

**Trela v As Is**

2025 NY Slip Op 34025(U)

October 9, 2025

Supreme Court, New York County

Docket Number: Index No. 160636/2019

Judge: Richard G. Latin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. RICHARD G. LATIN PART 46M**

*Justice*

-----X

ROBERT TRELA,

Plaintiff,

- v -

AS IS, AS IS NYC, 71 WORTH LLC. T/A AS IS NYC, 71  
WORTH LLC., 459 W 50 ST LLC., BILT/DFI, INC.,

Defendant.

**INDEX NO. 160636/2019**

08/29/2024,  
10/17/2024,  
10/28/2024,  
10/28/2024,  
10/29/2024

**MOTION DATE 10/29/2024**

**MOTION SEQ. NO. 003 004 005  
006 007**

**DECISION + ORDER ON  
MOTION**

-----X

AS IS, AS IS NYC, 71 WORTH LLC. T/A AS IS NYC, 71  
WORTH LLC., 459 W 50 ST LLC.

Plaintiff,

-against-

PARTS AND LABOR DESIGN, LLC, PABLOS GENERAL  
CONSTRUCTION LIMITED LIABILITY COMPANY, RAUL  
CABATO ARCHITECT

Defendant.

Third-Party  
Index No. 595704/2022

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 320, 322, 323, 324, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 350, 351, 352, 353, 362, 363, 370, 382, 392, 393, 394, 401, 402, 403, 404, 405

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 230, 321, 325, 354, 355, 356, 357, 364, 371, 374, 375, 376, 383, 384, 385

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

The following e-filed documents, listed by NYSCEF document number (Motion 005) 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 326, 365, 372, 377, 378, 386

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 006) 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 327, 358, 359, 360, 361, 366, 379, 380, 381, 395, 396, 397, 398, 399, 400

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

The following e-filed documents, listed by NYSCEF document number (Motion 007) 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 328, 345, 346, 347, 348, 349, 367, 368, 369, 373, 387, 388, 389, 390, 391

were read on this motion to/for

JUDGMENT - SUMMARY

### **Background**

On October 31, 2019, plaintiff Robert Trela brought this action for personal injuries against defendants As Is, As Is NYC, 71 Worth LLC. T/A As Is NYC, 71 Worth LLC, 459 W 50 St LLC (NYSCEF # 1). On February 22, 2019 at approximately 8:45pm, plaintiff sustained personal injuries while attempting to descend the exterior stair in front of a bar named “As Is” located at 734 10<sup>th</sup> Avenue in New York, New York (NYSCEF # 119 at 3).

On November 19, 2021, plaintiff commenced a related action against defendant BILT/DFI, Inc. (“BILT”) (NYSCEF # 121). On February 10, 2022, both cases were consolidated in this current action (NYSCEF # 124). On February 23, 2022, defendants As Is, As Is NYC, 71 Worth LLC. T/A As Is NYC, 71 Worth LLC, 459 W 50 St LLC interposed cross claims against BILT (NYSCEF # 125). On August 24, 2022, BILT commenced a third party under Index No. 595660/2022 against third party defendant Pablo’s General Construction LLC (“Pablo LLC”) (NYSCEF 47). The 71 Worth LLC and 459 W 50ST LLC commenced a second third party action under Index No. 595704/2022 (NYSCEF # 50). The third-party defendants in this action are: (a) Pablo LLC, (b) Parts and Labor Design, LLC (“Parts & Labor”), and (c) Raul Cabato Architect (“Cabato”) (NYSCEF # 119).

With regard to motion sequence 3, plaintiff moved for summary judgment against defendants (NYSCEF # 118). Plaintiff advances two primary bases to argue the motion should be granted (NYSCEF # 141). First, plaintiff alleged the evidentiary submissions demonstrate that the steps and handrail in front of the property were dangerous and defective that were substantial factors in causing Plaintiff to fall and sustain personal injuries (*see id.* at 3). Second, plaintiff alleged the evidentiary submissions demonstrate, prima facie, that each of the defendants owe plaintiff a duty of care, and are liable for breach of duty (*see id.* at 15).

