

Beier v Giglio
2021 NY Slip Op 34311(U)
March 25, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 008942/2015
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 008942/2015

CAL. No. 202000023OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY**P R E S E N T :**Hon. DAVID T. REILLY
Justice of the Supreme CourtMOTION DATE 9/2/20 (002, 003, 005)MOTION DATE 9/16/20 (004, 006)MOTION DATE 10/28/20 (007)ADJ. DATE 11/18/20

Mot. Seq. # 002 MG # 005 MG

003 MG # 006 MD

004 MD # 007 MG

-----X
ELSPETH A. BEIER,

Plaintiff,

RONEMUS & VILENSKI, ESQS.

Attorney for Plaintiffs

112 Madison Avenue, 2nd Floor

New York, New York 10016

ROSENBERG FORTUNA & LAITMAN, LLP

Attorney for Defendant/Fourth-Party

Plaintiff/Fifth-Party Plaintiff Giglio

666 Old Country Road, Suite 810

Garden City, New York 11530

- against -

WADE CLARK & MULCAHY, ESQS.

Attorney for the Adler Defendants & Third-Party

Plaintiff Catherine Adler

180 Maiden Lane, 9th Floor, Suite 901

New York, New York 10038

JOSEPH C. TONETTI, P.C.

Attorney for Third-Party Defendant Licciardi

Construction LLC

548 W. Jericho Turnpike

Smithtown, New York 11787

DAMON GIGLIO and LICCIARDI
CONSTRUCTION LLC, d/b/a/ LICCIARDI
BUILDERS, FREDERICK ADLER and
CATHERINE ADLER,Defendants.
-----X

LEWIS JOHS AVALLONE AVILES, LLP

Attorney for Fifth-Party Defendant J. Tortorella

One CA Plaza, Suite 225

Islandia, New York 11749

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CATHERINE ADLER,

Third- Party Plaintiff,

- against -

LICCIARDI CONSTRUCTION LLC, d/b/a
LICCIARDI BUILDERS,

Third- Party Defendant.

HAWORTH BARBER & GERSTMAN, LLC
Attorney for Fifth-Party Defendant Whitmores
80 Broad Street, 24th Floor
New York, New York 10004

-----X
DAMON GIGLIO,

Fourth-Party Plaintiff,

- against -

SWIMMING POOLS BY JACK ANTHONY,
INC.,

Fourth-Party Defendant.

-----X
DAMON GIGLIO,

Fifth-Party Plaintiff,

- against -

J. TORTORELLA SWIMMING POOLS, INC.,
and WHITMORES,

Fifth-Party Defendants.
-----X

Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by fifth-party defendant Whitmore Worsley, Inc., dated July 29, 2020; Notice of Motion and supporting papers by defendant/third-party plaintiff Catherine Adler, dated July 30, 2020; Notice of Motion and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated July 30, 2020; Notice of Motion and supporting papers by fifth-party defendant J. Tortorella Swimming Pools, Inc., dated July 30, 2020; Answering Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated September 9, 2020; Notice of Cross Motion and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated September 9, 2020; Answering Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated September 9, 2020; Answering Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated September 9, 2020; Replying

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Affidavits and supporting papers by fifth-party defendant Whitmore Worsley, Inc., dated September 15, 2020; Notice of Motion and supporting papers by defendant/third-party defendant Licciardi Construction LLC, d/b/a Licciardi Builders, dated September 28, 2020; Answering Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering Affidavits and supporting papers by plaintiff, dated October 21, 2020; Answering and Replying Affidavits and supporting papers by defendant/third-party plaintiff Catherine Adler, dated November 9, 2020; Replying Affidavits and supporting papers by defendant/third-party defendant Licciardi Construction LLC, d/b/a Licciardi Builders, dated November 13, 2020; Replying Affidavits and supporting papers by defendant/third-party defendant Licciardi Construction LLC, d/b/a Licciardi Builders, dated November 13, 2020; Replying Affidavits and supporting papers by fifth-party defendant J. Tortorella Swimming Pools, Inc., dated November 13, 2020; Replying Affidavits and supporting papers by defendant/third-party plaintiff Catherine Adler, dated November 13, 2020; Replying Affidavits and supporting papers by fifth-party defendant Whitmore Worsley, Inc., dated November 17, 2020; Replying Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated November 16, 2020; Replying Affidavits and supporting papers by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, dated November 17, 2020; it is

