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Case Number 146,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GAIL HELM and SCOTT HELM,	:	
	:	No. 146, 2014
Plaintiff Below, Appellants,	:	
	:	
v.	:	Court Below – Superior Court
	:	of the State of Delaware
206 MASSACHUSETTS AVENUE, LLC,	:	in and for Kent County
and GALLO REALTY, INC.,	:	C.A. NO. K12C-03-014 RBY
	:	
Defendants Below, Appellees.	:	

APPELLEE 206 MASSACHUSETTS AVENUE, LLC'S ANSWERING BRIEF

TYBOUT, REDFEARN & PELL

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NATURE OF PROCEEDINGS

This appeal stems from a personal injury action that was filed by Plaintiffs-Below/Appellants, Gail Helm ("Appellant") and Scott Helm, in the Superior Court, in and for Kent County. Appellant rented a beach house located at 206 Massachusetts Avenue, Lewes, Delaware (the "Property"), for a week in July, 2010. On July 10, 2010, as Appellant was descending the stairs from the second floor to the first floor of the Property, she fell and sustained injuries. In the suit below, Appellant sought to recover damages based on a claims of negligence and breach of contract and Scott Helm asserted a claim for loss of consortium.

On June 18, 2013, Apellee Gallo Realty, Inc. ("Gallo") filed a Motion for Summary Judgment based on two grounds. Gallo first asserted that it was not exercising control over the Property, but was merely acting as the agent for the Property owner. Second, Gallo argued that the indemnification provision of the rental contract shielded it from liability. On June 27, 2013, Appellee 206 Massachusetts Avenue, LLC (the "LLC") also filed a Motion for Summary Judgment arguing that Appellant primarily assumed the risk of her fall based on her deposition testimony, was more than fifty percent negligent as a matter of law, and argued that the indemnification clause of the rental contract also shielded the LLC from liability. Appellant responded to both Motions for Summary Judgment and the Court held oral arguments on September 20, 2013.

Based on the parties' submissions and oral arguments, the Superior Court granted both Defendants' Motions for Summary Judgment by decision dated December 12, 2013. (See Superior Court Decision on Motion for Summary Judgment dated Dec. 12, 2013 attached to Appellant's Op. Br. (hereinafter "*Helm I*")). The Superior Court held that Appellant was more than fifty percent (50%) negligent in causing her injuries as a matter of law and that she primarily assumed the risk of her fall. (*Helm I* at pp. 6-7). On December 19, 2013, Appellant filed a Motion for Reargument asserting that the Superior Court granted summary judgment in favor of Gallo, despite the fact that it never raised the issue of primary assumption of the risk or comparative negligence; that there remained material facts in dispute; that the Superior Court misapplied precedent in determining that Appellant was more negligent than the LLC and/or Gallo as a matter of law; and that the Superior Court erroneously dismissed Count II of Appellant's Complaint regarding the alleged breach of contract. Responses to the Motion for Reargument were filed on December 30 and December 31, 2013.

On February 20, 2014, the Superior Court issued an Order denying the Motion for Reargument. (See Superior Court Decision on Motion for Reargument dated Feb. 20, 2014 attached to Appellant's Op. Br. (hereinafter "*Helm II*")) The Superior Court found that despite the fact that Gallo never filed a Motion for Summary Judgment regarding primary assumption of the risk and comparative

negligence, under Superior Court Rule 56, the Court was permitted to look at pleadings, depositions, answers to interrogatories, and admissions on file to determine whether Gallo was entitled to judgment as a matter of law. (*Helm II* at pp. 3-4). The Superior Court also pointed out that at oral argument, Gallo's counsel argued that Appellant caused her own injuries without objection from Appellant. (Id.) The Superior Court upheld its finding that because Appellant had rented the Property in the two years prior, she was sufficiently familiar with graspability of the handrail (or the lack thereof) and with that knowledge, she could fully assume the risk of descending the stairs in the dark. (*Helm II* at p. 4). The Superior Court held that the record supported that Appellant was comparatively negligent in an amount greater than fifty percent (50%) as a matter of law; and finally, the Superior Court held that Appellant's breach of contract claim was nothing more than an alternative count to recover for her personal injuries. (*Helm II* at pp. 4-5). The Superior Court further held that the allegations in Appellant's Complaint, which were alleged to have been breached, were not terms of the rental contract, and further that Appellant accepted the Property "as is." (*Helm II* at pp. 5-6). Based on the foregoing, the Superior Court denied the Motion for Reargument.

