SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER **PART** 08

Justice

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INDEX NO. 156132/2022

ELEANOR MELLA,

MOTION DATE 03/28/2025

Plaintiff,

MOTION SEQ. NO. 003

- against-

RUSSIAN SAMOVAR, INC. and
ALVIN NEDERLANDER ASSOCIATES, INC.,

DECISION + ORDER ON MOTION

Defendants.

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RUSSIAN SAMOVAR, INC.,

Third-Party
Index No. 595463/2023

Third-Party Plaintiff,

-against-

ALVIN NEDERLANDER ASSOCIATES, INC.,

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for JUDGMENT - SUMMARY.

INTRODUCTION

In this negligence action, plaintiff Eleanor Mella alleges she was injured when she slipped on the staircase at the entrance to the restaurant and piano bar (the "demised premises" or "subject premises") operated by defendant/third-party plaintiff Russian Samovar, Inc., d/b/a Russian Samovar Restaurant and Piano Bar ("Russian"), which leases its space from defendant/third-party defendant Alvin Nederlander Associates, Inc. ("Nederlander"). Nederlander now moves pursuant to CPLR 3212 for summary judgment (1) dismissing Mella's amended complaint as against it, as well as Russian's third-party claims for contribution and common-law and contractual indemnification, and (2) for judgment in its favor on its cross claim

for contractual indemnification against Russian.[1] Mella and Russian both oppose the motion. The motion is decided as follows.

DISCUSSION

On a motion for summary judgment "the movant 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" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept. 2012] [internal quotation marks and citation omitted]). "Once this showing has been made, the burden shifts to the party opposing the motion for summary judgement to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024] [internal citation and quotation marks omitted]). Where the moving party fails to make such a showing, the motion must be denied without regard to the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "Since [summary judgment] deprives the litigant of [its] day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Mella's amended complaint asserts a single cause of action for negligence. For a defendant to be held liable for negligence, the plaintiff must establish that the defendant owes some duty of care to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976] ["In the absence of duty, there is no breach and without a breach there is no liability"]). Therefore, in a slip and fall action, a defendant moving for summary judgment to dismiss the complaint as asserted against it must establish, prima facie, that it did not create the defective condition alleged or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Rosario v Prana Nine Properties, LLC*, 143 AD3d 409, 410 [1st Dept. 2016]). "Once that showing is made, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice of it" (*id.*).

[1] Russian commenced a third-party action against Nederlander prior to Mella's filing of an amended complaint naming Nederlander as a defendant.

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Adriana G. v Kipp Washington Hgts. Middle Sch.*, 165 AD3d 469, 469 [1st Dept. 2018] [internal quotation marks and citation omitted]). However, while a premises owner has a duty to exercise reasonable care in maintaining their property in a reasonably safe condition under the circumstances (*Powers v 31 E 31 LLC*, 24 NY3d 84, 94 [2014] [internal quotation marks and citations omitted]), an out-of-possession landlord is not generally liable for negligence with respect to the condition of property after possession and control of the property is transferred to a tenant (*Ebrahim v Twin Development, LLC*, 237 AD3d 610, 610 [1st Dept. 2025] [internal quotation marks and citations omitted]). "[U]nless the landlord is either [1] contractually obligated to make repairs or maintain the premises, or [2] the landlord has a contractual right to reenter, inspect, and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*id.*), the landlord will not bear liability for such condition.

Here, Nederlander establishes its prima facie entitlement to summary judgment dismissing Mella's negligence claim against it through the submission of the commercial lease for the demised premises, which demonstrates that it is an out-of-possession landlord with no contractual obligation to make repairs or maintain the demised premises (*see Brocco v E. Metal Recycling Terminal LLC*, 211 AD3d 628, 629 [1st Dept. 2022]; *Kopetic v Port Auth. of New York & New Jersey*, 176 AD3d 530, 531 [1st Dept. 2019]). Pursuant to paragraph 6.01 of the lease agreement, all non-structural repairs to the demised premises are to be made by Russian at its sole cost and expense, and all such repairs and replacements are to be sufficient for the proper maintenance and operation of the demised premises and in compliance with all Legal Requirements[2] (NYSCEF No. 92, ¶ 6.01).

In opposition, both Mella and Russian fail to raise a triable issue of fact. While Nederlander retains a right of re-entry under the lease, Mella's accident is alleged to have been

[2] Legal Requirements is defined in the lease as, "the requirements of every present and future statute, law, ordinance, rules, regulation, judgment and order, including the ADA, each as modified and supplemented from time to time … made by any Federal, State, municipal or other public body, department, bureau, officer or authority … all environmental, building and zoning laws, ordinance and regulation, affecting the Property" (NYSCEF No. 92, ¶ 30.02[d]).

caused by a poorly lit entranceway that obstructed the visibility of one or more of the steps as she entered the demised premises (NYSCEF No. 84 [Bill of Particulars], ¶ 4), "and [Mella] fail[s] to point to any evidence that a significant structural or design defect was implicated" (*Brocco*, 211 AD3d at 629; *see Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497, 497–98 [1st Dept. 2011]). Mella's own expert, Dr. James Pugh, likewise does not attribute Mella's accident to a significant structural or design defect that is contrary to a specific statutory safety provision. In his report, Pugh concludes that Mella's accident was due to, "the failure to replace worn and degraded carpet on the steps … failure to ergonomically-identify the nosings of the stairs pursuant to ANSI standards and the failure to install ADA-compliant handrails" (NYSCEF No. 104).