ORDERED that the motion (seq. 002) by fifth-party defendant Whitmore Worsley, Inc., the motion (seq. 003) by defendant/third-party plaintiff Catherine Adler, the motion (seq. 004) by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, the motion (seq. 005) by fifth-party defendant J. Tortorella Swimming Pools, Inc., the cross motion (seq. 006) by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, and the motion (seq. 007) by defendant/third-party defendant Licciardi Construction LLC, d/b/a Licciardi Builders, are consolidated for purposes of this determination; and it is

ORDERED that the motion by fifth-party defendant Whitmore Worsley, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion by defendant/third-party plaintiff Catherine Adler for summary judgment dismissing the complaint and cross claims against her is granted; and it is

ORDERED that the motion by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio for summary judgment dismissing the complaint and cross claims against him is denied; and it is

ORDERED that the motion by fifth-party defendant J. Tortorella Swimming Pools, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio for leave to file a second amended answer is denied; and it is further

ORDERED that the motion by defendant/third-party defendant Licciardi Construction LLC, d/b/a Licciardi Builders for summary judgment dismissing the complaint and cross claims against it is granted.

This action was commenced by plaintiff Elspeth A. Beier to recover damages for injuries she allegedly sustained on May 23, 2012, when she tripped and fell on a single-step riser at the location known as 12 Sandringham Lane, Southampton, New York. At the time of plaintiff's incident, the

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subject property was owned by defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio, but had been leased by defendant/third-party plaintiff Catherine Adler for the period commencing May 21, 2012, and ending September 10, 2012. In a decision dated June 27, 2017, the Court (Martin, J. [Ret.]) granted the motion by Catherine Adler's husband, defendant Frederick Adler, to dismiss the complaint against him only. By a stipulation dated April 13, 2020, the fourth-party complaint and all cross claims against Swimming Pools by Jack Anthony, Inc. (Jack Anthony) were dismissed with prejudice. Furthermore, the Court notes that while plaintiff named Licciardi Construction LLC, d/b/a Licciardi Builders, as a defendant in her summons and complaint, and has included that entity as a defendant in the caption to this action, her answering papers state that no direct claims are asserted against it.

Fifth-party defendant Whitmore Worsley, Inc. (Whitmores) now moves for summary judgment in its favor, arguing that it merely provided the labor to install the allegedly defective pavers, and did so according to all relevant regulations and in a workmanlike manner. In support of its motion, Whitmores submits, among other things, transcripts of the parties' deposition testimony, copies of estimates and invoices, and an expert affidavit of Stan Pitera, P.E.

Defendant/third-party plaintiff Catherine Adler also moves for summary judgment in her favor, arguing that no defective condition existed but, if one did, she did not create the condition, it was open and obvious, and she did not have actual or constructive notice thereof. She further argues that Mr. Giglio was obligated to maintain the structural elements of the premises, and that she is not contractually obligated to indemnify Mr. Giglio, because it was he who was negligent in installing the tiles in question. In support of her motion, Mrs. Adler submits, among other things, transcripts of the parties' deposition testimony, a copy of the lease agreement, an expert report of Michael Simon, P.E., and five photographs.

Defendant/fourth-party plaintiff/fifth-party plaintiff Damon Giglio moves for summary judgment in his favor, arguing that he had no duty to warn of any condition, that the subject condition was open and obvious, that the single step was not inherently dangerous, that the single step conforms to all code requirements, and that sun glare cannot form the basis for a claim of negligence. More specifically, Mr. Giglio argues that if plaintiff was blinded by glare from the sun, the configuration of the step is of no consequence. He also cross-moves for leave to file a second amended answer to plaintiff's complaint to assert cross claims for contractual indemnification against Catherine Adler, as well as cross claims for contribution against Mrs. Adler and Licciardi Construction LLC. In support of his motion and cross motion, Mr. Giglio submits, among other things, his own affidavit, transcripts of the parties' deposition testimony, a copy of the lease agreement, and an expert report of Michael Simon, P.E.