Appellant filed this present appeal, appealing both the Superior Court's Order granting the LLC and Gallo's Motions for Summary Judgment, as well as

the Superior Court's Order denying the Motion for Reargument. This is 206 Massachusetts Avenue, LLC's Answering Brief on Appeal.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that Appellant, Gail Helm, knew of the risk associated with descending the dark stairwell, appreciated that risk, and nevertheless continued down the stairs in the face of that risk, which demonstrated that she primarily assumed the risk of her fall and/or was more than fifty percent (50%) negligent as a matter of law.

2. Denied. Contrary to Appellant's assertion, Superior Court did not base its grant of summary judgment on the indemnification clause in the rental contract and expressly stated that was not doing so. Even if the Superior Court relied on the indemnification clause in granting summary judgment, it is sufficiently clear and unambiguous to shield both 206 Massachusetts Avenue, LLC and Gallo Realty, Inc. from liability.

3. Denied. The Superior Court correctly granted summary judgment on Appellant's breach of contract claim as the Superior Court noted there was no evidence that any term of the rental contract was breached, the record below was devoid of any damages flowing from the alleged breach, and Appellant took the Property "as-is".

STATEMENT OF FACTS

Appellant, Gail Helm ("Appellant") filed the lawsuit below alleging she suffered bodily injuries when she fell down several steps between the first and second floor of a beach rental house located in Lewes, Delaware (the "Property"), which was owned by 206 Massachusetts Avenue, LLC (the "LLC") and leased through Gallo Realty, Inc. ("Gallo"). (A19-A26). Appellant's husband, Scott Helm, also asserted a claim for loss of consortium. (A25-26). Appellant alleged that her fall was caused by inadequate lighting as well as an improperly sized banister along the stairs at the Property.[1] (A22). Appellant previously rented the Property for week-long vacations in 2008 and 2009. (A95, 27:4-6). Appellant also rented the Property the year after her fall. (A327, 44:3-20)

Appellant's third week-long vacation at the Property was scheduled for July 10, 2010. (A94, 26:11-13). On the evening of July 10, 2010, Appellant arrived at the Property and was informed by family members that the Property required cleaning. (A96-97, 30:24-31:14). As part of the cleaning, Appellant testified that

[1] Appellant's claim that the banister was not properly sized was not alleged in the original Complaint. It was not until after her expert examined the Property and subsequently offered an opinion that the banister lacked graspability, which limited Appellant's ability to catch herself once she started to fall, that Appellant amended her Complaint to include this assertion. (A16-A17).

she took a number of rugs from the upstairs bathrooms and placed them in the washing machine located on the first floor of the Property. (A96, 30:2-8). Appellant further testified that at approximately 11:30 p.m., she was on the second floor of the Property and decided to go to the first floor because she wanted to change the rugs from the washing machine to the dryer. (A101, 40:20-23).

As Appellant attempted to descend the stairs from the second floor to the first floor, she noticed that the stairwell was very dark. (A104, 83:14-19). Appellant acknowledged that as she stood at the top of the stairs, before descending, she "definitely saw a safety issue." (A105, 84:10-12). Furthermore, Appellant acknowledged that she "knew it was unsafe when [she] looked down [the stairs]." (A105, 84:16-17). Appellant appreciated the purported hazard associated with the dark stairs and thought she could handle it. (A105, 84:19-21). Appellant made no effort to look for a flashlight prior to descending that dark stairs. (A104, 83:20-24). Appellant did not try to have a family member assist her in descending the stairs because she did not want to put them in "jeopardy". (A105, 84:13-17).

As Appellant descended the stairs in flip-flops, she again paused and realized that she could not see the step in front of her because of the darkness. (A98-100, 36:16-38:12). She testified that "It was dark. I don't see anything." (A101, 40:10). Appellant even testified that it was so dark that she could not see

her feet. (A101, 40:14-15). Unaware of what was in front of her, Appellant reached out with her foot in an attempt to feel the next step. (A99-100, 37:22-38:10). Not feeling the next step, Appellant assumed, incorrectly, that she had reached the landing and proceeded forward. (A99-100, 37:22-38:10). As Appellant proceeded forward, her foot landed on the edge of the next step, causing her to lose balance and fall forward. (A102-103, 45:13-46:15). Appellant was injured as a result of this fall.

Prior to renting the Property, Appellant entered into a Residential Lodging Agreement, dated November 21, 2009 (the "Contract"). (A57-58). The Contract contained the following relevant clauses:

> 4 (c) Guest acknowledges that he/she has personally inspected the property and accepts it in an "as-is" condition. If Guest has not inspected the property, he/she waives the right to withhold rent for any alleged deficiency in the premises or to otherwise claim that the property has been misrepresented to him/her either by the Owner or Agent.
>
> (d) Guest agrees to defend, indemnify, and hold harmless Owners and Prudential Gallo, REALTORS from and against any and all damage, loss, liability or expense, including, without limitation, attorney fees and legal costs, suffered directly or by reason of any claim, suit or judgement [sic], brought by or in favor of any person or persons, including without limitation minors, for damage, loss or expense due to, but not limited to, bodily injury and/or property damage sustained by such person or persons which arises out of, is occasioned by, or is in any way attributable to Guest's use or occupancy of the premises or the acts or omissions of Guest or guests, invitees or licensees of Guest, including without limitation friends and relatives of Guest, except to the extent caused by the sole negligence of Owner.