With regard to motion sequence 4, Pablo LLC moved for summary judgment dismissing the Third-Party complaint, Second-Third Party complaint and all cross-claims against it (NYSCEF # 145). Thereafter Cabato and Parts & Labor moved for summary judgment (motion seq. 005, 006) to dismiss all claims and cross claims (NYSCEF ## 231, 259). BILT also moved for summary judgment (motion seq. 007) dismissing plaintiff's complaint and all cross claims and counter claims (NYSCEF # 296).

### **Discussion**

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

### **Motion # 3**

#### **I. Plaintiff's Summary Judgment**

##### *A. Dangerous or Defective Condition*

Where liability is predicated on the owner's creation of a dangerous or defective condition, “usual questions of notice of the condition are irrelevant since the defendant created the condition” (*Cook v Rezende*, 32 NY2d 596, 599 [1973]; *see Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567, 567 [1st Dept 1993]). Within the exercise of reasonable care, there must be either proof that defendant created the condition or had a sufficient opportunity to remedy the situation (*see Lewis v Metro. Transp. Auth.*, 99 AD2d 246, 250 [1st Dept 1984]; *see also Madrid v City of New York*, 42 NY2d 1039, 1039 [1977]). In addition, expert opinion may be admitted when an expert offers an opinion on an issue which involves professional or scientific knowledge or skill not within the range of ordinary training or intelligence (*see Dufel v Green*, 84 NY2d 795, 798 [1995]). An expert may opine upon custom and usage in a particular industry such as building construction, renovations, and alternations (*see Trimarco v Klein*, 56 NY2d 98, 103 [1982]). Furthermore, expert testimony on the issue of whether conditions or conduct constitute a violation of a statute or regulation is permissible (*see Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 448 [1st Dept 2007]).

Plaintiff avers the steps and handrails were defective (NYSCEF # 141). Plaintiff provides Robert T. Fuchs' expert affirmation who stated the outdoor steps were nonuniform and had insufficient riser height which “does not conform to generally good and accepted practice in the engineering, construction, and safety industries” (NYSCEF # 136 at 7). Plaintiff's expert cites to § C26-292.0.d. of the 1938 New York City Building code which provides “[t]he treads and rises of required stairs shall be proportioned that the product of the number of inches in the tread

exclusive of nosing, and the number of inches in the riser, shall be between seventy and seventy five... Risers and treads, other than winding treads, shall be of uniform width and height in any one flight” (*id.* at 7-8). Plaintiff’s expert concluded that “the insufficient and non-uniform riser height at the bottom step was a dangerous condition” (NYSCEF # 136 ¶ 33).

In addition, plaintiff’s expert asserts the handrail does not conform to generally good and accepted industry practice or long-standing building code requirements (*id.* at 9). Plaintiff’s expert measured the handrail to be approximately 41 ¼ inches high above the riser at the bottom step (*see id.*). Plaintiff’s expert cites to § C26-292.0.1(1) of the 1938 New York City Building Code and section 27-375(f)(2) of the 1968 New York City Building Code, which provides “the height of handrails above the nosing of treads shall be not more than thirty-four nor less than thirty inches” (*id.* at 9).

In contrast to plaintiff’s expert affirmation, defendant 71 Worth LLC’s expert Mr. Scott argued the opposite (NYSCEF # 186 at 17). Mr. Scott averred the steps and handrails were not in violation of the New York City building codes which the “design and installation of the outside two-riser/single-tread configuration was professionally certified by the applicant of record, Raul Cabato, and approved for code review under codes prior to NYCBC/1968 (*id.* at 17-18). Therefore, the cited code sections were not applicable to the subject outside two-riser/single-tread configuration” (*see id.* at 18).

Accordingly, there is a triable issue of fact whether steps and handrails were defective. Thus, plaintiff’s motion for summary judgment against As Is, As Is NYC, 71 Worth LLC T/A As Is NYC, and 71 Worth LLC is denied. In addition, defendant 71 Worth LLC’s and 459 W 50 St., LLC’s cross-motion for summary judgment against plaintiff is also denied.