Fifth-party defendant J. Tortorella Swimming Pools, Inc. (Tortorella) moves for summary judgment in its favor, arguing that it did not own, occupy, or make special use of the subject property, that it did not create the alleged defective condition, that it did not install the white pavers in question, that it did not owe plaintiff or Mr. Giglio a duty of care, and that if any duty was owed, it was not breached. In support of its motion, Tortorella submits, among other things, transcripts of the parties' deposition testimony and copies of contracts between it and Mr. Giglio.

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Defendant/third-party defendant Licciardi Construction LLC (Licciardi) moves for summary judgment in its favor, arguing that it “did not install, select, deliver, pay for, or exercise any dominion over the white stone pavers” at the heart of this litigation. In support of its motion, Licciardi submits, among other things, deposition transcripts and an affidavit of Joseph Licciardi.

Plaintiff testified that on the date in question, she was performing a “feng shui” analysis of the house on the subject property. She indicated that she had been hired by Catherine Adler, a client for whom she had worked numerous times, to determine the ideal positioning of furnishings in her summer rental. Plaintiff stated that she arrived to the house at just before 9:00 a.m., that it was the first time she had been to this property, and that the weather was sunny and warm. She testified that at approximately 3:50 p.m. she walked up an interior staircase to reach the house’s second floor, then stepped through a set of sliding glass doors onto an exterior roof deck, the flooring of which was composed of the same bright white, crushed glass pavers that surrounded the pool area downstairs. Plaintiff stated that she walked along the deck, up a single-step riser, and toward an exterior spiral staircase. She indicated that she ascended the spiral staircase and, when at its apex, took photographs of the entire property from that superior vantage point. Plaintiff testified that she then slowly descended the spiral staircase to the second-story roof deck. She stated that as she began to walk across the deck toward the sliding glass doors and re-enter the house, she was “blinded” by sunlight reflecting off various surfaces, including a glass door, a glass partition, the white pavers, the swimming pool below, and the Shinnecock Bay, which abutted the property. She indicated that at a point approximately two to three steps from the spiral staircase, she “missed the [downward] step” of the single-step riser in her path of travel, and fell forward to the ground. Upon questioning, plaintiff acknowledged that she had traversed the step earlier while walking in the opposite direction, but did not notice it and, at the time of her fall, did not recall that it was there.

Damon Giglio testified that he purchased the subject premises in 2006, and occupied the house thereupon, seasonally, until 2012. In 2012, he entered into a contract with Catherine Adler whereby she would rent such premises for the aforementioned summer time period. He stated that during the years he resided at the premises, he hired contractors to perform renovations thereat. Mr. Giglio indicated that one such contractor was Tortorella, which was tasked with, among other things, installing a new swimming pool at the premises. However, he testified that a conflict arose between him and Tortorella prior to its working being commenced, and that it was dismissed from the project. Mr. Giglio stated that he then hired Jack Anthony to perform the planned renovations. One aspect of the work included the installation of white pavers surrounding the swimming pool and on the roof decks. Mr. Giglio testified that he had seen a specific style of white, crushed-glass paver in a magazine, and that he requested nonparty Short Hills Marble and Tile in New Jersey to obtain such pavers on his behalf, which it did. Questioned regarding Licciardi’s role in the renovations, he explained that it was present “just to oversee the construction” and had no input into the design or choice of pavers, nor did Jack Anthony. Asked if he ever experienced any difficulty walking on the subject pavers, in any of their locations at the premises, due to sun glare or any other condition, he replied in the negative.

Michael O’Brien testified that he is a project manager for Whitmores, that Whitmores was hired by Lance Nill, a project coordinator, to “provide the labor” to install the 18-by-18-inch white pavers on the roof decks of the house at the subject premises. He indicated that while performing the work,

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Whitmores received guidance from Licciardi, but Licciardi did not direct the manner in which the work was done. Mr. O'Brien stated that Whitmores did not select the pavers, and that they were at the subject premises prior to its arrival. Upon questioning, Mr. O'Brien stated that the work was completed in January 2009, and denied that anyone complained about the installation, or the degree of reflectivity, of the pavers in question. He further testified that Whitmores had no interaction with Tortorella or Jack Anthony.