(the "Indemnification Clause"). (A58). Appellant's Complaint alleged that the contract was breached due to the uncleanliness of the Property. (A24). Appellant did not notify Gallo or the LLC of the alleged uncleanliness. (A144-A145, 31:4-33:11). Appellant admitted that the uncleanliness was not a safety issue. (B1, 96:7-12). Appellant only had a brief conversation with an employee of Gallo regarding how she was injured as she was checking out on July 17, 2010. (A80-81). In addition, Appellant left a comment card at the time of check that stated "need to install switch at top of steps in the kitchen to turn light on at bottom of steps". (A161, 85:13-21; B2). Based on this alleged breach of contract, Appellant sought to recover for her medical expenses as well as "reliance damages" in the amount of $3,492.03. (A25). Appellant alleged that her fall and resulting damages were a foreseeable consequence of the breach of contract. (A24).

ARGUMENT

A. THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT AS APPELLANT'S UNEQUIVOCAL TESTIMONY SUPPORTS A FINDING OF PRIMARY ASSUMPTION OF THE RISK AND THAT SHE WAS MORE THAN FIFTY PERCENT NEGLIGENT AS A MATTER OF LAW

1. QUESTION PRESENTED

Whether the Superior Court's grant of summary judgment should be affirmed where the unequivocal testimony of Appellant supports a finding of primary assumption of the risk and that Appellant was more than fifty percent negligent as a matter of law? This issue was preserved in the trial court in the LLC's Motion for Summary Judgment (A85–A90), Reply in Support of its Motion for Summary Judgment (A275-A281) and its Response to Appellant's Motion for Reargument. (A349–A353)

2. STANDARD AND SCOPE OF REVIEW

On appeal, questions of law are reviewed *de novo*. *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007). Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Burkhart v. Davies*, 602 A.2d 56 (Del. 1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party

meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. *Id.*

3. MERITS OF ARGUMENT

a. The Superior Court Correctly Granted Summary Judgment where all Disputed Facts were Deemed True for the Purpose of Summary Judgment.

The Superior Court correctly granted summary judgment where the undisputed facts, in the light most favorable to Appellant, establish that the LLC was entitled to judgment as a matter of law. Appellant's first argument that there were disputed facts that should have precluded the Superior Court from granting summary judgment in the LLC's favor is completely without merit as the LLC acknowledged and the Superior Court accepted that the disputed facts were to be viewed in the light most favorable to Appellant.

Appellant points to footnote 2 in the LLC's motion for summary judgment for the proposition that "the LLC identified disputed facts regarding the lighting and banister that caused [Appellant's] injuries." Footnote 2 of the LLC's Motion for Summary Judgment, however, states that "[t]hese are disputed fact *but are assumed true* for the purpose of summary judgment." So, the LLC acknowledged, for the sole purpose of the summary judgment motion, that there were lighting and

banister defects. But even with these defects, the LLC asserted that Appellant's conduct barred her recovery.

Similarly, the Superior Court assumed that Appellant's allegations were true and not in dispute, including the graspability of the banister based on footnote 2.[2] The Court, taking into account the dispute regarding the graspability of the banister (and accepting Appellant's version as true), stated that Appellant (based on her own testimony) had sufficient knowledge of the graspability of the handrail or lack thereof to appreciate the risk of descending the dark stairwell that ultimately caused her fall. As such, the Superior Court correctly held that Appellant appreciated the risk associated with descending the dark stairwell, including the alleged ungraspable banister, and nevertheless descended the stairs in the face of that risk. As such, the Superior Court was correct in granting summary judgment where all disputed facts were deemed true for the purpose of summary judgment.

[2] Appellant correctly point out that they and the LLC hired experts to opine regarding the safety of the handrail and banister. Again, this point is moot because the LLC conceded that the banister and lighting were a hazardous condition for the purpose of summary judgment.

b. The Superior Court was not Required to Weigh the Evidence where Appellant's Clear and Unequivocal Testimony Established that she Primarily Assumed the Risk of her Fall and/or was Greater than Fifty Percent Negligent as a Matter of Law.