## II. BILT's Summary Judgment Motion

The general rule is that “[a] builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury” (*Henriquez v Parsippany Const. Co., Inc.*, 62 AD3d 749, 750-51 [2d Dept 2009], quoting *Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924]; *Cortez v Sladon Iron Works Co.*, 214 AD 404, 407 [1st Dept 1925]).

In addition, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care (*see Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). Thus, a party may be potentially liable in tort to third persons: (1) where the contracting party, fails to exercise reasonable care in his or her duties and launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see id.*; *see H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]); *see Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]; *see also Palka v Servicemaster Mgt. Services Corp.*, 83 NY2d 579, 589 [1994]).

Here, plaintiff failed to establish its prima facie entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561 [1980]). BILT did not own or lease the premises during plaintiff's accident, nor did BILT “operate, manage, maintain, supervise, use, or control the premises.” Nevertheless, based on the competing testimony of the experts, there remain issues of fact as to whether BILT was negligent with the design and construction of the

outer steps (NYSCEF # 174 at 2) and thus, launched the instrument of harm (*see Espinal*, 98 NY2d at 140-41).

Accordingly, Plaintiff's motion for summary judgment against BILT is denied (*see Zuckerman*, 49 NY2d at 561; *see also Henriquez*, 62 AD3d at 750-51).

### **III. 71 Worth LLC's Cross-Indemnification Claim**

Defendant 71 Worth LLC further asserts contractual indemnification against BILT and second third-party defendant Parts & Labor. In addition, 71 Worth LLC asserts common law indemnification against BILT, Parts & Labor, Pablo LLC, and Cabato (NYSCEF # 186 at 3).

#### *A. Contract Indemnification*

Contractual indemnification depends upon the specific language of the contract (*see Ging v F.J. Sciamme Constr. Co., Inc.*, 193 AD3d 415 [1st Dept 2021], citing *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]).

The 71 Worth LLC and BILT contract indemnification clause provides:

#### “12. Indemnification

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless, the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or part by negligent acts or omissions of the Contractor, Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they maybe liable, regardless of whether or not such claim, damage, loss or expense is caused in part by party indemnified hereunder” (NYSCEF # 210 at 7).

Here, the indemnification contract provision clearly states and obligates BILT to

to indemnify 71 Worth LLC for all claims which are “against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work” (*id.*). However, the clause covers only to “negligent acts or omissions” (*id.*). Here, there is an issue of fact regarding whether the BILT and its subcontractors are negligent (*see Cacket*, 183 AD3d at 422).

In addition, Parts & Labor and 71 Worth LLC’s indemnification clause provides:

- “a. If any negligence or willful misconduct of PARTS and LABOR DESIGN 2009 CORP. caused any damage, injury or loss claimed by the third party, then PARTS and LABOR DESIGN 2009 CORP. and the Client shall each indemnify the other against any loss of judgment on a comparative responsibility basis under comparative negligence principles (the Client's responsibility to include that of its agents, employees, and other consultants);
- b. Unless PARTS and LABOR DESIGN 2009 CORP. was guilty of negligence or willful misconduct which in whole or part caused the damage, injury or loss asserted in the third party claim, the Client shall indemnify PARTS and LABOR DESIGN 2009 CORP. against any claim, liability, loss, legal fees, consulting fees, expenses and other costs of defense reasonably incurred” (NYSCEF # 217 at 10).

Similar to 71 Worth LLC’s contract with BILT, the indemnification clause covers “negligence or willful misconduct” (*id.*). Here, there is an issue of fact regarding whether the Parts & Labor was negligent (*see Cacket*, 183 AD3d at 422).

Accordingly, 71 Worth LLC and Parts & Labor’s contract indemnification claims are conditionally granted pending a determination of their negligence.

*B. Common Law Indemnification:*

A party's right to indemnification may arise from a contract or may be implied based upon the law's notion of what is fair and proper between the parties (*see Mas v Two Bridges Assoc. by Nat. Kinney Corp.*, 75 NY2d 680, 684 [1990]).