Joseph Licciardi testified that he is the sole owner of Licciardi, a company that "builds houses," but also performs renovations. He stated that in October 2008, Licciardi was hired to oversee a project at the subject premises, having been referred to Mr. Giglio by Lance Nill, a roofer. Mr. Licciardi indicated that the approximately 30-by-30-inch white pavers surrounding the pool and covering the house's first-floor deck were chosen and supplied by Mr. Giglio and installed by Jack Anthony. Mr. Licciardi testified that Licciardi's work at the subject premises concluded in June 2009, and denied that it, or Jack Anthony, did any work on the second-floor roof deck. However, he stated that it was his understanding that Tortorella installed the pavers on the roof deck where plaintiff's accident is alleged to have occurred. Upon further questioning, Mr. Licciardi explained that despite Tortorella having been dismissed from the work site, it was "brought back" in approximately April 2009 to install the pavers on the second-floor roof deck, and that it was "the original permit holder." He testified that Licciardi was not the general contractor on the site; rather, it was a subcontractor to Louis Lindiakos, the project's architect and construction manager. However, at a further deposition, when shown photocopies purporting to be invoices Whitmores addressed to a person named George with Licciardi, Mr. Licciardi asserted that such invoices were intended for Mr. Giglio and that Licciardi had no direct relationship with Whitmores other than with regard to scheduling. In an affidavit submitted in support of Licciardi's motion, Mr. Licciardi states, in relevant part, that Licciardi "was not involved, in any way, with the installation of [the] pavers on the second floor balcony," and was not involved with the balcony's design.

Catherine Adler testified that she toured the premises once with a real estate agent prior to signing the lease agreement, and saw no dangerous conditions at the property. She stated that shortly after plaintiff's accident, and prompted by a significant number of electrical issues at the premises, she cancelled her lease agreement with Mr. Giglio. Mrs. Adler indicated that she likely visited the premises only two additional times after the incident, to retrieve some belongings that had been brought to the house by her assistants, and that she never spent a night there.

Supplying an expert affidavit on behalf of Whitmores, Stan Pitera, P.E., states that he is a licensed professional engineer and licensed residential building inspector in New York. He indicates that he is currently employed by Affiliated Engineering Laboratories, Inc., as an engineering consultant. Mr. Pitera states that he is familiar with the building codes in New York, including the Residential Code of New York State, International Building Code, and the Town of Southampton Property Maintenance Code. In formulating his opinion, he states that he conducted an inspection of the subject premises on July 15, 2020, and found, based upon his review of the various exhibits offered in this matter, that the site of plaintiff's incident was "unchanged." However, upon review of the photographs appended to his report, the Court notes that a black strip of tape now delineates the location of the single-step riser. Mr. Pitera indicated that the subject single-step riser is approximately six-feet-ten-inches wide, five inches tall, and is comprised of identical white pavers on each level. He opines that because the elevation

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change on the second-floor roof deck was not more than 8¼ inches tall, and was not comprised of more than three steps, it conformed to the 2007 Residential Code of New York State, and did not require a handrail. In conclusion, Mr. Pitera opines that “the pavers comprising the subject second-floor roof deck, including the subject single step, were properly installed in a workmanlike manner, complied with all applicable codes, and did not contain any structural defect.” He further opines that Whitmores was not required to warn of the pavers’ reflective properties or the single step riser.

Michael Simon, P.E., submitted an expert report on behalf of Mrs. Adler, which Mr. Giglio also submitted in support of his motion. However, such report is neither sworn nor notarized. Accordingly, it is inadmissible and was not considered.