Appellant incorrectly argues that the Superior Court weighed the evidence in granting the LLC's motion for summary judgment. In this case, the undisputed testimony of Appellant indicates that she appreciated the risk associated with descending the stairs in the dark and expressly consented to the inherent danger.[3] As Appellant stood at the top of the stairs, she "knew it was unsafe" but voluntarily went down the stairs. (A105, 84:16-17). Appellant again acknowledged that the stairs were unsafe when, approximately two-thirds of the way down, she stopped because she was unable to see the next step in front of her. (A98-99, 36:16-37:21). At no point did Appellant consider returning upstairs to look for a flashlight and/or returning in the morning. (A104, 83:20-24) Instead, deciding to continue on in the face of a known risk, Appellant began to feel around with her foot for the next step. (A99-100, 37:22-38:10). Ultimately, Appellant fell because she incorrectly

[3] It should be noted that Appellant did not produce any evidence to suggest that the lightning in the stairwell was in violation of any building code. Rather, Appellant relied upon expert testimony to suggest that the handrail attached to the banister of the stairwell was not "graspable", despite the fact that Appellant's expert acknowledged the presence of a fully compliant handrail on the other side of the stairwell.

assumed that she had reached the landing and stepped too far beyond the next step. (A99-100, 37:22-38:10). Therefore, the Superior Court was correct in holding that Appellant is barred from recovery as a matter of law because she expressly consented to a risk and understood or should have understood the dangers associated with that risk.

Appellant's argument that the Superior Court weighed the evidence is unavailing. First, Appellant argues that she was descending the dark stairs "to take care of the property (i.e., rugs) belonging to the LLC and/or Gallo." There is nothing in the record that would suggest that the LLC and/or Gallo had any connection with Appellant's decision to descend the stairs or that they required Appellant to descend the dark stairwell in the face of an obvious danger. Second, Appellant's assertion that there was no flashlight at the Property to aid her descending the stairs is meritless. Appellant testified that she did not look for a flashlight before descending the stairs. (A104, 83:20-24). It was only after she fell that Appellant looked for a flashlight and could not find one. (Id.) And as the Superior Court correctly noted, Appellant had rented the Property for two weeks previously and had been up and down the stairs where she ultimately fell. Therefore, the Superior Court did not weigh the evidence but rather relied on the clear undisputed testimony of Appellant in granting summary judgment.

c. The Superior Court Correctly Held that the Appellant Primarily Assumed the Risk of her Fall and/or was Greater than Fifty Percent Negligent as a Matter of Law.

Under Delaware law, primary assumption of the risk is a complete bar to recovery by a plaintiff in a negligence action. If the "plaintiff knows of the existence of risk, appreciates the danger of it and nevertheless does not avoid it, she will be held to have assumed the risk and may not recover". *Brady v. White*, 2006 WL 2790914, *2 (Del. Super. Ct. Sept. 27, 2006). "Primary assumption of risk is generally found where the plaintiff expressly consents to the risks at hand . . ." *Croom v. Pressley*, 1994 WL 466013, *5 (Del. Super. Ct. July 29, 1994) (internal quotations omitted). Expressed consent does not need to be specific words but can be manifest by circumstantial words or conduct. *Id.* Secondary assumption of the risk is subsumed within the principles of comparative negligence and applies where "plaintiff's conduct in encountering a known risk may in itself be unreasonable". *Id.* "Summary judgment may be granted in favor of the defendant if the trial judge determines that no reasonable juror could find that the plaintiff's negligence did not exceed the defendant's." *Baker v. E. Coast Properties, Inc.*, 2011 WL 5622443, at 4 (Del. Super. Nov. 15, 2011)(internal citations omitted).

1. Primary Assumption of Risk

Contrary to her assertion, and as the Superior Court recognized, Appellant's testimony makes it clear that she primarily assumed the risk of descending the dark stairwell. In *Brady*, for example, the court granted summary judgment against a plaintiff-veterinarian based on primary assumption of the risk, as the court found that the plaintiff knew or should have known of a dog's aggressive nature (based on prior encounters), and assumed the risk of a dog bite in treating the dog. 2006 WL 2790914 (Del. Super. Ct. Sept. 27, 2006). Appellant's attempt to distinguish *Brady* from the current case is unavailing. Throughout the *Brady* opinion, the Superior Court discusses the applicability of the "common law assumption of the risk defense" with no suggestion that it is limited to veterinarians. *Id.* The holding in *Brady* was not, as Appellant argues, based on the fact that she was "a professional injured in the course of her employment". Rather, the Court used the plaintiff's knowledge as a veterinarian to analyze the factors of primary assumption of the risk: existence of risk, appreciates the danger of it, and nevertheless not avoiding it[4]. *Id.* at *2. The *Brady* Court stated that "the standard to be applied is a subjective standard peculiar to the plaintiff." *Id.* Ultimately, the

[4] Unrelatedly, the Court also took into account the plaintiff' s status as a veterinarian in determining that she was not covered by the strict liability of 7 *Del. C.* §1711. *Brady*, 2006 WL 2790914, at *2.

