

Hakimisefat v Krausz
2017 NY Slip Op 32395(U)
November 17, 2017
Supreme Court, Kings County
Docket Number: 503054/14
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of November, 2017.

P R E S E N T:

HON. DEBRA SILBER,
Justice.
-----X

ORLY HAKIMISEFAT,
Plaintiff,

DECISION / ORDER

- against -

Index No. 503054/14
Mot. Seq. # 6, 7, 8

CHANA KRAUSZ, HERSHEY KRAUSZ, DANGRIGA
CUSTOM WOODWORKING, LTD. and GEMSTAR
CONSTRUCTION CORP.,
Defendants.
-----X

CHANA KRAUSZ and HERSHEY KRAUSZ,
Third-Party Plaintiffs,

- against -

GEMSTAR CONSTRUCTION CORP. and DANGRIGA
CUSTOM WOODWORKING, LTD.,
Third-Party Defendants.
-----X

CHANA KRASZ and HERSHEY KRAUSZ,
Second Third-Party Plaintiffs,

- against -

GENSTAR CONSTRUCTION CORP.,
Second Third-Party Defendant.
-----X

The following papers numbered 1 to 18 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

1-3 4-5 6-7
8-9, 10 8-9, 11 8-9, 10, 12
13-14 15 16-18

Upon the foregoing papers in this slip and fall action, defendant/third-party defendant, Dangriga Custom Woodworking, Ltd. (Dangriga), moves (in motion sequence 6) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the second cause of action in the second amended complaint and all cross claims asserted against it.

Defendants/third-party plaintiffs/second third-party plaintiffs, Chana Krausz and Hershey Krausz, cross-move (in motion seq. 7) for an order, pursuant to CPLR 3212: (1) granting them summary judgment dismissing the first cause of action in the second amended complaint and all cross claims and counterclaims asserted against them, and (2) granting them summary judgment on their third-party claims asserted against Dangriga for common-law and contractual indemnification.

Defendant/second third-party defendant, Gemstar Development Corp. (Gemstar), moves (in motion seq. 8) for an order, pursuant to CPLR 3212: (1) granting it summary judgment dismissing the third cause of action in the second amended complaint; (2) granting it summary judgment on its cross claim against Dangriga for contractual indemnification; and (3) granting it summary judgment dismissing all third-party claims and cross claims asserted against it for common-law and contractual indemnification and contribution.

Background

The Slip And Fall Accident

On January 17, 2014 at approximately 12:30 p.m., Orly Hakimisefat (Hakimisefat) claims she was injured when she slipped and fell while descending an interior staircase at the residence of defendants Chana and Hershey Krausz, at 2064 58th Street in Brooklyn, New York (Premises). Hakimisefat was at the Premises for the first time, having been asked to be a personal fitness trainer for Chana Krausz. There were no witnesses to the accident.

Hakimisefat, who was unfamiliar with the staircase at the Premises, fell on the part of the staircase that goes from the first floor to the lower level/basement of the Premises. She

tumbled down the stairs and the back of her head hit the wall at the bottom of the stairs. Hakimisefat testified at her deposition that she had descended two or three steps and then “slipped” on the first triangular (winder) step she encountered while descending the staircase. When asked if she slipped on anything, Hakimisefat testified that “I remember it was a new paint smell . . .” and she described the stairs as “shiny.” When asked if the stairs were wet, Hakimisefat responded that “[i]t was newly paint[ed]. It was newly shellacked.” When asked if there was anything on the step that caused her to slip, Hakimisefat responded “I don’t think so.” Hakimisefat testified that there were no objects or substances on the stairs when she fell.

At the time Hakimisefat was descending the basement stairs, she testified that she was holding boxing gloves, punch mitts and an exercise mat in a box. Hakimisefat testified at her deposition that when she slipped on the first triangular step, she dropped the items in her hands and reached out to “the side” with “both hands,” but she was unable to reach or grab onto anything to stop her fall. Hakimisefat does not remember any other details regarding her fall, including the nature of the lighting in the stairwell and where on the triangular step her foot was when she slipped.

Four years earlier, Chana and Hershey Krausz had verbally contracted with Gemstar, a general contractor, to gut and renovate the Premises. Dangriga, a subcontractor of Gemstar, had both fabricated the subject staircase, including the handrail/bannister, pursuant to the Krauszes’ architectural plans, and then installed the staircase in July 2010. Dangriga’s work on the staircase and handrail was then reviewed and approved by Gemstar.