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

A landowner has a duty maintain his or her property “in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). “Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case, and is a question of fact for the jury” (*Palladino v City of New York*, 127 AD3d 708, 709, 7 NYS3d 207 [2d Dept 2015]). For a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, “it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence” (*Touloupis v Sears, Roebuck & Co.*, 155 AD3d 807, 808, 63 NYS3d 518 [2d Dept 2017], quoting *Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). Further, a landowner “has no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous” (*Espinosa v Fairfield Props. Group, LLC*, 160 AD3d 927, 927, 72 NYS3d 487 [2d Dept 2018], quoting *Salomon v Prainito*, 52 AD3d 803, 805, 861 NYS2d 718 [2d Dept 2008]). The issue of whether a dangerous condition is open and obvious “is fact-specific and usually a question for a jury” (*Davidoff v First Dev. Corp.*, 148 AD3d 773, 775, 48 NYS3d 755 [2d Dept 2017]). In some cases, a “condition that is generally apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Dalton v N. Ritz Club*, 147 AD3d 1017, 1017, 46 NYS3d 900 [2d Dept 2017] [internal quotation marks omitted]). “Ordinarily, a landowner’s duty to warn of a latent, dangerous condition on

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his property is a natural counterpart to his [or her] duty to maintain his [or her] property in a reasonably safe condition” (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636, 781 NYS2d 249 [2004]).

Optical confusion occurs “when conditions in an area create the illusion of a flat surface, visually obscuring any steps” (*Masker v Smith*, 188 AD3d 867, 869, 135 NYS3d 135 [2d Dept 2020]). “Findings of liability based on optical confusion have typically turned on factors such as inadequate warning of the drop coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition” (*Id.*). The absence of a violation of a specific code or ordinance “is not dispositive of a plaintiff’s allegations based on common-law negligence principles . . . [and thus] a defendant may be held negligent for departing from generally accepted customs and practices even when the allegedly defective condition is in compliance with the relevant codes and ordinances” (*Romero v Waterfront N.Y.*, 168 AD3d 1012, 1013, 92 NYS3d 333 [2d Dept 2019]).

Here, the initial question is whether movant contractors Whitmores, Tortorella, or Licciardi breached a duty of care owed to Mr. Giglio with their construction work at the subject premises. “The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party . . . [and] is warranted where a defendant’s role in causing the plaintiff’s injury is solely passive, and thus its liability is purely vicarious” (*Bd. of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC*, 150 AD3d 1063, 1064, 55 NYS3d 374 [2d Dept 2017] [internal citations omitted]). If an injury “can be attributed solely to the negligent performance or nonperformance of an act solely within the province of a contractor engaged by a landowner, the contractor may be held liable to the landowner for common-law indemnification” (*Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700, 950 NYS2d 185 [2d Dept 2012]). A defendant, therefore, “can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action for common-law indemnification and contribution asserted against it by establishing that it was not at fault in the happening of the subject accident” (*Cutler v Thomas*, 171 AD3d 860, 861, 98 NYS3d 230 [2d Dept 2019]).

Whitmores established its prima facie case of entitlement to summary judgment in its favor as to defendant Giglio’s fifth-party complaint (*see generally Alvarez v Prospect Hosp.*, *supra*). It demonstrated, primarily through the affidavit of Mr. Pitera, that while it installed the subject pavers, it did so pursuant to Mr. Giglio’s request and design, in a code-compliant manner, and that it was not required to warn anyone of the pavers’ reflectivity or their use on a single-step riser (*see Lindeman v Vecchione Constr. Corp.*, 275 AD2d 392, 712 NYS2d 594 [2d Dept 2000]).

Tortorella and Licciardi, while not submitting the affidavit of an expert, also established their prima facie entitlement to summary judgment through the deposition testimony of the parties (*see Duncan v 112 Atl. Realty, LLC*, 163 AD3d 769, 81 NYS3d 178 [2d Dept 2018]). Tortorella demonstrated that it installed sliding glass doors and glass handrails at the subject premises, in accordance with Mr. Giglio’s wishes and design, more than four years prior to plaintiff’s incident. The deposition testimony further established that Mr. Giglio never lodged a complaint regarding the work Tortorella or Licciardi performed, and that plaintiff’s alleged injuries did not occur due to any negligence

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on their part. Additionally, plaintiff's complaint, bill of particulars, and deposition testimony are devoid of any allegation that the sliding glass doors or glass handrails were in any way defective.