Court determined that the defendant did not owe a legal duty to the plaintiff where she had assumed the risk of being bitten by the defendant's dog. *Id.* at *4. In the case at hand, the general knowledge of a tenant at the LLC's Property was not needed to support the Superior Court's finding of primary assumption of the risk. The Court was able to rely upon Appellant's actual knowledge as set forth in her testimony.

Similarly, Appellant also incorrectly analogize the statements made by the plaintiff in *Croom* with Appellant's statements in relying upon it to support her assertion that the Superior Court committed legal error. In *Croom*, the plaintiff "admitted in his deposition testimony that he appreciated a risk of falling off the scaffold if he wasn't careful . . ." *Croom v. Pressley*, 1994 WL 466013, at *6 (Del. Super. July 29, 1994). This testimony supported an acknowledgement of the general risks associated with climbing a scaffold. The court found that the evidence was "at least inconclusive on the question of expressed consent." *Id.* In the present case, the undisputed facts show that Appellant encountered an actual hazardous condition, appreciated the danger, and did not avoid the actual hazardous condition. Unlike *Croom*, the undisputed evidence is clear that Appellant expressly consented to assume the risk of descending the stairs, which she first acknowledged were unsafe.

Further, Appellant's reliance on *Koutoufaris v. Dick* is not supportive of her arguments as it is factually distinguishable from the present case. 604 A.2d 390 (Del. 1992). Most importantly, the plaintiff in *Koutoufaris* was an employee of the restaurant owned by the defendants and was *required* to park her vehicle in the rear of the parking lot where she was ultimately assaulted when leaving work. *Id.* at 393-94. As a result, the plaintiff in *Koutoufaris* had no alternative but to traverse the parking lot in order to get into her car to leave the premises. *Id.*

In the present case, Appellant was not under any obligation or requirement to go to the first floor of the Property at the time of her fall. Instead, Appellant voluntarily descended the stairs that she acknowledged were unsafe and that she knew were a "safety issue". (A105, 84:10-12). Appellant could have returned upstairs to look for a flashlight or wait until to the morning to descend the stairs, but she instead proceeded down a knowingly dark stairwell. Appellant knew of the existence of risk of descending the stairs, appreciated the danger of it and nevertheless did not avoid risk. As the Superior Court held Appellant primarily assumed the risk and there can be no negligence on the part of the Defendant.

2. Secondary Assumption of the Risk/Comparative Negligence

Contrary to Appellant's assertion, the undisputed facts also show Appellant was comparative negligent in an amount greater than fifty percent (50%). While issues of negligence are usually questions for the jury, summary judgment is

appropriate where no reasonable juror could find that the plaintiff's negligence did not exceed the defendant's. *Baker*, 2011 WL 5622443, at *4. In *Baker*, the plaintiff installed an alarm in his apartment. *Id.* at *1. The plaintiff's landlord entered the plaintiff's apartment, setting off the alarm, startling the plaintiff, and causing him to sustain injuries. *Id.* In granting the landlord's motion for summary judgment, the court held that the plaintiff's installation of the alarm, which led to him to jumping out of bed and falling, was more negligent than the landlord as a matter of law. *Id.* at *4.

Appellant argues at length about the Court's error in relying on *Trievel v. Sabo* to support the grant of summary judgment. 714 A.2d 742 (Del. 1998). Appellant's argument, however, is futile. The Superior Court was merely citing *Trievel* for the well-established law that trial judges are not required to submit a case to a jury when the judge determines that under the facts presented (in the light most favorable to the plaintiff), no reasonable jury could find for the plaintiff. (*Helm I* at p. 7). In fact, in denying the Motion for Reargument, the Superior Court stated that it was relying on *Trievel* for the aforementioned legal principle only. (*Helm II* at pp. 4-5). As such, Appellant's argument that the Superior Court misapplied *Trievel* is misplaced.

In this case, the Superior Court correctly determined that Appellant's negligence greatly exceeds the negligence of the LLC and/or Gallo as a matter of

law. Similar to the plaintiff in *Baker,* it is clearly the negligent actions taken by Appellant that caused her to fall and sustain injuries. As Appellant stood at the top of the stairs, she recognized that the stairwell was very dark. As she was about two-thirds of the way down the stairs she testified that "[i]t was dark" and that she "[could not] see anything." (A101, 40:10). Appellant even testified that it was so dark that she could not see her feet. (A101, 40:14-15). Based on her own testimony, it is clear that Appellant voluntarily undertook an unreasonable risk in continuing down the stairs once she realized that she could not see the next step. Appellant's negligence and/or secondary assumption of the risk proximately caused her injuries. As such, the Superior Court properly determined that Appellant's negligence was greater than that of the LLC and/or Gallo and Appellant was therefore barred from recovering against them. Accordingly, this Court should affirm the decision of the Superior Court.

B. THE INDEMNIFICATION PROVISION OF THE CONTRACT IS VALID AND ENFORCEABLE

1. QUESTION PRESENTED

Whether the clear and unambiguous indemnification provision of the Contract was enforceable against Appellant? This issue was preserved in the LLC's Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment. (A86-A90, A276-A280).

2. SCOPE OF REVIEW

Contract interpretation is treated as a question of law even though it is analytically a question of fact. *Casey Employment Servs., Inc. v. Dali*, 634 A.2d 938 (Del. 1993). On appeal, questions of law are reviewed *de novo*. *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).

3. MERITS OF ARGUMENT

Contrary to her contention on appeal, Appellant's claims are barred pursuant to the Indemnification Clause of the rental contract. The Contract provides that Appellant agrees to "defend, indemnify and hold harmless" Defendants "from and against any and all damage, loss or liability …brought by or in favor of any person or persons ... for damage… not limited to, bodily injury...sustained by such person …which arises out of … guest's use or occupancy of the premises…except to the extent caused by the sole negligence of Owner." (A58).

As set forth above, the evidence clearly demonstrates that Appellant was comparatively negligent in this case, and that Appellant's injuries were not caused by the sole negligence of the Owner, 206 Massachusetts Avenue, LLC. Thus, the LLC was entitled to summary judgment as a matter of law.

a. The Superior Court did not base its Grant of Summary Judgment on the Indemnification Provision

Appellant first argues that the Superior Court should be reversed because it found that the Indemnification Clause applied to Gallo without first finding the Indemnification Clause was unambiguous. (Appellant's Op. Br. p. 25). Thus, Appellant argues that the Superior Court failed to establish a sufficient record for this Court to review. This point is moot, however, because the Superior Court did not base its decision on the Indemnification Clause. In its December 12, 2013 Order, the Superior Court stated that "Plaintiffs argue that the relevant language may be ambiguous as it applies to a claim by the Plaintiffs, and because of the following circumstance, this issue need not be addressed." (*Helm I* at p. 2). The Superior Court later reiterates that "Plaintiffs asserts . . . that the language is to some extent ambiguous. For these purposes, that assertion need not be addressed." (*Helm I* at p. 5). Ultimately, the Superior Court held that "[a]s a consequence, of the Plaintiff's superior negligence and primary assumption of the risk, as a matter of law, Defendant's Motion for Summary Judgment is GRANTED." (*Helm I* at p. 7). Although, in passing, the Superior Court did note that the indemnification

provision would likely shield Gallo (and therefore the LLC) from liability, it was mere *dicta* and not the basis for its holding. The Superior Court did not specifically address the LLC's argument regarding the applicability of the Indemnification Clause.

b. The Indemnification Clause of the Contract is Sufficiently Clear to be Enforceable Against Appellant

Had the Superior Court examined the Indemnification Clause, it would have determined that it is sufficiently clear to be enforceable. Contrary to Appellant's position, Delaware Courts have consistently held that the inclusion of provisions eliminating or limiting indemnification based on the indemnitee's sole negligence is sufficiently clear and unequivocal language to provide indemnification for the indemnitee's own negligence. *Rizzo v. John E. Healy and Sons, Inc.*, 1990 WL 18378, at *2 (Del. Super. Ct. Feb. 16, 1990). In *Rizzo*, this Court stated as follows:

> [t]he parenthetical phrase, '(excluding the sole negligence of [defendant])', which appears in the indemnification paragraph . . . does focus attention on negligence of the indemnitee in a manner not unlike that which [has been] . . . found to be sufficient under Delaware law.

Id. Similarly, the Superior Court has found that the inclusion of limitations on indemnification for "injuries or death solely and proximately caused by or arising out of the . . . negligence of [indemnitee]" was sufficiently clear and unequivocal to provide indemnification for the indemnitee's own negligence. *James v. Getty Oil Co. (E. Operations), Inc.*, 472 A.2d 33, 37 (Del. Super. 1983)(holding that if

indemnitee was not solely negligent, it was entitled to full indemnification, including for its own negligence). Finally, the Court in *Laws v. Ayre Leasing, Inc.*, relying on *James* and *Rizzo*, held that the relevant indemnification language – "except when caused by or resulting from the *sole negligence of* [indemnitee]" – was valid and enforceable to require indemnification for the indemnitee's own negligence. 1995 WL 465334 (Del. Super. July 31, 1995).