Dangriga had fabricated and installed the staircase pursuant to a June 9, 2010 Subcontract between Dangriga and Gemstar. Paragraph 1 of the Rider to the Subcontract Agreement contains the following indemnification provision:

“1. Indemnity. In consideration of the Contract Agreement, and to the fullest extent permitted by law, the Subcontractor shall defend and

shall indemnify, and hold harmless, at Subcontractor's sole expense, the Contractor, all entities the Contractor is required to indemnify and hold harmless, the Owner of the property, and the officers, directors, agents, employees, successors and assigns of each of them from and against all liability or claimed liability for bodily injury . . . and all property damage or economic damage, including all attorney fees, disbursements and related costs, arising out of or resulting from the Work covered by this Contract Agreement to the extent such Work was performed by or contracted through the Subcontractor or by anyone for whose acts the Subcontractor may be held liable, excluding only liability created by the sole and exclusive negligence of the Indemnified Parties. This indemnity agreement shall survive the completion of the Work specified in the Contract Agreement."

Gemstar and Dangriga did not perform any of the "finishing" work (i.e., painting or staining and coating) on the staircase and handrail. Chana and Hershey Krausz independently hired a non-party named Trevor to do the finishing work on the staircase and handrail, which was completed in 2011. Subsequently, on April 11, 2011, the Department of Buildings issued a certificate of occupancy for the Premises.

Chana and Hershey Krausz testified at their depositions that nobody has ever slipped on the staircase since its installation and that they have used the staircase on a daily basis. Chana Krausz testified that she has walked up and down the staircase hundreds of times without any issue. Chana and Hershey Krausz further testified that they have never received any complaints about the staircase being slippery or otherwise hazardous.

The Instant Action

On April 8, 2014, Hakimisefat commenced this personal injury action against Chana and Hershey Krausz by filing a summons and a verified complaint asserting a cause of action for negligence. Chana and Hershey Krausz answered the complaint on July 28, 2014.

On October 8, 2014, Chana and Hershey Krausz commenced a third-party action against Dangriga and Gemstar alleging that they "created the condition" that caused the accident. The first through third causes of action of the third-party complaint assert claims against Gemstar for indemnification, contribution and breach of contract, and the fourth

through sixth causes of action assert claims against Dangriga for indemnification, contribution and breach of contract. Dangriga answered the third-party complaint and asserted a cross claim against Chana and Hershey Krausz and Gemstar for indemnification and/or contribution.

On or about November 18, 2014, Chana and Hershey Krausz commenced a second third-party action against Gemstar, alleging that Gemstar "entered into an Agreement with [them] to perform work on the stairs inside the [P]remises . . ." and asserting causes of action against Gemstar for indemnification, contribution and breach of contract. Gemstar answered the second third-party complaint, asserted a counterclaim against Chana and Hershey Krausz for common-law or contractual indemnification and asserted a cross claim against Dangriga for common-law or contractual indemnification.

On or about December 22, 2014, Hakimisefat amended the complaint to add Dangriga as a direct defendant. On or about February 25, 2016, Hakimisefat further amended the complaint to add Gemstar as a direct defendant.

The plaintiff's second amended complaint asserts three causes of action for negligence, one against each of the three defendants. The first cause of action against Chana and Hershey Krausz alleges that they were negligent:

"in failing to provide plaintiff with a safe place to work; in failing to have a proper stairway; in failing to have a proper railing; in failing to have a proper bannister; in failing to have adequate lighting; in failing to have stairs properly installed and maintained; in creating a trap, hazard and nuisance; in failing to warn; in causing or permitting a dangerous condition to exist; in failing to hire qualified contractors; in failing to have proper building permits and certificates of occupancy; [and] in violating applicable laws, rules and regulations . . ." (second amended complaint at ¶ 17).

The second cause of action is against Dangriga and the third cause of action is against Gemstar, and both allege that they were negligent:

"in failing to install the stairway properly; in failing to maintain the stairway properly; in failing to have a proper railing; in failing to have

a proper bannister; in failing to install a railing or bannister properly; in failing to have adequate lighting; in creating a trap, hazard and nuisance; in failing to warn; in causing or permitting a dangerous condition to exist; in failing to have sufficient and efficient personnel; in failing to properly supervise the work being performed; in failing to properly coordinate work being performed; [and] in violating applicable laws, rules and regulations . . ." (second amended complaint at ¶¶ 23 and 27).

Chana and Hershey Krausz answered the second amended complaint and asserted cross claims against Dangriga and Gemstar for contribution and indemnification.

After issue was joined, discovery ensued. Thereafter, on July 29, 2016, Hakimisefat filed a note of issue, indicating that discovery was complete.