Licciardi also demonstrated that it had no role in the design of the subject roof deck or in the selection of materials. As to plaintiff's direct claims and Mrs. Alder's third-party claims against it, Licciardi established that there was no privity of contract between it and those parties, and that pursuant to *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 (2002), it owed them no duty of care. The burden then shifted to the opposing parties to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

In opposition, Mr. Giglio argues that while he believes no defective or dangerous condition existed at the premises, should the finder of fact determine that such a condition was present, Whitmores, Tortorella, and Licciardi were involved in the installation of the architectural features that plaintiff claims contributed to her accident. Specifically, Mr. Giglio argues that Whitmores and Tortorella, as installers of the white pavers and glass features respectively, and Licciardi as general contractor, share liability, if any, for plaintiff's alleged injuries. However, he submits no evidence or authority to support his theory that, in essence, a contractor's work, done in compliance with a property owner's specifications, using commercially-available materials, and approved by him, can obligate such contractor to indemnify that property owner against suits arising out of his or her own design. He also fails to identify any deficiency in the work of any of the contractors, or establish that one or more of them was solely responsible for plaintiff's alleged injuries (*see Bd. of Mgrs. of the 125 N. 10th Condominium v 125North10, LLC, supra*). Furthermore, with respect to Mr. Giglio, "[a] party that has actually participated in the wrongdoing is not entitled to indemnification" (*Rappel v Wincoma Homeowners Assn.*, 125 AD3d 833, 835, 4 NYS3d 276 [2d Dept 2015]). As will be discussed later, Mr. Giglio has not submitted sufficient admissible evidence to demonstrate that he is without liability for plaintiff's alleged injuries.

The sine quo non of plaintiff's alleged injuries is the single-step riser, and the Court is unaware of any evidence of which party, if any, was responsible for the design and construction thereof. Whether the single-step riser existed prior to the 2007-2009 renovations is unclear. Nevertheless, the mere workmanlike installation of certain architectural commonalities such as white pavers, sliding glass doors, or glass handrails, at a homeowner's request, cannot form the basis of a negligence claim in the absence of evidence that such were "patently defective" (*see Rappel v Wincoma Homeowners Assn.*, 125 AD3d 833, 4 NYS3d 276 [2d Dept 2015]). Further, "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects" (*Merchants Mut. Ins. Co. v Quality Signs of Middletown*, 110 AD3d 1042, 1043, 973 NYS2d 787 [2d Dept 2013]). It is undisputed that Whitmores, Tortorella, and Licciardi were hired by Mr. Giglio for the limited purpose of installing various architectural features at the subject premises, not to provide safety evaluations, design opinions, warning signs, glare reduction, or paver selection. Accordingly, the motion by Whitmores for summary judgment dismissing the complaint and cross claims against it, the motion by Tortorella for summary judgment dismissing the complaint and cross claims against it, and the motion by Licciardi for summary judgment dismissing the complaint and cross claims against it are granted.

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Turning to Mrs. Adler's motion, she, too, established a prima facie case of entitlement to summary judgment in her favor. "A tenant has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises" (*Gatto v Coinmach Corp.*, 172 AD3d 1176, 1177, 101 NYS3d 390 [2d Dept 2019]). However, "a tenant's common-law duty to maintain premises in a reasonably safe condition is limited to those areas which it occupies and controls, or makes a special use" (*Arshinov v Gr 10-40, LLC*, 176 AD3d 1019, 1019, 108 NYS3d 892 [2d Dept 2019]). "In general, a tenant would not reasonably expect to be liable for repairs that require the opening of walls, ceilings, or floors" (*Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 863, 841 NYS2d 673 [2d Dept 2007]). Here, the alleged dangerous conditions were not transient in nature, such as snow, ice, a wet floor, or debris, and thus able to be remedied independently by a tenant. Rather, they are alleged to be a single-step riser and glare caused by, among other things, glass barriers, glass doors, and white pavers. Mrs. Adler demonstrated, through the lease agreement and Mr. Giglio's testimony, that she lacked the authority to alter the structural components of the subject premises, including the single-step riser, the white pavers, or the glass surfaces, which plaintiff claims were proximate causes of her fall (*see McDermott v Santos*, 171 AD3d 1158, 98 NYS3d 646 [2d Dept 2019]; *Futter v Hewlett Sta. Yogurt, Inc.*, 149 AD3d 912, 52 NYS3d 432 [2d Dept 2017]). Specifically, the lease agreement provides that "[n]o repair or alteration shall be made without the prior express written consent of the Landlord." Thus, Mrs. Adler did not possess the requisite "control" over the accident-causing agents, and cannot be held liable for plaintiff's alleged injuries (*see Arshinov v Gr 10-40, LLC, supra*; *see also Knight v 177 W. 26 Realty, LLC*, 173 AD3d 846, 103 NYS3d 503 [2d Dept 2019] [Lessee not liable for dangerous conditions that fell within the purview of landlord's obligations]).

