SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

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

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XIA-PING WANG, Index No.: 898/11

Plaintiff, Motion Date: 12/6/12

- against - Motion Seq.: 5

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

Defendants.

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The following papers numbered 1 to 10 read on this motion by defendant Diamond Hill Realty, LLC (Diamond Hill) pursuant to CPLR 3212 for summary judgment declaring that defendant New York Food & Drink Flushing Inc. (New York Food) owes it a defense and indemnification against plaintiff's personal injury claims, and for summary judgment in its favor on its contractual indemnification cross claim against defendant New York Food.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-8
Reply Affidavits	9-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action seeking to recover damages for personal injuries sustained in a slip/trip and fall accident which allegedly occurred on April 9, 2010 as a result of a dangerous or defective condition at the sidewalk or with regards to the cellar doors located at or near 40-06 Main Street, Flushing, New York (the premises) in front of the United Colors

of Benetton store. At the time of the accident, the premises was owned by defendant Diamond Hill. Issue has been joined with respect to defendants Diamond Hill, New York Food and Benetton U.S.A. Corp. Defendants United Colors of Benetton and Altino Corp. have not answered or otherwise appeared in the action.

Defendant Diamond Hill moves for summary judgment against defendant New York Food declaring that defendant New York Food owes it a defense and indemnification against plaintiff's personal injury claims, and in effect, for conditional summary judgment on its cross claim against defendant New York Food for contractual indemnification, including for all defense costs. Defendant New York Food opposes the motion. Plaintiff and the remaining defendants have not appeared in relation to the motion.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman*, 49 NY2d 557).

Defendant Diamond Hill asserts that defendant New York Food entered into a lease dated September 21, 2009 with it for the entire building at 40-06 Main Street, with a ten-year term, commencing on February 1, 2010 (the Lease). Defendant Diamond Hill also asserts that pursuant to the rider to the Lease, defendant New York Food agreed to indemnify, defend and save it harmless from all claims arising during the term of the lease in connection with personal injuries sustained in or about the demised premises, including the sidewalks immediately adjacent thereto. In support of the motion, defendant Diamond Hill offers, among other things, copies of the pleadings, an affirmation of its counsel, copies of the Lease, a letter dated November 28, 2011 tendering its defense in the action to New York Food and seeking indemnification, a letter dated December 15, 2011 from New York Food declining the tender and refusing to provide indemnification, and the order dated May 1, 2012.

At the outset, the court notes that to the extent plaintiff relies upon the denial of the pre-answer motion by defendant New York Food to dismiss the complaint pursuant to CPLR 3211, such

motion was denied because defendant Diamond Hill's cross claim for contractual indemnification states a cause of action (CPLR 3211 [a][7]) and defendant New York Food had failed to present documentary evidence which resolved all factual issues as a matter of law and conclusively disposed of Diamond Hill's claim (CPLR 3211[a][1]) (*see* order dated May 1, 2012).

That branch of the motion by defendant Diamond Hill which seeks summary judgment declaring defendant New York Food owes it a defense and indemnification against plaintiff's personal injury claims is denied. Defendant Diamond Hill did not assert a cross claim against defendant New York Food for declaratory relief.

With respect to that branch of the motion by defendant Diamond Hill for, in effect, conditional summary judgment in its favor on its cross claim for contractual indemnification, defendant New York Food agreed under the Lease to indemnify, defend and save defendant Diamond Hill harmless "from any and all claims... damages or expenses (including reasonable attorney's fees) or other liability arising during the term of this Lease out of or in connection with (i) ... , (ii) ..., or (iii) any injury to person ... sustained in or about the Demised Premises or any part thereof, including the sidewalks and curbs immediately adjacent thereto, or, if due to a breach of Tenant's express obligations under this Lease regarding the repair and maintenance of the sidewalk" (paragraph 45[A]). Defendant New York Food also agreed, "at its own cost and expense" to "defend any and all actions, suits and proceedings which may be brought," and to "pay, satisfy and discharge any and all judgments, orders and decrees which may be made or entered against [defendant Diamond Hill]... with respect to, or in connection with, any of the foregoing" (*id.*).

Defendant Diamond Hill has established its prima facie entitlement to conditional summary judgment as a matter of law on the cross claim for contractual indemnification and for reimbursement of defense expenses including reasonable attorneys' fees, against defendant New York Food by demonstrating that the Lease had commenced prior to the accident, and that it is entitled to contractual indemnification and pursuant to section 45(A) of the rider to the Lease (*see Lugo v Austin-Forest Associates*, 99 AD3d 865 [2d Dept 2012]).

To the extent defendant New York Food asserts the Lease had yet to commence by the time of the accident, such assertion is without merit. The Lease specifically provides that the lease term commences on February 1, 2012, and it is clear under its terms that the failure by defendant Diamond Hill to deliver

possession of the demised premises on the lease commencement date due to the holding over of the premises by any tenant did not impair the validity of the lease, and does not subject Diamond Hill to any liability for failure to give possession on the commencement date (*see* paragraph 23).[1]

Defendant New York Food alternatively asserts that it does not owe defendant Diamond Hill a duty to indemnify or defend Diamond Hill with respect to plaintiff's claims, notwithstanding the commencement of the lease. It contends it did not own, control, operate, manage, occupy, maintain or repair the sidewalk in front of the premises prior to its obtaining possession of the premises on April 21, 2010, and that the contractual duty to indemnify is implicitly pre-conditioned upon the delivery of possession of the demised premises. Defendant New York Food claims that defendant Altino Corp. (Altino) was a tenant of defendant Diamond Hill at the premises pursuant to a lease (the Altino lease) which expired on January 31, 2010, and was holding over following the expiration of the lease term, including on the day of the accident. It also claims that defendant Diamond Hill brought a summary holdover proceeding against Altino Corp. d/b/a Benetton which resulted in a stipulation of settlement dated February 24, 2010 allowing Altino to remain in possession through April 20, 2010. Defendant New York Food offers, among other things, the affidavit of Guo Wei Lian, its vice-president, and a copy of the Altino lease (and lease amendment and settlement agreement), and a stipulation of settlement dated February 24, 2010, entered into between Diamond Hill and Altino in a summary holdover proceeding. Guo Wei Lian avers that defendant New York Food took possession pursuant to the Lease on April 21, 2010, and defendant Diamond Hill did not deliver possession of the demised premises to New York Food until defendant Altino Corp./Benetton vacated the premises on April 20, 2010 pursuant to the stipulation of settlement.

Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or

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[1] Such lease terms are meant to protect the landlord from claims by the tenant of rescission and for recovery of the consideration paid based upon the landlord's failure to deliver possession at the start of the lease term under Real Property Law § 223–a. The Lease, however, allows for a rent abatement in the event the landlord fails to deliver possession of the demised premises on the lease commencement date due to a tenant holding over (*see* paragraph 23). In addition, the lease contemplates that the provisions of the lease be applicable under the circumstances where the landlord grants the tenant permission to enter into possession of the demised premises prior to the date of commencement (*see* id.).

special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care to maintain the property in a safe condition (*see Basso v Miller*, 40 NY2d 233, 241 [1976]; *Iannelli v Powers*, 114 AD2d 157, 161 [2d Dept 1986], *lv denied* 68 NY2d 604 [1986]). Where no element is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*see Minott v City of New York*, 230 AD2d 719 [2d Dept 1996]; *Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [3d Dept 1992]). Control is the test which generally measures the responsibility of an owner or occupant of real property for defects relating to it (*see Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10 [2d Dept 2011]; *Turrisi*, 179 AD2d at 958).

Defendant New York Food acknowledged at provision 15 of the Lease it "ha[d] inspected the premises and accept[ed] them 'as is' ...." Under paragraph 52 of the rider to the lease, defendant New York Food is responsible for all necessary repairs to the demised premises, both 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.

Such lease duties to maintain the premises and the sidewalks in good repair, however, are inextricably linked to the ability of the tenant to exercise control over the premises and the abutting sidewalks. Defendant Diamond Hill makes no claim that defendant New York Food entered into possession of the premises prior to the date of the accident, or created any condition or performed any repairs or maintenance vis-a-vis the sidewalk where the accident allegedly occurred. To the extent defendants Altino/Benetton were holding over at the demised premises on April 9, 2010 to have exercised control over such premises and the abutting sidewalks from the time of the commencement of the Lease. Thus, defendant New York Food was not responsible to take steps to remedy the alleged defective or dangerous condition at the sidewalk, or to warn of the alleged unsafe condition until such time as defendant Diamond Hill was able to deliver possession to the demised premises.

Insofar as direct liability is not be possible without evidence of that defendant New York Food created the alleged dangerous or defective condition, or had control of the demised premises and appurtenant sidewalk (*see Kennedy v C & C New Main St. Corp.*, 269 AD2d 499, 500 [2nd Dept. 2000]; *see also Collado v*

Cruz, 81 AD3d 542 [1st Dept 2011]), the concomitant duty to indemnify defendant Diamond Hill must also be considered to be contingent upon such creation or control. It would be incongruous to expect that a tenant be charged with the obligation to indemnify where it did not create the unsafe condition, and had no authority to control the activity or condition bringing about the injury to enable it to avoid or correct such unsafe condition.

To the extent defendant New York Food has presented evidence that at the time of the alleged accident, it exercised no control over the demised premises or adjacent sidewalks and was not in possession of the demised premises due to the holding over of defendants Altino/Benetton, it has raised a triable issue of fact with respect to defendant Diamond Hill's cross claim for contractual indemnification. Under such circumstances, conditional summary judgment on the contractual indemnification cross claim asserted by defendant Diamond Hill is inappropriate.

That branch of the motion by defendant Diamond Hill for conditional summary judgment in its favor on the cross claim for contractual indemnification against defendant New York Food is denied.

Dated: Long Island City, NY
April 1, 2013

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ROBERT J. McDONALD
J.S.C.