Common law indemnity is a restitution concept which permits shifting the loss because failing to do so would result in the unjust enrichment of one party at the expense of the other (*see McCarthy v Turner Const., Inc.*, 17 NY3d 369, 374-75 [2011], citing *McDermott v City of New York*, 50 NY2d 211, 216-217 [1980]); *see also Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 22 [1985] [stating indemnity may be implied “to prevent a result which is regarded as unjust or unsatisfactory” and “is frequently employed in favor of one who is vicariously liable for the tort of another]). Common-law indemnification is generally available “in favor one who is held responsible solely by operation of law because of his relation to the actual wrongdoer” (*McCarthy*, 17 NY3d at 375 [2011], quoting *Mas*, 75 NY2d at 690).

A party's authority to “supervise the work and implement safety procedures is not alone a sufficient basis for requiring common-law indemnification” (*id.* at 378). Liability for indemnification may only be imposed against those parties who exercise actual supervision (*see id.*)

Here, 71 Worth LLC’s claims of common law indemnification are denied. There is an issue of fact of whether there was a defect in the construction and design of the steps and handrails as well as to which party had the sufficient authority to control the work of the defects in question (*see id.*).

#### **IV. 459 W 50 St. LLC’s (Owner) Liability**

Defendant 459 W 50 St. LLC avers it is not liable because it was an “out-of-possession landlord and 71 Worth LLC as the tenant was responsible for making repairs/renovations to the subject premises including the construction of the handicapped ramp” of the real property upon which Plaintiff suffered his accident (NYSCEF # 402 at 2). 459 W 50 St. LLC supports its argument by citing to the lease agreement with 71 Worth LLC (NYSCEF # 137). In addition, 459

W 50 St. LLC argues it lacked notice that the claimed steps and handrail were “dangerous and defective” conditions, nor did it create the alleged dangerous/defective conditions (NYSCEF # 402 at 2).

*A. Out of Possession Landowner*

As a general rule, landowners owe a duty of reasonable care to people on their property (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Liability for unsafe conditions on property must be predicated on ownership, occupancy, control, or special use of the premises (*see Casale v Brookdale Med. Assoc.*, 43 AD3d 418, 418 [2d Dept 2007]; *see also James v Stark*, 183 AD2d 873, 873 [2d Dept 1992]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]).

Generally, an out-of-possession owner who has no supervision or control over the premises, and who has no obligation to maintain or repair cannot be held liable for dangerous conditions on the property (*see Davis v HSS Properties Corp.*, 1 AD3d 153, 154 [1st Dept 2003]). Thus, an out-of-possession owner can be held liable for injuries resulting from a dangerous condition through constructive notice only where it has reserved the right to enter the premises to perform inspection, maintenance and repairs at the tenant's expense (*id.*) The injury must be caused by “a significant structural or design defect that is contrary to a specific statutory safety provision” (*id.*, quoting *McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [1st Dept 2003]). However, merely retaining the right of re-entry will not be sufficient to impose a duty to maintain; rather under such circumstances a statutory violation must be alleged (*see Quinones v 27 Third City King Rest., Inc.*, 198 AD2d 23, 23 [1st Dept 1993] [finding the “lease provided that the owner or its agent retained the right, but was not obligated, to enter the demised premises at any time in any emergency”]; *see also Chery v Exotic Realty, Inc.*, 34 AD3d 412, 413 [2d Dept 2006]). When specific non-delegable duties are breached, the owner may not escape liability under the net lease agreement for dangerous

conditions on the premises (*see Bonifacio v 910-930 S. Blvd. LLC*, 295 AD2d 86, 90 [1st Dept 2002]) “In any event, the mere absence of a right of re-entry provision in the net lease does not in itself conclusively establish, in all circumstances, that the owner has “completely parted with” control of the building” (*id.*). “Rather, retention of a right of re-entry is merely one way an owner may maintain a degree of control (*id.*).

Here, the lease agreement’s “Access to Premises” clause provides:

“Owner or Owner’s agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and at other reasonable times, to examine the same and make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform” (NYSCEF # 137 at 3).