Dangriga's Summary Judgment Motion (Motion Seq. 6)

Dangriga moves for summary judgment dismissing the second cause of action in the second amended complaint which is asserted against it for negligence, and dismissing all cross claims asserted against it. Dangriga argues that Hakimisefat's accident, which it claims was attributed by plaintiff to new paint or shellac on the staircase, cannot be attributed to its subcontracting work, which was limited to creating and installing an *unfinished* wood staircase and handrail more than three years earlier.

Dangriga contends that any claim that the staircase violated the Building Code is irrelevant because Hakimisefat testified that she fell because she slipped on wet paint or shellac. Dangriga also argues that the dimensions of "the staircase winder" (the triangular step) is irrelevant because it was not the proximate cause of Hakimisefat's fall. Dangriga seeks dismissal of its co-defendants' cross claims for indemnification on the ground that Hakimisefat's fall did not arise from Dangriga's work in creating and installing an unfinished staircase.

Hakimisefat, in opposition to Dangriga's motion, asserts that "the gravamen of [her]

case on the issue of liability is the negligent design of the staircase rather than any new paint smell or shiny surface that [she] may have perceived as she descended the stairs involved.”¹ Hakimisefat asserts that “the staircase had been negligently designed and constructed such that the width of the staircase at the top of the stairs was improperly constructed by a large wooden gate in violation of good staircase construction practices and contributing to the creation of a potentially hazardous condition.”² In addition, Hakimisefat asserts that her negligence claim is based on the defendant’s construction of an inadequate handrail because “she was unable to grasp the handrail or anything else to stop herself from falling.”³ Hakimisefat contends that there is “an issue of fact as to whether the absence of a proper handrail at the point on the staircase where the accident occurred was a proximate cause of her injuries.”⁴

Hakimisefat’s opposition is based on her July 28, 2016 bill of particulars and the affidavit of her expert witness, William Q. Brothers III, both of which allege that Dangriga negligently configured and installed a defective staircase and inadequate handrail. Brothers, an architect who inspected the staircase and handrail, attests that “the handrail swoops downward at the point where the first winder tread is located[.]” “is not continuous and falls to only 25 inches above the tread contiguous with the winder step[.]” which is “odd and structurally unsafe . . .”⁵ Brothers explains that “[t]he particular handrail was improperly designed such that any user descending the staircase and losing his or her balance as they

¹ See ¶ 15 of the April 13, 2017 affirmation of Norman E. Frowley, Esq., submitted in opposition to defendants’ summary judgment motions (Frowley Opposition Affirmation).

² Frowley Opposition Affirmation at ¶ 2.

³ *Id.* at ¶ 21.

⁴ *Id.* at ¶ 22.

⁵ See ¶ 5 of the April 7, 2017 affidavit of William Q. Brothers, III, submitted in opposition to defendants’ summary judgment motions (Brothers Affidavit).

approached or walked on the first winder tread would have to reach both forward and down in order to grasp the handrail . . . assuming the user was familiar with the staircase and the peculiar configuration of its handrail.”⁶ For this reason, Brothers opines that the handrail “did not conform to good and accepted stairway construction practices.”⁷

Chana and Hershey Krausz, in opposition to Dangriga’s motion, argue that Dangriga is not entitled to summary judgment because: (1) “[i]t may be held liable as the contractor that ‘created’ the staircase at issue, which is alleged to have a defect”; (2) “[u]nder the terms of the Subcontractor Agreement, [Dangriga] is required to indemnify the Krauszes for any and all liability arising from [its] fabrication and installation of the staircase”; and (3) [u]nder the terms of the Subcontractor Agreement, [Dangriga] was required to procure insurance for the Krauszes, and failed to do so.”⁸ They argue that Hakimisefat alleges in her bill of particulars that she fell due to inherent defects in the shape, construction or design of the staircase, and that Dangriga misconstrues Hakimisefat’s deposition testimony regarding the cause of her slip and fall. They contend that Dangriga has not established that the staircase was not hazardous.

The Krauszes’ Summary Judgment Cross Motion (Motion Seq. 7)

Chana and Hershey Krausz cross-move for summary judgment dismissing the first cause of action in the second amended complaint for negligence and granting them summary judgment on their third-party claims for common-law and contractual indemnification against Dangriga. They argue that: (1) “plaintiff was unable to identify the cause of her accident” and (2) “[they] did not create nor have actual or constructive notice of any alleged condition

⁶ Brothers Affidavit at ¶ 7.