Mr. Giglio opposes Mrs. Adler's motion, arguing that, as his tenant, she owed him a duty of care under common law to maintain the subject premises in a reasonably safe condition. However, Mr. Giglio submits no evidence that anyone, other than himself, had the authority to alter the alleged dangerous condition at the subject premises (*cf. King v Marwest, LLC*, ___AD3d___, 2021 NY Slip Op 08225 [2d Dept 2021]). Thus, he fails to raise a triable issue. Plaintiff also opposes Mrs. Adler's motion, arguing, among other things, that while she had no duty to correct the alleged dangerous condition on the second-floor roof deck, she possessed a duty to warn plaintiff of such condition. This argument is unavailing, as are plaintiff's other arguments. Plaintiff offers no authority for the existence of such a duty and, therefore, fails to raise a triable issue. Accordingly, the motion by Catherine Adler for summary judgment dismissing the complaint and cross claims against her is granted.

Mr. Giglio also argues that Mrs. Adler owes him contractual indemnification, a cross claim for which he is cross-moving herein to now assert, against any negligent acts of plaintiff, such as plaintiff's failing to wear sunglasses or failing to stop walking when blinded by glare. Mr. Giglio argues that a provision in the lease agreement, mandating that Mrs. Adler indemnify him for all negligent acts of her or her guests, would serve to indemnify him against all of plaintiff's claims, and thus seeks leave to serve a second amended answer pursuant to CPLR 3025 (b), asserting cross claims for contractual indemnification and contribution against her, as well as a cross claim for contribution from Licciardi. "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit . . . [and a] determination whether to grant such leave is within the Supreme Court's

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broad discretion” (*McIntosh v Ronit Realty, LLC*, 181 AD3d 579, 579, 117 NYS3d 613 [2d Dept 2020] [citations omitted]). “In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated and whether a reasonable excuse for the delay was offered” (*id.* at 580).

The lease provision in question provides that “[t]enant agrees to indemnify and hold harmless Landlord from and against any liability for personal injury or property damage sustained by any person (including Tenant’s guests) as a result of any deliberate or negligent act or omission by Tenant or its invitees, including reasonable attorneys’ fees, disbursements or costs of investigation.” Interpreted in the manner Mr. Giglio’s counsel suggests, the provision would serve no practical purpose in relation to these circumstances, as Mrs. Adler would only be indemnifying Mr. Giglio against plaintiff’s own comparative negligence— something for which he would not be ultimately liable in any outcome. Mrs. Adler cannot be compelled to indemnify Mr. Giglio against all damages, if any, obtained by plaintiff in this action, as that would serve to improperly indemnify him against his own negligence (*see Hadzihasanovic v 155 E. 72nd St. Corp.*, 70 AD3d 637, 896 NYS2d 83 [2d Dept 2010]; *Danielson v Jameco Operating Corp.*, 20 AD3d 446, 800 NYS2d 421 [2d Dept 2005]; General Obligations Law § 5-321). Thus, the proposed cross claim for indemnification is patently devoid of merit. Further, as to the contribution cross claims Mr. Giglio now seeks to assert against Mrs. Adler and Licciardi, such claims are moot in light of the Court’s findings herein. Accordingly, the cross motion by Mr. Giglio for leave to serve a seconded amended answer is denied.