While Pugh opines that the stair risers are in violation of New York City (NYC) Building Code, he fails to demonstrate the applicability of the code provisions he cites, as he does not disclose either the year the subject stairs were built or last structurally modified, or which version of the NYC building code he applied in his analysis (*see Marie D. v R.C. Church of the Sacred Heart*, 161 AD3d 448, 448 [1st Dept. 2018]). Furthermore, an alleged building code provision which concerns uniformity of the riser heights of steps cannot serve as the predicate for an out-of-possession landlord's liability (*see Drotar v 60 Sweet Thing, Inc.*, 106 AD3d 426, 427 [1st Dept. 2013]), as stair riser, tread and handrail violations are not considered significant structural defects (*see Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept. 2014]). Because the alleged defects of the subject staircase do not constitute significant structural defects, they cannot serve as the basis for liability against Nederlander. Therefore, Nederlander's motion is granted to the extent it seeks summary judgment dismissing the amended complaint as asserted against it.

Because Nederlander establishes, *prima facie*, that it was not negligent, and no triable issue of fact is raised in opposition with respect to Nederlander's negligence, the motion is likewise granted to the extent it seeks summary judgment dismissing Russian's third-party claims/cross claims for contribution and common-law indemnification (*see Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646–47 [1988]; *Herrero v 2146 Nostrand Ave. Assocs., LLC*, 193 AD3d 421, 423 [1st Dept. 2021]).

The motion is also granted to the extent it seeks summary judgment in Nederlander's favor on its cross claim for contractual indemnification and to dismiss Russian's third-party

claim/cross claim for contractual indemnification. The lease for the demised premises contains competing indemnification provisions. Pursuant to paragraph 10.03, Russian agreed, as relevant here, to:

> [I]ndemnify, defend and save harmless Landlord . . . from and against any and all liability (statutory or otherwise), claims, suits, demands, damages, judgments, costs, fines, penalties, interest and expenses (including but not limited to reasonable counsel fees and disbursements incurred in any action or proceeding), to which Landlord . . . may be subject or suffer by reason of any liability or claim for any injury to . . . any person . . . or otherwise arising from or in connection with the use and occupancy of the Demised Premises . . . except in each case if caused by the negligent acts or willful misconduct of Landlord . . . .

Paragraph 10.04, in turn, provides, in pertinent part, that:

> Landlord will defend, indemnify and save harmless Tenant . . . from and against any and all liabilities, claims, demands, damages, expenses, fees, fines, penalties, suits, proceedings, and causes of action of any and every kind and nature (whether well founded or not) arising out of . . . the negligence or willful misconduct of Landlord . . . .

Nederlander's submission of the lease suffices to demonstrate its entitlement to summary judgment on its contractual indemnity cross claim against Russian, as the lease's broad indemnity provision in favor of Nederlander pursuant to paragraph 10.03 was triggered by Mella's commencement of the present personal injury action and, as already discussed, Nederlander has demonstrated the absence of triable issues of fact with respect to its own negligence. As such, Nederlander is entitled to recover from Russian the reasonable attorneys' fees and costs incurred in the defense of this action. Nederlander may file supplemental papers, within sixty (60) days of the date of this order, to establish the amount of its reasonable attorneys' fees and costs.

Nederlander's demonstration that it was not negligent likewise establishes its entitlement to summary judgment dismissing Russian's third-party claim/cross claim for contractual indemnification pursuant to paragraph 10.04. No triable issue of fact is raised in opposition to either branch of the motion concerning contractual indemnification.

The court has considered the parties' additional arguments, even if not specifically addressed herein, and finds them unpersuasive.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party defendant Alvin Nederlander Associates, Inc.'s motion for summary judgment pursuant to CPLR 3212 on its cross claim for contractual indemnification against defendant/third-party plaintiff Russian Samovar, Inc., d/b/a Russian Samovar Restaurant and Piano Bar, to dismiss the amended complaint as against it, and to dismiss the third-party complaint, is granted, the amended complaint is dismissed as against defendant/third-party defendant Alvin Nederlander Associates, Inc., and the third-party complaint is likewise dismissed; and it is further

ORDERED that defendant/third-party defendant Alvin Nederlander Associates, Inc. shall file supplemental papers, within sixty (60) days of the date of this order, to establish the amount of its reasonable attorneys' fees and costs incurred in the defense of this action, and shall provide notice to the court of any such filing by emailing Jordan Girasole, Esq. at jgirasole@nycourts.gov and Aryeh Roskies, Esq. at aroskies@nycourts.gov; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

7/8/2025
DATE

LYNN R. KOTLER, J.S.C.

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