at 49-50), she also asserted in her affidavit in opposition to the motions that the photographs annexed to her opposition (Doc. 117), which show lighted steps, depict the condition on the day of the incident. Doc. 113 at par. 7.

that the stairs were lighted, since at least the time he became building manager. Doc. 89 at 60, 62. He further stated that, as tenant, Sada was responsible for maintenance of the stairway. Doc. 89 at 37-39. He was not aware of any violation being issued in connection with the stairs prior to the date of plaintiff's accident. Doc. 89 at 40.

Adam Rand testified at his deposition on June 12, 2017 that he was hired by Sada as a restaurant consultant and, in this capacity, oversaw the maintenance at the restaurant. Doc. 90 at 8, 12, 14. Sada was an umbrella company which operated three restaurants in New York City. Doc. 90 at 16-17. Sada had four partners, two of whom were Alexander Stupak, who was also the chef and founder, and David Rodolitz. Doc. 90 at 18-19. He knew of no complaints about the lighting on the stairs and was not aware of any employees falling on the stairs other than plaintiff. Doc. 90 at 29-31. Rand stated that, although the lighting on the stairs was sufficient, Sada would have been required to install additional lighting if it had been needed. Doc. 90 at 28-29. Rand represented that food at the restaurant was prepared downstairs and cooked upstairs. Doc. 90 at 24-26.

Rodolitz testified at his July 7, 2017 deposition that he was a partner at Sada Holdings Empellon. Doc. 91 at 6. Rodolitz stated that Stupak owned a company called Empellon LLC which had a business relationship with Sada. Doc. 91 at 9. According to Rodolitz, "Sada One LLC [was] the legal name of Empellon Taqueria at 230 West 4th Street." Doc. 91 at 17. Rodolitz believed that the stairway had a railing and lights when Sada first leased the restaurant. Doc. 91 at 32. He also admitted that Sada took the restaurant "as is" and that it therefore would have been responsible for the "general maintenance" of the stairway, including lighting and cleaning. Doc. 91 at 33. He never received any complaints about the stairs and did not recall any prior incident involving them. Doc. 91 at 34.

In a bill of particulars filed October 16, 2017, plaintiff realleged the same code violations set forth in the initial bill of particulars and also alleged violations of the Building Code of 1916, § 146 (handrails), § 153, paragraph 4 (treads and risers), § 154 (exterior stairways), § 527 (means of egress); Building Code of 1938 and 1968 § C26-604.8 and 27-375(e) and (f) (treads and risers) and C26-126.105.2 and § C27-128 (owner responsible for safe maintenance); Building Code of 2008 § 28-301.1 (owner responsible for safe condition); Rules and Regulations of the State of New York Article 5, § 765.4(9) (treads and risers); MDL § 59 (bakeries and fat boiling), § 78 (repairs), § 80 (cleanliness), New York State Building Construction Code sections C 212-4 (821.4) (stairways) and C 212-4 (821.4a) (general requirements); New York State Building Code § 101.2 (property maintenance); Residential Code of New York State § R314.2 (treads and risers), R315.1 (handrails); and Administrative Building Code § C26-292.0 (treads). Doc. 44. Although plaintiff once again alleged that she fell as the result of an ongoing dangerous condition, she did not specify what the condition was. She further alleged that the treads were not of uniform size, that the tread nosings were bent, and that the lighting on the steps was inadequate. Doc. 44.

After plaintiff filed a note of issue 184 moved, pursuant to CPLR 3212 (motion sequence 003), for summary judgment dismissing the complaint and for summary judgment against Sada and Empellon on its claim for contractual indemnification. Plaintiff, Sada and Empellon oppose the motion. Empellon and Sada move, pursuant to CPLR 3212 (motion sequence 004), for summary judgment dismissing all claims against them. Plaintiff and 184 oppose the motion.

CONTENTIONS OF THE PARTIES:

184 argues that it is entitled to summary judgment dismissing the complaint because it is merely an out-of-possession landlord with a right to inspect the premises, and thus cannot be liable

for any injuries arising from a defective condition unless the condition was a significant structural or design defect violative of a specific safety provision.[4] It further asserts that the code provisions alleged by plaintiff are inapplicable. 184 also maintains that it is entitled to summary judgment on its claim against Sada and Empellon for contractual indemnification because paragraph 42 of the Rider requires Sada to procure insurance for the benefit of 184 and to indemnify 184 for any damages, including costs, for which it was not covered by the insurance procured by 184.[5] Additionally, 184 asserts that the indemnification provision is not violative of General Obligations Law ("GOL") § 5-321 (prohibiting agreements pursuant to which parties are indemnified for their own negligence) since it is combined with an insurance procurement provision.

In support of its motion, 184 submits, inter alia, the sworn affidavit of its expert, Jeffrey Schwalje, P.E., a professional engineer licensed in New York and New Jersey, dated January 19, 2018. Doc. 94. Schwalje, who inspected the stairway on behalf of 184 on August 25, 2017 opines, inter alia, that the stairway was "reasonably safe for persons descending [it]"; "the step geometry was reasonably consistent and would not [have been] a contributing factor in plaintiff's accident"; that the tread on which plaintiff allegedly slipped was "slip resistant in wet conditions pursuant to American National Standards Institute B101.3 slip resistance standards;" and that the lighting on the stairs was code compliant. Doc. 94. He further stated that, since the stairway is "an access stairway", the provisions of the NYC Building code relating to interior stairways do not apply." Doc. 94 at par. 4.

[4] In its motion papers, 184 refers to the tenant as "Empellon" despite the fact that the lease was between 184, as landlord, and Sada, as tenant. Doc. 93.

[5] Although 184's notice of motion seeks summary judgment dismissing the complaint as well as summary judgment on its contractual indemnification claims against Sada and Empellon, it argues in its reply that "if [its] motion for summary judgment [dismissing the complaint] is not granted, [then it] is entitled to contractual indemnity over and against [Sada and Empellon]." Doc. 132 at par. 11.

Empellon and Sada assert that they are entitled to summary judgment dismissing all claims against them on the ground that the stairs were reasonably safe for their intended use and neither had notice of any dangerous condition. Empellon also asserts that it is entitled to summary judgment dismissing all claims against it on the ground that, since it neither leases nor made a special use of the premises, it did not owe plaintiff any duty to keep the stairs safe.

In support of their motion, Sada and Empellon submit, inter alia, the affidavit of Stupak, in which he attests, among other things, that: 1) he is a member of Sada and the owner of Empellon; 2) Empellon is "a personal business account he created and trademarked as a part of the corporate structure"; 3) Empellon is not responsible for maintaining the restaurant or hiring, firing, or training its employees; 4) Empellon was not a party to the lease between 184 and Sada; and 5) Empellon does not receive any revenue from Sada or the restaurant. Doc. 98.

Sada and Empellon also submit an expert disclosure for Schwalje, as well as an unsworn report by Schwalje in which he essentially states that the stairs were safe. Doc. 102.

In an affirmation in partial opposition to the motion by Sada and Empellon, 184 argues that those entities are not entitled to dismissal of all claims asserted against them by 184. Doc. 110. In support of this contention, 184 maintains that the lease required the tenant to be responsible for the stairs. 184 further asserts that the lease required the tenant to indemnify and procure insurance for it. Thus, maintains 184, if the claims against it are not dismissed, then none of the claims against Sada and Empellon should be dismissed since those entities had a duty to 184 to maintain the stairs, including cleaning and lighting the same.

Plaintiff's counsel submits what he characterizes as an affirmation in opposition to both summary judgment motions. Doc. 112.[6] The affirmation is single-spaced, thereby violating Part

[6] Although counsel represents that the affirmation, filed under sequence 003, is in opposition to both summary judgment motions, the major substantive arguments which can be gleaned therefrom are in opposition to the motion

2 rules, and this, combined with the fact that it does not contain any page or paragraph numbers, renders it extremely difficult to read. Additionally, the rambling, blunderbuss affirmation contains arguments which are poorly formed and disjointed. Nevertheless, this Court discerns the following arguments as having been raised by plaintiff's attorney: 1) defendants Sada and Empellon failed to establish their entitlement to summary judgment because the question of direction and control over the steps cannot be determined as a matter of law; 2) Empellon is not entitled to dismissal since its principal, Stupak, directed and controlled plaintiff's duties; 3) summary judgment in favor of Sada and Empellon would be premature pursuant to CPLR 3212(f) since those entities were not deposed and did not produce documents.

Annexed to plaintiff's affirmation in opposition is an affidavit of plaintiff, who attests that her work was supervised by Stupak, who operated Empellon, or his assistant. Doc. 113. She was directed to "cook the sauce, [and] take the hot sauce from the kitchen, down the stairs to the [b]asement." Doc. 113 at par. 7. On the day of the alleged accident, Stupak told her to carry a bowl of hot sauce from the kitchen downstairs to the basement. Doc. 113. That day, the steps were not lit, there was no handrail on the stairs, and there was no reflective tape on the treads, which were also irregular in size. Doc. 113.

In opposition to the motions, plaintiff also submits the report of Alvin Ubell, a building inspector, sworn and signed under the penalty of perjury. Doc. 119. There is no indication in Ubell's curriculum vitae that he is a licensed engineer. Ubell, who inspected the stairs, opines that it is his "opinion within a reasonable degree of building inspection and stair maintenance certainty that the stair in question, particularly the combination of a created darkened stairwell, a non repaired and non maintained set of steps, in that the treads and risers are inconsistent, and a

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by Sada and Empellon filed under motion sequence 004. With respect to 184, plaintiff merely contends that it "cannot abrogate a dangerous condition [it created]."

handrail that has an applied support block creating a hand and finger obstruction", as well as "forward bent [ ] tread nosings at the foot of the stair" caused plaintiff's accident. Doc. 119 at 13.

In a reply affirmation, 184 maintains that plaintiff's opposition papers do not address the arguments made in support of its motion. Doc. 123. In any event, argues 184, Ubell's report was unsworn and thus cannot be considered in opposition to the summary judgment motions. Further, asserts 184, the codes allegedly violated by 184 are inapplicable herein since neither plaintiff nor anyone else testified that the condition or structure of the stairs caused the accident which, according to plaintiff herself, resulted from a slippery substance on a tread as well as dim lighting, for neither of which 184 would have been responsible.

In a reply affirmation in partial opposition to 184's motion and in reply to plaintiff's and 184's opposition to their motion for summary judgment, Sada and Empellon argue that, since Empellon is not a party to the lease, it is not required to indemnify 184. Sada also asserts that it is not required to indemnify 184 since plaintiff has not established any negligence on its (Sada's) part. Sada and Empellon further maintain that plaintiff's opposition papers must be disregarded as unintelligible. To the extent plaintiff's affirmation is considered, Sada and Empellon argue that their motion should not be denied as premature pursuant to CPLR 3212(f) because Stupak was never deposed, since plaintiff filed a note of issue certifying that discovery was complete, and thus cannot now assert that depositions remain outstanding. They also assert that plaintiff failed to raise a question of fact regarding whether Empellon has a duty to plaintiff.

In an affirmation in reply to Sada and Empellon's opposition to its motion (Doc. 132), 184 argues that, despite Empellon's insistence that it was not involved with the restaurant, Empellon admitted in opposition to plaintiff's motion to amend the caption that "[t]here is no doubt that plaintiff was employed with EMPELLON LLC at the time of the accident." Doc. 33 at par. 14.

(emphasis provided). 184 maintains that, since this contention contradicts Empellon's previous representation, it cannot be considered on this motion. Further, 184 asserts that, although plaintiff fails to establish that the stairs were unsafe, any such condition would have been the responsibility of Sada and/or Empellon and, thus, if its motion is not granted, then it is entitled to contractual indemnification against Sada and Empellon.

LEGAL CONCLUSIONS:

Motion for Summary Judgment by 184 (Motion Sequence 003)

184, the owner of the premises and an out-of-possession landlord, established its entitlement to summary judgment as a matter of law by establishing that it had no contractual duty to maintain the stairway in question but, rather, retained a limited right to reenter the premises to inspect them, show them for rental or sale purposes, or make repairs not required to be made by 184 (such as structural repairs), and by demonstrating that the alleged inadequate lighting, absence of a handrail, and construction of the steps were not significant structural or design defects which violated specific statutory safety provisions. *See Dirschneider v Rolex Realty Co. LLC*, 157 AD3d 538 (1st Dept 2018); *Joyner v Mingles Café, Inc.*, 115 AD3d 560 (1st Dept 2014); *Kittay v Moskowitz*, 95 AD3d 451 (1st Dept 2012).

As noted above, plaintiff claims a litany of code and statutory violations, and they are addressed as follows:

1. MDL § 50 governs "entrance halls" and is inapplicable herein.
2. MDL § 52 governs "stairs" in multiple dwellings constructed after 1929 and is thus inapplicable to this building which, Brue testified, existed as early as 1881. Doc. 89 at 16-19.

3. Building Code § 1009.10.1 and 1012 govern handrails and are thus inapplicable since plaintiff testified that she was carrying a hot bowl with two hands when she fell and thus would not have been able to hold what she claims was a missing handrail. *See Bethea v Weston House Hous. Dev. Fund Co., Inc.*, 70 AD3d 470, 471 (1st Dept 2010).

4. Building Code § 1024.2.1 sets forth requirements for markings on egress paths and is thus inapplicable herein.

5. Building Code § 1024.2.3 sets forth requirements for handrails on egress paths and is thus inapplicable herein. In any event, a handrail violation does not constitute a significant structural or design defect. *See Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 (1st Dept 2014).

6. Building Code § 1024.5 is entitled "Reserved" and thus, contrary to plaintiff's contention, does not govern illumination. In any event, noncompliance with a regulation regarding lighting does not constitute a significant structural or design defect. *See Kittay v Moskowitz*, 95 AD3d at 452.

7. Building Code of 1916, § 146 (handrails) is insufficient to impose liability on 184 since a handrail violation is not a significant structural defect. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

8. Building Code of 1916, § 153 (4) (treads and risers) is insufficient to impose liability on 184 since tread and riser violations are not significant structural defects. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

9. Building Code of 1916, § 154 (exterior stairways) is clearly inapplicable to the stairway from the kitchen to the basement which is the subject of this case.

10. Building Code of 1916, § 527 (means of egress) is also inapplicable to the stairway from the kitchen to the basement which is the subject of this case.

11. Building Code of 1938 and 1968 § C26-604.8 and 27-375(e) and (f) (treads and risers) are insufficient to impose liability on 184 since tread and riser violations are not significant structural defects. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

12. Building Code of 1938 and 1968 § C26-126.105.2 and § C27-128 (owner responsible for safe maintenance) are insufficient to impose liability on 184 since they impose only a general duty on owners to keep their buildings in safe condition. *See Varga v North Realty Co.*, 123 AD3d 639 (1st Dept 2014).

13. Building Code of 2008 § 28-301.1 (owner responsible for safe condition) is also insufficient to impose liability on 184 since it imposes only a general duty on owners to keep their buildings in safe condition. *See Varga v North Realty Co.*, 123 AD3d at 639. Indeed, it falls under the heading "Article 301 General".

14. Rules and Regulations of the State of New York Article 5, § 765.4(9) (treads and risers) is insufficient to impose liability on 184 since tread and riser violations are not significant structural defects. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

15. MDL § 59 (bakeries and fat boiling) is inapplicable herein.

16. 184 cannot be liable pursuant to MDL § 78 (repairs) because there is no evidence that it created the slippery condition or had actual and/or constructive notice thereof. *Zapin v Israel*, 285 AD 968 (2d Dept 1955).

17. This Court is unable to locate New York State Building Construction Code § C 212-4 (821.4) (stairways) and 821.4a (general requirements). Plaintiff appears to be referring to 9 NYCRR 821.4, which addresses risers and guardrails, and is thus insufficient to impose liability on 184. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580. In any event, since §821.4a sets forth only general requirements, this section would not be sufficient to impose liability on 184.

18. This Court is also unable to locate New York State Building Code § 101.2, which, plaintiff asserts, governs property maintenance. Plaintiff appears to be referring to Property Maintenance Code § 101.2, which is entitled "Scope" (*see People v Kaloedas Realty Enterprises, Inc.*, 18 Misc3d 128(A) (App Term 9th and 10th Jud Dists 2007) and is thus insufficient to impose liability on 184.

19. Residential Code of New York State § R314.2 (treads and risers) and R315.1 (handrails) are insufficient to impose liability since, as noted above, tread, riser, and handrail violations are not significant structural defects. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

20. Administrative Building Code § C26-292.0 (treads) is also insufficient to impose liability since, as noted above, tread violations are not significant structural defects. *See Podel v Glimmer Five, LLC*, 117 AD3d at 580.

Given the foregoing, all claims and cross claims asserted against 184 are dismissed.

Motion for Summary Judgment By Sada and Empellon (Motion Sequence 004)

As noted previously, 184 argued that it only sought contractual indemnification against Sada and Empellon in the event that its motion for summary judgment dismissing all claims against it were not granted. Given that 184 has no liability, its motion for summary judgment has been granted, and all claims against it have been dismissed, Sada and Empellon are entitled to summary

judgment dismissing 184's third-party complaint seeking contractual indemnification against them. This leaves plaintiff's negligence cause of action against Empellon as the sole remaining claim.

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises." *Branch v County of Sullivan*, 25 NY3d 1079, 1082 (2015) *citing Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 (1st Dept 2006). In an action to recover damages in a slip and fall action such as this, a defendant moving for summary judgment must establish that it did not create the condition which caused the fall, and that it had no actual or constructive notice of the condition for a sufficient length of time to remedy it. *See Gordon v American Museum of Natural History*, 67 NY2d 836 (1986); *Pagan v New York City Hous. Auth.*, 121 AD3d 622, 623 (1st Dept 2014). Only if the moving party meets its initial burden of proving that it is entitled to summary judgment as a matter of law will the burden then shift to the opponent who must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Since the granting of summary judgment is the functional equivalent of a trial, it is a drastic remedy which should not be granted "where there is any doubt as to the existence of a triable issue." *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 231 (1978) (internal quotation marks omitted). Whether a dangerous or defective condition exists usually depends on the circumstances of the case and is generally an issue of fact. *See Trincere v. County of Suffolk*, 90 NY2d 976, 977 (1997).

> A nonowner who occupies or controls premises has a duty to exercise reasonable care regarding the condition of the premises (*see Stevenson v Saratoga Performing Arts Ctr., Inc.*, 115 AD3d 1086, 1086-1087 [2014]). The boundaries of occupancy and extent of control are typically addressed in a written agreement, and may also be established or modified by a course of conduct (*see Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011]). The absence of a written

> agreement creates a situation ripe for factual issues regarding relevant rights and responsibilities to the premises (*see e.g. Geffs v City of New York*, 105 AD3d 681, 682 [2013]; *McClenan v Brancato Iron & Fence Works*, 282 AD2d 722, 722-723 [2001]; *Downey v R.W. Garraghan, Inc.*, 198 AD2d 570, 571-572 [1993]).

Contreras v Randi's Enter., LLC, 126 AD3d 1199, 1199-1200 (3d Dept 2015).

Here, Empellon established its prima facie entitlement to summary judgment by establishing that it neither created the allegedly dangerous conditions nor had prior actual or constructive notice thereof. *See Luna v CEC Entertainment, Inc.* 159 AD3d 445 (1st Dept 2018). Specifically, it relies on the following:

1. Plaintiff's testimony that, on the day of her accident, she had gone up and down the stairs twice before without incident, and the stairs were not slippery. (Doc. 88 at 39-40, 73);

2. Plaintiff's testimony that, during the six months she had worked at the restaurant, she had carried cooked vegetables to the basement five times per week without incident until the date she fell. (Doc. 88 at 40-41, 101);

3. Brue's testimony that he was not aware of any violation being issued in connection with the stairs prior to the date of plaintiff's accident. (Doc. 89 at 40);

4. Rand's testimony that the lighting on the stairs was sufficient, that he knew of no complaints about the lighting on the stairs, and was not aware of any employees falling on the stairs other than plaintiff. (Doc. 90 at 28-31); and

5. Rodolitz's testimony that he never received any complaints about the stairs and did not recall any prior incident involving them. (Doc. 91 at 34).[7]

In opposition to the motion, plaintiff submitted, inter alia, her testimony that she fell because the stairs were slippery and dark (Doc. 88 at 44-45, 50) and that, about three months before

[7] As noted above, Empellon submitted an expert disclosure for Schwalje, as well as an unsworn report he wrote. Since it is not in admissible form, it was not considered in determining whether Empellon established its prima facie entitlement to summary judgment.

the accident, she complained to a chef named Max, who was not an owner of the restaurant, about the poor lighting but her complaint was ignored. Doc. 88 at 50-51, 80, 94, 97. However, since plaintiff did not know Max's last name and has not submitted proof of who he worked for, this, alone, is insufficient to raise an issue of fact regarding whether Empellon had actual notice of the allegedly inadequate lighting. Although plaintiff also testified that she was employed by the restaurant Empellon Taqueria (Doc. 88 at 15) and was awarded benefits by the Workers Compensation Board as an employee of Sada (Doc. 35) she stated in an affidavit in opposition to both motions that a chef named "Alex", who "operates and is Empellon LLC", hired her, was her boss, and he or his second chef controlled her work. Doc. 113.[8] Since Rodolitz testified that Alexander Stupak owned a company called Empellon LLC, which had a business relationship with Sada, this Court finds that questions of fact exist regarding: 1) whether "Alex" is Alexander Stupak and, if so, whether Empellon, through Stupak, knew or should have known that the lighting on the stairs was inadequate; and 2) if Stupak indeed supervised and directed plaintiff, whether he and/or Empellon had the responsibility under the circumstances to make the stairs safer. *See Contreras v Randi's Enter., LLC*, 126 AD3d at 1199-1200.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendant/third-party plaintiff 184th West 10th Street Corp. seeking summary judgment dismissing the complaint and all cross claims asserted

[8] This Court does not address the inconsistency between plaintiff's affidavit, in which she stated that she was supervised by Alex, and her deposition testimony, in which she stated that Jasson supervised her, since this argument was not raised by Empellon.

against it (motion sequence 003) is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion by defendant/third-party plaintiff 184th West 10th Street Corp. seeking summary judgment on its claim for contractual indemnification against defendant/third-party defendant Empellon LLC and third-party defendant Sada One LLC (motion sequence 003) is denied as moot; and it is further

ORDERED that the motion by defendant/third-party defendant Empellon LLC and third-party defendant Sada One LLC seeking summary judgment dismissing all claims asserted against them (motion sequence 004) is granted to the extent of dismissing all third-party claims asserted against those movants, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the claims and cross claims against defendant/third-party plaintiff 184th West 10th Street Corp. and the third-party claims against defendant/third-party defendant Empellon LLC and third-party defendant Sada One LLC are severed and the balance of the action, consisting of plaintiff's direct claim against Empellon LLC, shall continue; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendant/third-party plaintiff 184th West 10th Street Corp. and the third-party action against third-party defendants Empellon LLC and Sada One LLC; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for defendant/third-party plaintiff 184th West 10th Street Corp. shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible* at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that this constitutes the decision and order of the court.

3/20/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:		GRANTED		DENIED		GRANTED IN PART		X	OTHER
		SETTLE ORDER				SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT			REFERENCE