As to Mr. Giglio’s own motion for summary judgment, he has failed to establish a prima facie case of entitlement to summary judgment in his favor (*see Mongelli v Emart Dept. Stores, Inc.*, 174 AD3d 703, 102 NYS3d 452 [2d Dept 2019]; *Washington-Fraser v Indus. Home for the Blind*, 164 AD3d 543, 83 NYS3d 503 [2d Dept 2018]; *Ross v Bretton Woods Home Owners Assn., Inc.*, 151 AD3d 774, 55 NYS3d 417 [2d Dept 2017]; *Matheis v Hunt Country Furniture, Inc.*, 140 AD3d 713, 30 NYS3d 883 [2d Dept 2016]; *Surujnaraine v Val. Stream Cent. High Sch. Dist.*, 88 AD3d 866, 931 NYS2d 119 [2d Dept 2011]; *Scher v Stropoli*, 7 AD3d 777, 776 NYS2d 870 [2d Dept 2004]). “Even in the absence of a duty to repair an allegedly defective condition, liability may attach to an out-of-possession landlord who has affirmatively created a dangerous condition or defect” (*Bartels v Eack*, 164 AD3d 1202, 1203, 83 NYS3d 657 [2d Dept 2018]). Here, not only does Mr. Giglio admit that he chose, and caused to be installed, the subject pavers and other architectural elements at the accident location, the lease agreement with Mrs. Adler specifically places upon him the responsibility for repairs. Therefore, Mr. Giglio had the burden of establishing that no defective condition existed there, or that if a defective condition existed, it was not a proximate cause of plaintiff’s alleged injuries. On the issue of the defective condition, Mr. Giglio submitted the unsworn, unnotarized report of Michael Simon, P.E., which is inadmissible (*see Pabon v Long Island R.R. Co.*, 189 AD3d 860, 133 NYS3d 456 [2d Dept 2020]). Thus, he failed to sustain his burden in that respect. Even assuming, arguendo, that such report were deemed admissible and established that the single-step riser was not in violation of any relevant code, the affidavit of plaintiff’s expert would, nevertheless, raise triable issues.

It is axiomatic that there can be more than one proximate cause of an injury. While it is true that plaintiff, in her deposition testimony, emphasized her temporary loss of vision caused by glare, she nonetheless referenced the single-step riser’s difficulty in being seen. “When a question of proximate

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cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Hain v Jamison*, 28 NY3d 524, 529, 46 NYS3d 502 [2016] [citations and internal quotation marks omitted]). In this case, it would not be unreasonable for a factfinder to determine that the glare on a waterfront second-floor roof deck was foreseeable, that such glare could contribute to a decrease in the single-step riser's visibility, and that a first-time visitor to a home could be unaware of the single-step riser (see *Roros v Oliva*, 54 AD3d 398, 863 NYS2d 465 [2d Dept 2008]). Plaintiff also alludes to optical confusion in her complaint and bills of particulars (cf. *Uppstrom v Peter Dillon's Pub*, 172 AD3d 497, 100 NYS3d 239 [1st Dept 2019]). Therefore, the Court cannot say, as a matter of law, that an alternate design, or prominent markings, would not have prevented her alleged injuries, notwithstanding the glare, or that a confluence of factors relating to the visibility of the subject single-step riser did not contribute to plaintiff's alleged injuries (see *Flanger v 2461 Elm Realty Corp.*, 123 AD3d 1196, 998 NYS2d 502 [3d Dept 2014]). Mr. Giglio also failed to demonstrate that the alleged condition was open and obvious and not inherently dangerous, or that he had no notice thereof. Without establishing that the single-step riser was not inherently dangerous, "proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (*Crosby v Southport, LLC*, 169 AD3d 637, 640, 94 NYS3d 109 [2d Dept 2019] [citation omitted]). Furthermore, plaintiff's act of walking in bright sunshine without sunglasses "was not so extraordinary, culpable, or unforeseeable as to supersede [Mr. Giglio's] alleged negligence and constitute the sole proximate cause of the accident" (*Valentin v New Docs, LLC*, 186 AD3d 1570, 1571, 131 NYS3d 68 [2d Dept 2020]). Thus, it is the purview of the factfinder to determine which, if any, dangerous conditions at the subject premises contributed to her alleged injuries. Mr. Giglio having failed to establish a prima facie case for relief, the Court need not consider any opposing party's papers in opposition (see generally *Winegrad v New York Univ. Med. Ctr.*, *supra*). Accordingly, the motion by Damon Giglio for summary judgment dismissing the complaint and cross claims against him is denied.



Dated: March 25, 2021

David T. Reilly, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION