SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

XIA-PING WANG,

Plaintiff,

- against -

DIAMOND HILL REALTY, LLC, UNITED COLORS OF BENETTON, BENETTON USA CORPORATION, ALTINO CORPORATION AND NEW YORK FOOD & DRINK FLUSHING, INC.,

Defendants.

- x

Index No.: 898/11

Motion Date: 2/27/12

Motion No.:

Motion Seq.: 2

The following papers numbered 1 to 17 read on this motion by New York Food & Drink Flushing, Inc. (New York Food), to dismiss the complaint pursuant to CPLR 3211; and cross motion by Diamond Hill Realty, LLC (Diamond), for summary judgment in its favor on its cross claims for a defense and contractual indemnification from New York Food.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 5
Notice of Cross Motion - Affidavits - Exhibits	6 - 9
Answering Affidavits - Exhibits	10 - 13
Reply Affidavits	14 -17

Upon the foregoing papers it is ordered that the motion and cross motions are denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained in a slip/trip and fall accident on April 9, 2010, at 40-06 Main Street, in Flushing, New York (premises). At the time of the accident, the premises were owned by Diamond, and leased to, inter alia, United Colors of Benetton,

Benetton U.S.A. While New York Food allegedly took possession of the space on or about April 20, 2010, New York Food executed a lease for the space in February, 2010. Based on the allegation that New York Food did not take possession of the premises until on or after April 20, 2010, *after* the date of the subject accident, New York Food moves to dismiss the complaint pursuant to CPLR 3211. Based upon the terms of the lease, Diamond opposes the motion and cross moves for a defense and indemnification from New York Food. The cross motions by Diamond are opposed by New York Food.

The Altino Corporation (Altino) entered into a lease agreement for the subject premises for the term of October 1, 1994 through September 30, 2004. This lease was amended in 2003, whereupon a new lease term was agreed upon. Pursuant to the lease amendment, the newly agreed upon term of the lease for the subject premises was October 1, 2004 through January 31, 2010. Thereafter, pursuant to a standard form of store lease ("Lease"), Diamond leased the premises to New York Food for a period of ten years with commencement of the said lease on February 1, 2010. In the complaint, plaintiff alleges to have been injured at the subject premises on April 9, 2010, more than two months after the effective date of the lease between Diamond and New York Food.

Motion by New York Food

In its pre-answer motion to dismiss, New York Food alleges that it was not the tenant in possession of the subject premises. It further alleges that it did not take possession of the subject premises until April 20, 2010. As such, New York Food argues that it cannot be held liable to plaintiff.

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002], citing *Teitler v Pollack & Sons*, 288 AD2d 302 [2001]; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]; *Leon v Martinez*, 84 NY2d 83 [1994]).

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated" (*Schneider v Hand*, 296 AD2d 454, 454 [2002]). Such a motion will fail if, from the four corners of the complaint, factual allegations are discerned which

taken together manifest any cause of action cognizable at law (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, "bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021-1022 [2007]; *see Kupersmith v Winged Foot Golf Club, Inc.*, 38 AD3d 847, 848 [2007]). Applying these principles to the facts at hand, the motion to dismiss is denied.

It is axiomatic that "before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff ... In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *see Petito v Verrazano Contr. Co.*, 283 AD2d 472, 474 [2001]). Further, it is well settled that "'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property"' (*Aversano v City of New York*, 265 AD2d 437 [1999], quoting *Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [1992]).

While it is alleged (and not yet established) that New York Food did not take possession of the premises until on or about April 20, 2010, the Lease clearly supports Diamond's contention that New York Food assumed control or responsibility for the premises on or about February 1, 2010. "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*id.*; *see Correnti v Allstate Props., LLC*, 38 AD3d 588, 590 [2007]). The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court (*see Katina, Inc. v Famiglietti*, 306 AD2d 440, 441 [2003]).

According to provision 15 of the Lease entitled "Occupancy", the "Tenant [New York Food] ha[d] inspected the premises and accept[ed] them 'as is' . . ." Pursuant to provision 23 of the Lease, entitled "Failure to Give Possession," "If Owner [Diamond] is unable to give possession of the demised premises on the date of the commencement of the term hereof because of the holding-over or retention of possession of any tenant, . . . the validity of the lease shall not be impaired." Pursuant to the

Rider of the Lease, for the period between February 1, 2010 and January 31, 2011, New York Food was obligated to pay Diamond the annual rent of $480,000. Thus, the Lease was valid and in effect at the time of plaintiff's accident.

According to paragraph 52 of the Rider to the Lease, New York Food is responsible for **all** repairs, interior, exterior, structural and non-structural, and it is expressly stated that *the landlord is not expected to make any expenditures to maintain the leased property in good condition.* Paragraph 53(B) of the Rider specifically requires the tenant to keep the sidewalks in good repair and clean of any debris. In the context of real property transactions, and where a contract is negotiated at arm's length between sophisticated counseled parties, special import must be given (*see M & R Rockaway, LLC v SK Rockaway Real Estate Co., LLC*, 74 AD3d 759 [2010]; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]) to the rule that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Under the terms of the Lease, New York Food assumed control or responsibility for the premises on or about February 1, 2010. Therefore, that New York Food may not have taken possession of the space until after the accident does not relieve it from responsibility.

The court also notes that the Lease contradicts the Stipulation and therefore creates an issue of fact as to when New York Food actually took possession of the subject premises.

Furthermore, in digressing, the court notes that the Stipulation which New York Food submitted in support of its motion to dismiss does not "resolve all factual issues as a matter of law, and conclusively dispose of plaintiff's claim" (*Country Pointe at Dix Hill Home Owners' Ass'n, Inc. v Beechwood Organization*, 80 AD3d 643 [2011]). Pursuant to the Stipulation, Diamond and Altino agreed to a final judgment of possession of the subject premises in favor of Diamond and against Altino. The Stipulation (at provision 6b) also indicates that the execution of the warrant of eviction is stayed through and including April 20, 2010, however, Altino "may vacate the premises prior to April 12, 2010. Based upon this provision, New York Food argues that the subject premises stayed with Diamond and Altino until April 20, 2010, and that New York Food did not own, operate, manage, control, lease, occupy, maintain and or repair the subject premises. There is, however, no proof of when Altino actually vacated the subject premises or when New York Food took possession of the subject premises. The Stipulation merely

indicates the date on which Diamond could evict Altino should they fail to vacate the subject premises prior thereto. Accordingly, the motion to dismiss is denied.

Cross Motions by Diamond

The pre-answer cross motion by Diamond for summary judgment against New York Food on its cross claims to defend and indemnify Diamond in this action is denied without prejudice. The cross motion is premature inasmuch as the application is made prior to the joinder of issue (see *City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]; *Sonny Boy Realty, Inc. v City of New York*, 8 AD3d 171 [2004)], *affd*, 4 NY3d 858 [2005]).

Conclusion

The motion and cross motion are denied.

Dated: Long Island City, NY
May 1, 2012

ROBERT J. McDONALD
J.S.C.