Thus, 459 W 50 St. LLC’s right of reentry can demonstrate defendant 459 W 50 St. LLC’s degree of control to the property (*see Bonifacio*, 295 AD2d at 90).

#### *B. Constructive Notice*

When the right of re-entry is for the purpose of inspection and repair, charging the owner with constructive notice of dangerous conditions may exist, even in the absence of statutory violations (*see Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559, 566 [1987] [finding although there was no evidence of actual notice of the claimed dangerous condition, defendant’s right to reenter the premises was sufficient to charge it with constructive notice]). Notice of a defect or dangerous condition can be established by prior accident reports, maintenance reports regarding remedial efforts, or testimony of workers concerning their knowledge (*see Tucker v New York City Tr. Auth.*, 42 AD3d 316, 317 [1st Dept 2007]). Constructive notice can be established if there was a visible and apparent defect that existed for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see id.*). In addition, notice of a general or unrelated problem is not sufficient; rather, the particular defect must have been

apparent (*see Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [1st Dept 2007]). In addition, a defendant who has actual knowledge and was aware of an ongoing and recurring dangerous condition is on constructive notice of specific reoccurrences of the condition (*see O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 106 [1st Dept 1996]). Thus, even if the owner is not alleged to have created the defective condition, liability may be predicated on the owner's failure to remedy the condition based on notice and sufficient time to do so (*see Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2d Dept 2010]; *Birthwright v Mid-City Sec., Inc.*, 268 AD2d 401, 402 [2d Dept 2000]; *Perlongo v Park City 3 & 4 Apartments, Inc.*, 31 AD3d 409, 411 [2d Dept 2006]).

Here, there is a triable issue of fact whether defendant 459 W 50 St. LLC was on notice of the alleged dangerous conditions. Although 459 W 50 St. LLC argues that it had no knowledge and the “steps and handrail existed without incident for over three years before the subject incident occurred,” the court finds this claim unavailing (NYSCEF # 402 at 2-3).

Here, notice can be imputed on 459 W 50 St. LLC based on the “Alteration” clause in the lease agreement, to which tenant 71 Worth made improvements to the property including the alleged defects stemming from plaintiff’s injury (NYSCEF # 137 at 2). The Alteration clause provides “Tenant shall make no changes in or to the demised premises without owner's prior written consent” (*id.*). Based on the lease agreement, notice can be imputed to premise owner 459 W 50 St. LLC regarding the construction of the alleged defect (*see id.*).

### *C. Dangerous or Defective Condition*

Where liability is predicated on the owner's creation of a dangerous or defective condition, “usual questions of notice of the condition are irrelevant since the defendant created the condition” (*Cook v Rezende*, 32 NY2d 596, 599 [1973]; *see Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567, 567 [1st Dept 1993]). Within the exercise of reasonable care, there must be

either proof that defendant created the condition or had a sufficient opportunity to remedy the situation (*see Lewis v Metro. Transp. Auth.*, 99 AD2d 246, 250 [1st Dept 1984]; *see also Madrid v City of New York*, 42 NY2d 1039, 1039 [1977]). In addition, expert opinion may be admitted when an expert offers an opinion on an issue which involves professional or scientific knowledge or skill not within the range of ordinary training or intelligence (*see Dufel v Green*, 84 NY2d 795, 798 [1995]). An expert may opine upon custom and usage in a particular industry such as building construction, renovations, and alternations (*see Trimarco v Klein*, 56 NY2d 98, 103 [1982]). Furthermore, expert testimony on the issue of whether conditions or conduct constitute a violation of a statute or regulation is permissible (*see Franco v Jay Cee of New York Corp.*, 36 AD3d 445, 448 [1st Dept 2007]).

Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Trincere v County of Suffolk*, 90 NY2d 976, 976 [1997]; *see also Adsmond v City of Poughkeepsie*, 283 AD2d 598 [2d Dept 2001]).

Here, there is an issue of fact whether the difference in elevation of the stairs to the ground as trivial and non-actional as a matter of law (*see Bovino v J.R. Equities, Inc.*, 55 AD3d 399, 400 [1st Dept 2008]; *see also Fasano v Green-Wood Cemetery*, 21 AD3d 446, 447 [2d Dept 2005] [“defendant failed to make a prima facie showing that the condition upon which the plaintiff tripped and fell, a difference in elevation between the landing of a concrete staircase and the adjoining walkway, which ranged up to two inches, for a length of approximately two feet, was trivial and nonactionable as a matter of law. The plaintiff’s testimony together with photographs of the defective condition as well as all other relevant factors and surrounding circumstances demonstrated that there exist triable issues of fact”]).

In addition, because the property is a bar open to the public, the owners have a “nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress” (see *Reynolds v Sead Dev. Group*, 257 AD2d 940, 940-41 [3d Dept 1999], quoting *June v Bill Zikakis Chevrolet Inc.*, 199 AD2d 907, 909 [3d Dept 1993]). Accordingly, defendant 459 W 50 St. LLC, in its capacity as owner of the premises, may be held vicariously liable for the alleged negligent design and construction of the stairs and handrails (see *Reynolds*, 257 AD2d at 940-41, citing *Richardson v David Schwager Assoc., Inc.*, 249 AD2d 531 [2d Dept 1998]).

Here, the conflicting expert affirmations together with photographs of the alleged defect demonstrated that there exist triable issues of fact (NYSCEF ## 136, 186).

Accordingly, defendant’s motion for summary judgment is denied due to an issue of fact.

#### **Motion # 4 – Pablo’s Liability**

On October 17, 2024 Pablo LLC moved for summary judgment dismissing the third-party complaint, second-third party complaint, and all cross claims against it regarding contract indemnification and contribution claims (NYSCEF ## 145, 170). Pablo LLC’s motion is granted dismissing the third-party complaint, second-third party complaint, and all cross-claims against it regarding contract indemnification and contribution claims.

There is no issue of triable fact on whether Pablo LLC was involved in plaintiff’s injury based on the scope of construction work which was only for the ramp (NYSCEF ##160, 162). Both depositions provided by 71 Worth LLC’s and Pablo’s deposition state that Pablo was contracted on construction for the ramp (see *id.*). 71 Worth acknowledged Pablo LLC was “kind of doing the ramp” (NYSCEF # 160 at 20). Pablo also stated: “I built the ramp” and “they just told me what they wanted for ramp (NYSCEF # 162 at 20-21).

Accordingly, there is no triable issue of fact where Pablo LLC was involved in the construction of the alleged defective stairs stemming from Plaintiff's injury. In addition, the papers do not provide any indemnification contract agreed by Pablo to any party (NYSCEF # 170 at 5). Thus, Pablo LLC sufficiently established its prima facie entitlement to judgment as a matter of law (*see generally Zuckerman*, 49 NY2d at 561). Accordingly, the motion is granted.

#### **Motion # 5 - Cabato's (Architect) Liability**

On October 28, 2024, Cabato moved for summary judgment dismissing all claims and cross-claims (NYSCEF # 231). Cabato's motion is granted.

Cabato's architect contract did not expressly provide indemnification or contribution to any party (NYSCEF # 249). In addition, the designs provided by Cabato show the designs of a ramp (NYSCEF # 252).

Therefore, Cabato is entitled to summary judgment dismissing the cross claims asserted against it (NYSCEF # 249). Furthermore, the common-law indemnification claims are dismissed because Cabato was not actively at fault in bringing about the damage caused to Plaintiff building, nor did Cabato exercise actual supervision or control over the alleged defect construction (*see 87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 542 [1st Dept 2014], citing *McCarthy v Turner Const., Inc.*, 17 NY3d 369, 375-376 [2011]).

In addition, liability for plaintiff's injury may not be imposed on it, since there is no evidence that it committed an affirmative act of negligence, and there is no clear contractual provision creating an obligation explicitly running to and for the benefit of workers such as plaintiff (*see Walker v Metro-N. Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004], citing *Hernandez v Yonkers Contr. Co., Inc.*, 306 AD2d 379 [2d Dept 2003]).

### **Motion # 6 – Parts & Labor’s Liability**

On October 28, 2024, Parts & Labor moved for summary judgment dismissing all claims and cross-claims (NYSCEF # 231). Parts & Labor’s motion is denied.

The general rule is that “[a] builder or contractor is justified in relying upon the plans and specifications which he [or she] has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury” (*Henriquez*, 62 AD3d at 750-51, quoting *Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43, 46 [1924]; *Cortez v Sladon Iron Works Co.*, 214 AD 404, 407 [1st Dept 1925]).

Here, there is a question of fact as to whether the construction plans which Parts and Labor followed were so apparently defective that “ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury” (*Henriquez*, 62 AD3d at 750-51). As stated earlier, there exist a question of fact whether the construction of the stairs was defective based on the opposing expert affirmations whether the construction and design of the stairs and handrails are defective (NYSCEF ## 136, 186). In addition, Parts & Labor’s contract with 71 Worth LLC states in its indemnification clause of part 13 as

- a. “If any negligence or willful misconduct of PARTS and LABOR DESIGN 2009 CORP. caused any damage, injury or loss claimed by the third party, then PARTS and LABOR DESIGN 2009 CORP. and the Client shall each indemnify the other against any loss of judgment on a comparative responsibility basis under comparative negligence principles (the Client's responsibility to include that of its agents, employees, and other consultants);
- b. Unless PARTS and LABOR DESIGN 2009 CORP. was guilty of negligence or willful misconduct which in whole or part caused the damage, injury or loss asserted in the third party claim, the Client shall indemnify PARTS and LABOR DESIGN 2009 CORP. against any claim, liability, loss, legal fees,

consulting fees, expenses and other costs of defense reasonably incurred” (NYSCEF # 247 at 10).

Here, there exist a question of fact whether Parts & Labor was negligent in the design and construction of the stairs and handrails in question to impose indemnification (*see id.*).

Accordingly, Parts and Labor Design LLC’s motion for summary judgment is denied.

### **Motion # 7 – BILT’s Liability**

BILT’s motion for summary judgment dismissing all claims and cross-claims (NYSCEF # 231) is denied.

Here, an indemnification clause between 71 Worth LLC and BILT exists (NYSCEF 210 at 7). Section 12 of the contract provides

“To the fullest extent permitted by law, the **Contractor shall indemnify and hold harmless, the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses**, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or part by negligent acts or omissions of the Contractor, Subcontractor, or anyone directly or indirectly employed by them or anyone for whose acts they maybe liable, regardless of whether or not such claim, damage, loss or expense is caused in part by party indemnified hereunder” (*id.*).

Based on the explicit text of the indemnification clause which states that “Contractor shall indemnify and hold harmless, the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses,” BILT’s argument against indemnification is denied, as well as BILT’s argument that it is entitled to indemnification and defense fees from its co-defendants is also denied (*see id.*; NYSCEF # 299).

Rather, the clause provides that BILT shall indemnify and hold harmless said parties (NYSCEF # 210 at 7).

**Conclusion**

In view of the above, it is

ORDERED that plaintiff’s motion for summary judgment for sequence # 3 is denied in its entirety; 71 Worth LLC’s contractual indemnification against BILT and second third party defendant Parts & Labor is denied; 71 Worth LLC’s common law indemnification claims against BILT, Parts & Labor, Pablo LLC, and Cabato are denied. Owner 459 W. 50 St. LLC’s claim as an out of possession owner is denied;

ORDERED that Pablo’s motion for summary judgment for sequence # 4 dismissing the third-party complaint, second-third party complaint, and all cross-claims against it regarding contract indemnification and contribution claims is granted;

ORDERED that Cabato’s motion for summary judgment for sequence # 5 dismissing all claims and cross-claims is granted;

ORDERED that Parts & Labor’s motion for summary judgment for sequence # 6 dismissing all claims and cross-claims is denied; and

ORDERED that BILT’s motion for summary judgment for sequence # 7 dismissing all claims and cross-claims is denied; and it is further

ORDERED that Pablo shall serve a copy of this order with notice of entry on all parties within 14 days of its upload onto NYSCEF.

10/9/2025  
DATE

  
RICHARD G. LATIN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE