| **Livadas v First Denco Realty, Inc.** |
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| 2020 NY Slip Op 31341(U) |
| May 4, 2020 |
| Supreme Court, New York County |
| Docket Number: 159505/2014 |
| Judge: Nancy M. Bannon |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
-----------------------------------------X
TASSIA LIVADAS

Plaintiff

Index No. 159505/2014

DECISION AND ORDER
Action No. 1

FIRST DENCO REALTY, INC., THOR 1566
THIRD AVENUE LLC, B&B STREET MARKET CORP.,

Defendants.

MOT SEQ 004, 005

-----------------------------------------X
AISSA KHIRANI

Plaintiff

Index No. 153199/2013

DECISION AND ORDER
Action No. 2

FIRST DENCO REALTY, INC., B&B STREET
MARKET CORP., KIM JA BONG

Defendants.

MOT SEQ 005, 006

-----------------------------------------X
MICHELLE DEFORREST, JASON HACKENWERTH

Plaintiff

Index No. 156912/2014

DECISION AND ORDER
Action No. 3

MR. AND MRS. BONG KIM, B&B STREET MARKET
CORP., FIRST DENCO REALTY INC., DENCO
REALTY, LLC, DENCO DISTRIBUTORS, INC.

Defendants.

MOT SEQ 006, 007

-----------------------------------------X

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CLAIRE LUCKNER, ADAM HASHO

Plaintiff

Index No. 156914/2014

DECISION AND ORDER
Action No. 4

MR. AND MRS. BONG KIM, B&B STREET MARKET CORP., FIRST DENCO REALTY INC., DENCO REALTY, LLC, DENCO DISTRIBUTORS, INC.

Defendants.

MOT SEQ 008, 009

-----------------------------------------X

KEVIN O'CONNOR

Plaintiff

Index No. 156916/2014

DECISION AND ORDER
Action No. 5

MR. AND MRS. BONG KIM, B&B STREET MARKET CORP., FIRST DENCO REALTY INC., DENCO REALTY, LLC, DENCO DISTRIBUTORS, INC.

Defendants.

MOT SEQ 005, 006

-----------------------------------------X

NANCY M. BANNON, J.:

## I. INTRODUCTION

Motion sequence numbers 004 and 005 in Action No. 1, motion sequence numbers 005 and 006 in Action No. 2, motion sequence number 006 and 007 in Action No. 3, motion sequence number 008 and 009 in Action No. 4, and motion sequence number 005 and 006 in Action No. 5 are consolidated for disposition.

In these related actions for, *inter alia*, negligence, personal injury, and property damage arising from a fire at an apartment building located at 1566 3rd Avenue in Manhattan, defendants First Denco Realty, Inc. (Denco), B&B Street Market Corp. (B&B), and Bong Ja Kim (Kim)[1] move for summary judgment dismissing the complaint and all cross-claims as against them in each action. The respective plaintiffs in each action oppose the motions.

The motions in Action No. 1 (SEQ 004, 005) are denied. The motions in Action No. 2 (005, 006) are denied. The motions in Action No. 3 (006, 007) are denied. The motions in Action No. 4 (008, 009) are denied. The motions in Action No. 5 (SEQ 005, 006) are granted in part, as discussed herein.

## II. BACKGROUND

At approximately 10:30 p.m. on July 21, 2012, a fire started in the space above the drop-down ceiling of B&B, a 24-hour grocery store that occupied the entire street level of the five-story apartment building owned by Denco at 1566 3rd Avenue in Manhattan. At the time of the fire, plaintiffs Tassia

[1] Defendant Bong Ja Kim was sued as Kim Ja Bong in Action No. 2.

Livadas, Michelle Deforrest, Jason Hackenwerth, Claire Luckner and Adam Hasho were in their respective apartments, located at various locations in the four stories above B&B. The plaintiffs Aissa Khirani and Kevin O'Connor were not in the building at the time of the fire. Upon discovering the fire, the plaintiffs fled the building and escaped through a four-flight stairwell filled with smoke. The fire extensively damaged the building, leaving it uninhabitable for approximately 14 months after the fire. The day after the fire, the plaintiffs were allowed a short amount of time to return to the building to attempt to salvage any personal belongings.

The fire report, in relevant part, stated that: "the fire originated at the subject premises on the ground floor, in the ceiling...in combustible material (wood) in the heat of electrical wiring. The fire extended to all walls, ceilings and contents therein. The fire extended to the second floor, via open voids." The drop-down ceiling where the fire originated was installed in either 1997 or 1998, according to a NYC Buildings Work Permit issued to B&B.

The plaintiff in Action No. 1, Tassia Livadas, alleges a cause of action for negligence as against Denco and B&B and a cause of action for constructive eviction as against Denco.

The plaintiff in Action No. 2, Aissa Khirani, alleges causes of action for negligence against Denco, B&B, and Kim, and breach of the warranty of habitability as against Denco.

The plaintiffs in Action No. 3, Michelle DeForrest and Jason Hackenwerth, allege causes of action for negligence, premises liability, and negligent infliction of emotional distress against Denco, B&B, and Kim.

The plaintiffs in Action No. 4, Claire Luckner and Adam Hasho, allege causes of action for negligence, premises liability, and negligent infliction of emotional distress against Denco, B&B, and Kim and breach of the warranty of habitability against Denco.

The plaintiff in Action No. 5, Kevin O'Connor, alleges causes of action for negligence, premises liability, and negligent infliction of emotional distress against Denco, B&B, and Kim, and breach of warranty of habitability against Denco.

Denco moves for summary judgment, arguing that it was not the proximate cause of the fire, nor did it have actual or constructive notice of any dangerous conditions that may have caused the fire. Moreover, Denco claims that the fire in question occurred within the demised space occupied by B&B and

that B&B was responsible for maintaining the demised space pursuant to the lease between the parties.

B&B and Kim move for summary judgment, arguing that they are not the proximate cause of the fire, nor were they on actual or constructive notice of any dangerous conditions that may have caused the fire. Moreover, B&B claims that the lease provides that it was not permitted to maintain, repair, or affect the public portions of the building or the building's utility services, and that the area where the fire originated was beyond the demised space set forth in the lease.

## III. DISCUSSION

### A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward

with proof in admissible form to raise a triable issue of fact. See Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851 (1985); O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Negligence and Premises Liability

"In order to prevail on a negligence claim, a plaintiff must demonstrate 1) a duty owed by the defendant to the plaintiff, 2) a breach thereof, and 3) injury proximately resulting therefrom." CB by Suarez v Howard Security, 158 AD3d

157 (1st Dept. 2018). The rules concerning premises liability are well settled. A landlord and its commercial tenant have a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). A landlord or commercial tenant may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017).

In support of its motion for summary judgment, Denco submits, *inter alia*, the fire marshal's report, which is inconclusive as to the proximate cause of the fire, its lease with B&B, whereby B&B assumed responsibility for the maintenance and repair of the demised premises, and the affidavit of Robert Denison, the sole owner and shareholder of Denco, which states that he never received any complaint or was aware of any issue with the building's wiring.

Similarly, in support of their motion, B&B and Kim submit, *inter alia*, the fire marshal's report and the lease agreement, whereby Denco prohibits B&B from making any repairs or

alterations to the public portions of the building and the building's utility services. B&B and Kim also submit the expert affidavit of Eugene Pietzak, a New York certified fire investigator, who states that he inspected the wiring above the dropped ceiling after the fire and concluded based on the inspection that B&B did not cause the fire. Additionally, B&B and Kim submit the deposition transcript of Kim, which states that B&B never made any changes to the electrical wiring in the building and that the area above the drop ceiling was not B&B's responsibility under the lease.

The submissions by Denco, B&B, and Kim do not *prima faice* eliminate the existence of triable issues of fact. While the defendants claim that the plaintiffs cannot establish negligence, as there is no evidence as to what caused the fire, it is well settled that "[a] defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the plaintiffs case" (Giaquinto v Town of Hempstead, supra at 1049; see Torres v Merrill Lynch Purchasing, Inc., 95 AD3d 741 [1st Dept. 2012]; Sabalza v Salgado, 85 AD3d 436 [1st Dept. 2011]), "but must affirmatively demonstrate the merit of [their] claim or defense." Velasquez v Gomez, 44 AD3d 649, 651 [2nd Dept.

2007]; see Torres v Merrill Lynch Purchasing, supra; Alvarez v 21st Century Renovations Ltd., 66 AD3d 524 [1st Dept. 2009]).

Instead, the defendants' submissions present issues of fact as to what actually caused the fire, and whether the defendants caused or created the condition that led to the fire or had notice of the condition. Moreover, the conflicting factual assertions of Robert Denison and Kim as to which party had a duty to maintain and repair the area above the drop-down ceiling where the fire started present issues of credibility, which are to be resolved at trial, not on a summary judgment motion. See S.J. Capelin Assoc. V Globe Mfg. Corp., 34 NY2d 338 (1974); DeSario v SL Green Mgt., 105 AD3d 421 (1st Dept. 2013).

In response to both motions, the plaintiffs submit the certificate of occupancy for the building which shows that the ground floor of the building was only approved to be used as a retail store, and affidavits of the various plaintiffs stating that B&B often prepared food. The plaintiffs further submit the affidavit of Joseph Sage, a licensed registered New York architect, which states that, under the New York City Building Code, an authorization to use part of a building for a retail store is distinct from authorization to use part of a building for a restaurant or delicatessen, as the electrical needs of

retail space, i.e. lighting, signage, and possible refrigeration, are significantly less than those of a restaurant or delicatessen, i.e. ovens, stoves, griddles, microwaves, hot water heaters, and dishwashers.

Sage's affidavit further states that, according to the fire report, the fire extended to the second floor via open voids, and that the failure of Denco and B&B to plug said voids could have contributed to the spread of the fire throughout the building.

The plaintiffs also submit the expert affidavit of James Rogers, a master electrician and certified fire investigator, who, upon a review of the pleadings, discovery, deposition testimony, and documents relating to the fire, concludes with a reasonable degree of certainty that the increased electrical load in B&B coupled with water damage degrading the wiring was the cause of the fire. Roger's affidavit states that if the wiring in the building had not been updated, then it would date back to the 1940s. Roger's affidavit also states that if the wiring was originally installed for retail space, rather than food storage and preparation, it would have become significantly strained over time, given the increased electrical load required for refrigeration equipment, lighting, and food preparation

equipment in a 24-hour grocery store. Roger's affidavit further states that this increased electrical load likely lead to the deterioration of the conductor insulation in the wiring, causing the fire. Roger's affidavit also states that, according to Kim's deposition testimony, she repeatedly complained to Denco about water leaks in the ceiling area of the store which were never remedied, and that those leaks likely caused further degradation of the wiring in the building.

The plaintiffs' submissions raise further triable issues of fact as to whether the defendants caused or had actual or constructive notice of a dangerous condition within the premises that they failed to remedy. Specifically, the affidavits of Sage and Rogers raise triable issues as to whether the B&B's operation of a 24-hour grocery store with equipment beyond what was contemplated in the certificate of occupancy, and the electrical strain that the operations caused on the building's wiring, degraded the wiring thereby causing a dangerous condition. The affidavits also raise triable issues of fact as to whether the leaks in the ceiling that Kim complained of and Denco failed to fix contributed to the dangerous condition, or whether Denco's failure to plug the open voids in the building contributed to the spread of the fire.

C. Negligent Infliction of Emotional Distress

To establish a cause of action for the negligent infliction of emotional distress, it must be shown that there was a breach of duty owed to the plaintiff which either unreasonably endangered the plaintiff's physical safety, or caused the plaintiff to fear for his or her own safety. See Sheila C. V Povich, 11 AD3d 120 (1st Dept. 2004); see also Taggart v Costabile, 131 AD3d 243 (2nd Dept. 2015). Although a claim for negligent infliction of emotional distress no longer requires physical injury as a necessary element (see Orenstein v New York City Health and Hospitals Corp., 10 NY3d 1 [2008]; Losquadro v Winthrop University Hosp., 216 AD2d 533 [1995]), the factual situations giving rise to such claims must demonstrate "an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Johnson v State of New York, 37 NY2d 378, 382 (1975). That is, a cause of action for negligent infliction of emotional distress "must generally be premised upon conduct that unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." Gaylord v Fiorella, 28 AD3d 713, 713-714

(1st Dept. 2006) *quoting* Perry v Valley Cottage Animal Hosp., 261 AD2d 522, 522-523 (2nd Dept. 2009).

However, recovery for emotional distress may not be predicated upon the observation of damage to one's property. See Allstate Ins. Co. v Burger King Corp., 25 AD3d 472 (1st Dept. 2006)[negligent destruction of plaintiffs' property without claim that plaintiffs themselves were put in physical danger does not constitute viable claim for negligent infliction of emotional distress]. See also Stella v County of Nassau, 71 AD3d 573 (1st Dept. 2010) [home eviction accompanied by ransacking and videotaping does not constitute sufficient grounds for intentional infliction of emotional distress].

As previously discussed herein, there are triable issues of fact as to whether the defendants breached a duty owed to the plaintiffs. Therefore, to establish entitlement to summary judgment, the defendants must demonstrate that the purported breach did not either unreasonably endanger the plaintiffs' physical safety, or cause the plaintiffs to fear for their own safety. See Sheila C. v Povich, supra.

The defendants fail to submit evidence establishing that the plaintiffs who escaped the burning building did not fear for their own safety. Instead, the defendants argue that the claims

for negligent infliction of emotional distress must fail because they require expert proof to establish a likelihood of severe mental distress. However, the case relied upon by the defendants to support their position, Graber v Bachman (27 AD3d 986 [3rd Dept. 2006]) is distinguishable. The plaintiff in that action, who was asleep in her bedroom when a truck hit a different part of her house, did not have a contemporaneous awareness of the dangerous condition, did not suffer any physical injury, and was not in any danger of physical harm such that there was a traumatic event that placed her in imminent fear of her safety. Id. Therefore expert testimony was required to illustrate how the circumstances gave rise to her emotional distress. Id.

In this case, where the plaintiffs had to flee a burning building, there are circumstances that demonstrate "an especial likelihood of genuine and serious mental distress" such that there is a "guarantee that the claim is not spurious." Johnson v State of New York, supra; see also Battistello v East 51st Street Development Co., 24 Misc 3d 858 (Sup Ct, NY County 2009)(tenant fleeing building after crane crashed into it). Under such circumstances, expert testimony is not necessary, as the conclusion that an individual who has to escape a burning building may experience emotional trauma from such an event does

not require special knowledge or training. See Eiseman v State of New York, 70 NY2d 175 (1987); Allinger v City of Utica, 226 AD2d 1118 (4th Dept. 1996).

However, the defendants do establish their *prima facie* burden for summary judgment as against plaintiff Kevin O'Connor's cause of action for negligent infliction of emotional distress. O'Connor was not in the building at the time of the fire, instead arriving at the building after being called by one of his neighbors. O'Connor's cause of action is predicated on the observation of damage to his property, which is not sufficient to sustain a cause of action for negligent infliction of emotional distress. See Allstate Ins. Co. v Burger King Corp., supra. In response, the plaintiff further alleges that Denco, in allowing the plaintiffs to return to the fire-damaged building the day after the fire to attempt to salvage any personal belongings, caused him to fear for his safety. However, such a voluntary return to the building does not constitute circumstances that demonstrate "an especial likelihood of genuine and serious mental distress" such that a triable issue of fact is raised. Johnson v State of New York, supra.

D. Constructive Eviction and Breach of the Warranty of Habitability

A constructive eviction exists where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. See Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77 (1970); see also Leon v. Harlan, 114 NYS3d 635 (1st Dept. 2020).

A breach of the warranty of habitability provides that a tenant shall not be subjected to any conditions which would be dangerous, hazardous, or detrimental to their life, health, or safety. See Real Property Law § 235-b; Park West Mgt. Corp. v Mitchell, 47 NY2d 316 (1979).

In an action for constructive eviction, a tenant is entitled to recover any rent paid that is attributable to the period after the constructive eviction has taken place, and consequential damages resulting from the eviction. See Real Property Law § 18:18; see also 487 Elmwood, Inc. V Hassett, 107 AD2d 285 (4th Dept. 1985). Similarly "the proper measure of damages for breach of the warranty [of habitability] is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach." Park W. Mgt. Corp. v Mitchell, supra.

Denco, in moving for summary judgment on the plaintiffs' respective claims for constructive eviction and the breach of the warranty of habitability only argues that the plaintiffs fail to seek damages properly attributable to such causes of action, and are instead attempting to recover damages for personal injury and loss of personal property. Although the plaintiffs do not specify their damages in relation to the their respective causes of action for constructive eviction or breach of the warranty of habitability, the defendants fail to submit evidence establishing, *prima facie*, that the plaintiffs are not entitled to any damages for said causes of action, such as for unreturned security deposits or paid rent that is attributable to periods after the July 21, 2012 fire. Therefore, there remain triable issues of fact such that Denco's motion for summary judgment is denied.

E. Punitive Damages

Punitive damages will only be awarded when the alleged conduct manifests "spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." Prozeralik v Capital Cities

Communications, 82 NY2d 466, 479 (1993) *quoting* Prosser and Keeton, Torts § 2 at 9-10 (5th ed 1984); see also Dupree v Giugliano, 20 NY3d 921 (2012). Punitive damages are awarded to punish and deter behavior involving moral turpitude. See Ross v Louise Wise Servs., Inc., 8 NY3d 478 (2007). Here, the defendants alleged wrongful actions, including using cooking equipment in a building only certified for retail space and failing to recognize that increased electrical use in a building could result in an electrical fire, do not rise to a level of conscious and deliberate disregard such that punitive damages are warranted.

F. Indemnification

Both Denco and B&B argue that they should be indemnified pursuant to the lease agreement. Article 4 of the lease, in pertinent part, states: "Owner shall maintain and repair the public portions of the building...Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and apparatuses therein." Moreover, Article 58 of the first amendment to the lease states: "Tenant shall indemnify the Landlord and hold Landlord harmless against any and all claims, suits, loss, costs and liability...caused or happening

in connection with the demised premises...possession or use thereof or the operations thereon, unless arising out of the negligence or willful misconduct of the Landlord."