Appellant disregards the aforementioned case law and relies primarily on *Slowe v. Pike Creek Court Club, Inc.*, 2008 WL 5115035 (Del. Super. Dec. 4, 2008) in arguing that the Indemnification Clause is unenforceable. Appellant argues that the Indemnification Clause "is similar to the wavier in *Slowe*" because "it does not explicitly reference 'negligence' or any similar phrase." This is incorrect. The Indemnification Clause, which Appellant quotes in its entirety, expressly states that Appellant is required to indemnify for all damages "except to the extent caused by the *sole negligence of Owner*." (A58). Unlike the waiver in *Slowe*, the Indemnification Clause specifically refers to the negligence of the protected party and is therefore enforceable.

The Indemnification Clause of the rental contract is sufficiently clear and unequivocal in indemnifying the LLC and must be enforced. The Indemnification Clause is nearly identical to the language held to be valid and enforceable in *Rizzo*, *James*, and *Laws*. The Indemnification Clause makes it clear that Appellant would

be required to defend, indemnify, and hold harmless the LLC for its own negligence except for damages caused by the *sole negligence* of the LLC. The record below clearly established that Appellant was negligent in causing her injuries, which means that it was not caused by the sole negligence of the LLC, and the Indemnification Clause would preclude Appellant from pursuing her claims against the LLC and Gallo.

c. The Indemnification Clause is not Ambiguous and is Enforceable Against Appellant

Appellant's suggestion that the Contract is ambiguous is not supported by its plain language. "Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)(internal citations omitted). "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions." *Id.* at 1159-60. The parties' disagreement over the interpretation of contract language does not make it ambiguous. *Id.* at 1160. Instead, the determination of whether a contract is ambiguous is vested solely with the court. *Id.*

Appellant attempts to muddy the waters with "five plausible readings" of the Indemnification Clause to show that there is ambiguity. Although Appellant's five versions of the Indemnification Clause are confusing, the Indemnification Clause

itself is not. The plain and unambiguous indemnification language of the Contract requires Appellant to defend, indemnify, and hold harmless, the LLC and Gallo in all scenarios except where the damages were caused by the sole negligence of the LLC. Because the clear and unambiguous language of the Contract requires Appellant to indemnify and hold harmless the LLC, the LLC is entitled to judgment as a matter of law.

d. The Indemnification Clause is not Void Against Public Policy where the Parties Freely Enter into a Contract that Shifts the Risk to the Contracting Party.

Although not the basis for the Superior Court's grant of summary judgment, Appellant argues that the Superior Court should be reversed because the Indemnification Clause is void against public policy. Delaware, however, has a strong policy of enforcing parties' rights to freedom of contract. "When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract." *Libeau v. Fox*, 880 A.2d 1049, 1056 (Del. Ch. 2005)(internal citations omitted). The *Libeau*, the court stated as follows:

> The right to contract is one of the great, inalienable rights accorded to every free citizen . . . If there is one thing more than any other which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that this

> freedom of contract shall not lightly be interfered with. We also recognize that freedom of contract is the rule and restraints on this freedom the exception, and to justify this exception unusual circumstances should exist.

Id. at 1057.

Appellant argues, without supporting case law, that indemnification agreements, which includes indemnification for one's own negligence, are impermissible as against public policy. Appellant freely and voluntarily entered into the Contract, which contained the Indemnification Clause. It would be illogical to allow the parties to enter into a contract to shift the risk on to Appellant for all claims of negligence and damages except for Appellant's own negligence. Where Delaware strongly favors freedom of contract, the Indemnification Clause is not void and is enforceable against Appellant. In fact, as previously recognized, the courts have upheld the clause as not against public policy.

C. THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' UNSUBSTANTIATED BREACH OF CONTRACT CLAIM

1. QUESTION PRESENTED

Whether the Superior Court correctly held that Appellant failed to establish damages for the alleged breach of contract and took the Property "as is". This issue was preserved in the trial court below in the LLC's Response to the Motion for Reargument on Summary Judgment. (A350-A353)

2. SCOPE OF REVIEW

On appeal, questions of law are reviewed *de novo*. *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007). Summary judgment is appropriate and should be granted where the evidence of record fails to raise a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Burkhart v. Davies*, 602 A.2d 56 (Del. 1991). The moving party has the burden of showing that no issue of material fact exists and that it is entitled to judgment as a matter of law. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets this burden, the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. If the non-moving party is unable to designate specific facts showing a genuine issue for trial, the movant is entitled to summary judgment as a matter of law. *Id.*

3. MERITS OF THE ARGUMENT

The Superior Court correctly determined that Appellant's breach of contract claim falls as a matter of law. Accordingly, this Court should affirm the Superior Court's decision.

Appellant's Complaint alleges that the LLC and/or Gallo breached the Contract by failing to clean the Property and failing to provide "a safe premises to rent as the stairs were unreasonably dangerous." Appellant never notified Gallo or the LLC that the Property was uncleanly. The crux of Appellant's breach of contract claim is that "[a]s a foreseeable consequence of these breaches of the Residential Lodging Agreement, Plaintiff Gail Helm had to clean the Property . . . [i]n the course of cleaning the Property, Gail Helm fell walking down the stairs." Appellant's Complaint goes on to itemize damages allegedly sustained as a result of the breach of contract, which are related solely to the injuries that she sustained as a result of her fall. The only semblance of Appellant seeking to recover for the alleged breach of contract is that in Appellant's "WHEREFORE" clause following the breach of contract count of the Complaint, the she asked for "reliance damages in the amount of $3,492.30". The amount of $3,492.30 reflects the amount paid by Appellant for the week rental of the Property in 2010.

The LLC argued, and the Superior Court agreed, that Appellant's "breach of contract" claim must fail where it is nothing other than an alternative theory to

recover for personal injuries sustained as a result of her fall. "To prevail in a claim for damages for breach of contract, a plaintiff must show both the existence of damages provable to a reasonable certainty, and that these damages flowed from defendant's violation of the contract." *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *17 (Del. Ch. Dec. 4, 2013)(internal citations omitted). Damages for breach of contract are confined to such damages as may fairly and reasonably be considered as arising naturally from such breach itself. *Leary v. Oswald*, 2006 WL 3587249 (Del. Super. Oct. 25, 2006). The standard damages for breach of contract would be expectation damages, i.e. the amount of money that would put the promisee in the same position as if the promisor had performed the contract. *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001).

Appellant is not attempting to recover damages associated with a failure to clean or rental cost for what was allegedly an unsafe premises. Rather, Appellant is attempting to recover for her personal injuries. In the present case, the undisputed evidence in the record below demonstrated that Appellant was the proximate cause of her injuries. As the Superior Court held in its Order granting summary judgment, the "actions by Plaintiff are negligent to a far greater extent than any of Defendants". It was Appellant's own negligence that caused her injuries and not any alleged breach of contract on the part of Gallo or the LLC. In

its Order on Appellant's Motion for Reargument, the Court relied on the fact that it was Appellant that caused her injuries and not any alleged breach of contract. Appellant did not point to facts that would establish that her personal injuries "flowed from Defendant's violation of the contract" nor can it be said that her injuries "fairly and reasonably be considered as arising naturally from such breach". Appellant acknowledged that the uncleanliness of the Property was not a safety issue. (B1, 96:17-21). Furthermore, Appellant did not establish any other damages that would have flowed from the alleged breach of contract.

Even if it accepted that Appellant had asserted a viable claim, the Superior Court properly determined that Appellant's breach of contract claim failed as a matter of law. (*Helm II* at p. 5). Appellant's claim for breach of contract is based on the LLC and/or Gallo's failure to clean the Property and failure to provide safe premises. These are not terms of the Contract, however, and cannot result in a breach of contract. Even if the aforementioned terms were part of the Contract, the LLC and/or Gallo did not breach the contract because Appellant took the Property "as-is". (*Helm II* at pp. 5-6). Specifically, pursuant to paragraph 4(c) of the Contract, "Guest acknowledges that he/she has personally inspected the property and accepts it in "as-is" condition. (A58). The Contract further states that "[i]f Guest has not inspected the property, he/she waives the right to withhold rent for any alleged deficiency in the premises or to otherwise claim that the property has

been misrepresented to him/her . . ." (Id.) Appellant never contacted Gallo or the LLC to inform them of problems with the Property. In fact, the only information Appellant provided was a note on a comment card that the Property "need[ed] to install switch at top of steps in the kitchen to turn light on at bottom of steps" and a brief conversation with an employee of Gallo on the day she was checking out (7 days after her fall). (A161, 85:13-21; A80-81; B2). The uncleanliness of the Property was not a safety concern to her. (B1, 96:17-21)She never alleged the Property was unsafe until she filed this claim. In fact, Appellant returned the following year to the same house with her family. Therefore, where the LLC and/or Gallo did not breach any terms of the Contract and/or Appellant accepted the Property "as-is", the Superior Court correctly granted summary judgment on the breach of contract claim.

CONCLUSION

For the reasons stated herein, Defendant Below/Appellee, 206 Massachusetts Avenue, LLC requests this Court to enter an order affirming the Superior Court's order granting its Motion for Summary Judgment.

TYBOUT, REDFEARN & PELL

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