Denco fails to establish its burden for summary judgment dismissing all cross-claims for indemnification, and its own cause of action for indemnification, because, as discussed herein, it has not established that the claims resulting from the fire do not arise out of its negligence.

In addition to the lease, B&B also submits the deposition transcript of Kim in support of its motion for summary judgment dismissing Denco's cross-claim. Kim states that the area above the drop ceiling was not demised to B&B under the lease and that Denco was responsible for the space above the drop ceiling as it was a common area in the building. In response, Denco submits the affidavit of Robert Denison, the owner and sole shareholder of Denco, which states that the area above the drop ceiling was demised to B&B pursuant to the lease, and the New York City building permit issued to B&B for when the drop-ceiling was installed. These submissions raise a triable issue of fact as to whether the space above the drop ceiling where the fire started was demised to B&B or whether it was a common area in the building for which Denco was responsible.

## IV. CONCLUSION

The motions of defendants Denco, B&B, and Kim in the first, second, third, and fourth actions are denied in their entirety, as there are triable issues of fact as to whether the electrical strain caused by B&B or the leaks above the drop-down ceiling that Denco did not remedy degraded the wiring in the building, causing the fire. There are also issues of fact as to whether the defendants were under any duty to close the open voids in the ceiling that led to the spread of the fire, and whether Denco or B&B were required to maintain the space above the drop-down ceiling under the lease. The motions of the defendants in the fifth action are granted only to the extent that plaintiff Kevin O'Connor's cause of action for negligent infliction of emotional distress is dismissed, and the remainder is denied.

Accordingly,

*In Action No. 1, Livadas v First Denco Realty, Inc., Index No. 159505/2014; it is,*

ORDERED that the motion by defendants B&B Street Market Corp. and Bong Ja Kim for summary judgment dismissing the complaint and all cross-claims asserted against them (SEQ 004) is denied; and it is further,

ORDERED that the motion by defendant First Denco Realty, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it, or in the alternative, summary judgment on its cross-claim for indemnification as against B&B Market Street Corp. (SEQ 005) is denied.

*In Action No. 2, Khirani v First Denco Realty Inc., Index No. 153199/2013; it is,*

ORDERED that the motion by defendants B&B Street Market Corp. and Bong Ja Kim for summary judgment dismissing the complaint and all cross-claims asserted against them (SEQ 005) is denied; and it is further,

ORDERED that the motion by defendant First Denco Realty, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it, or in the alternative, summary judgment on its cross-claim for indemnification as against B&B Market Street Corp. (SEQ 006) is denied.

*In Action No. 3, DeForrest v Mr. And Mrs. Bong Kim, Index No. 156912/2014; it is,*

ORDERED that the motion by defendants B&B Street Market Corp. and Bong Ja Kim for summary judgment dismissing the complaint and all cross-claims asserted against them (SEQ 006) is denied; and it is further,

ORDERED that the motion by defendant First Denco Realty, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it, or in the alternative, summary judgment on its cross-claim for indemnification as against B&B Market Street Corp. (SEQ 007) is denied.

*In Action No. 4, Luckner v Mr. And Mrs. Bong Kim, Index No. 156914/2014; it is,*

ORDERED that the motion by defendants B&B Street Market Corp. and Bong Ja Kim for summary judgment dismissing the complaint and all cross-claims asserted against them (SEQ 008) is denied; and it is further,

ORDERED that the motion by defendant First Denco Realty, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it, or in the alternative, summary

judgment on its cross-claim for indemnification as against B&B Market Street Corp. (SEQ 009) is denied.

*In Action No. 5, O'Connor v Mr. And Mrs. Bong Kim, Index No. 156916/2014; it is,*

ORDERED that the motion by defendant B&B and Kim for summary judgment dismissing the complaint and all cross-claims asserted as against them (SEQ 005) is granted to the extent that the cause of action for negligent infliction of emotional distress is dismissed, and the remainder of the motion is denied; and it is further,

ORDERED that the motion by defendant First Denco Realty, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it, or in the alternative, for summary judgment on its cross-claim for indemnification as against B&B Market Street Corp. (SEQ 006), is granted to the extent that the cause of action for negligent infliction of emotional distress is dismissed, and the remainder of the motion is denied.

It is further,

ORDERED that all parties in are to appear for a settlement conference on September 23, 2020 at 3:00 p.m.

This constitutes the Decision and Order of the Court.

Dated: May 4, 2020

ENTER: ___________________________

J.S.C.