⁷ *Id.*

⁸ See ¶ 6 of the May 25, 2017 affirmation of Michael Frittola, Esq., submitted in opposition to Dangriga’s and Gemstar’s summary judgment motions (Frittola Opposition Affirmation) (italics in original).

on the subject stairs . . .”⁹ Chana and Hershey Krausz also argue that Dangriga must defend and indemnify them, pursuant to the indemnification provision in the Subcontract Agreement Rider.

Hakimisefat, in opposition to the Krauszes’ motion, argues that her deposition testimony was “more than adequate . . . as to how she was proceeding down the stairs and where she slipped and fell upon which [her] expert could base his opinions,” including her testimony that “she was unable to grasp anything when she started to fall.”¹⁰

Dangriga, in opposition to the Krauszes’ motion, argues that their third-party/cross claims for indemnification should fail, “as plaintiff’s accident did not ‘arise out of Dangriga’s work’” and “Dangriga’s indemnity obligations are only triggered when there is a finding or determination that the bodily injury is ‘arising out of or resulting from the Work covered by this Contract Agreement.’”¹¹ Dangriga contends that Hakimisefat’s accident, “by her own admission, did not arise from Dangriga’s work, but arose from a slippery staircase . . .” and that “the subject contract does not provide for indemnification *where it is merely claimed* that the accident arose from Dangria’s work.”¹² Dangriga argues that there are questions of fact as to whether Chana and Hershey Krausz created or had notice of a slippery condition on the staircase. According to Dangriga, Chana and Hershey Krausz are not entitled to indemnification if they were negligent themselves.

Chana and Hershey Krausz, in reply, argue that they are entitled to summary judgment dismissing plaintiff’s negligence claim because Hakimisefat admitted that the gravamen of

⁹ See ¶ 4 of the December 29, 2016 affirmation of Cristina M. Grullon, Esq., submitted in support of Chana and Hershey Krauszes’ cross motion (Grullon Affirmation).

¹⁰ Frowley Opposition Affirmation at ¶ 20.

¹¹ See ¶ 3 of the January 26, 2017 affirmation of Ajay C. Bhavnani, Esq., submitted in opposition to Chana and Hershey Krauszes’ cross motion for summary judgment on their third-party/cross claims against Dangriga (Bhavnani Opposition Affirmation).

¹² Bhavnani Opposition Affirmation at ¶¶ 5-6 (emphasis added).

her claim is the allegedly negligent design of the staircase rather than a slippery condition caused by new paint or shellac. Chana and Hershey Krausz argue that they did not “create” the defective condition of the staircase, which was fabricated and installed by Dangriga. They further argue that they did not have constructive notice of a dangerous condition because “[r]egular use of the stairs by the homeowners constitutes a reasonable inspection of the premises, and clearly, any potentially dangerous condition was not visible and apparent after ‘hundreds’ of uses.”¹³

Gemstar’s Summary Judgment Motion (Motion Seq. 8)

Gemstar similarly moves for summary judgment: (1) dismissing the third cause of action in the second amended complaint for negligence; (2) granting its cross claim for contractual indemnification against Dangriga; and (3) dismissing the third-party claims and cross claims asserted against it for common-law and contractual indemnification and contribution.

Gemstar submits an attorney affirmation contending that “the evidence establishes that Gemstar did not owe a duty of care to the plaintiff and, in any event, was not involved with either the design, construction, or finishing of the staircase.”¹⁴ Gemstar contends that its oral contract with Chana and Hershey Krausz “did not specifically impose any duties with respect to the construction of the staircase . . .” and that “[its] execution of its limited contractual obligations in no way comports with a ‘comprehensive and exclusive’ contract requiring inspection, repair and maintenance of the premises, such that it displaces the Krauszes’ duty

¹³ See ¶ 17 of the May 31, 2017 reply affirmation of Michael Frittola, Esq., submitted in further support of Chana and Hershey Krauszes’ summary judgment motion (Frittola Reply Affirmation) (emphasis in original).

¹⁴ See ¶ 42 of the December 29, 2016 affirmation of Michael P. Hess, Esq., submitted in support of Gemstar’s summary judgment motion (Hess Affirmation).

as a property owner to maintain the premises safely.”¹⁵ Gemstar also argues that “the only allegedly defective condition of the stairwell that the plaintiff identified at her deposition was the inherent slipperiness of the stairs, which is not an actionable defect.”¹⁶

In addition, Gemstar asserts that it is entitled to summary judgment on its cross claim against Dangriga for contractual indemnity under the indemnification provision in the Subcontract Agreement Rider, given the absence of any proof that Gemstar was negligent. Gemstar contends that dismissal of all third-party claims and cross claims asserted against it for common-law and contractual indemnification is warranted because there is no evidence that Gemstar contracted to indemnify anyone or that it was negligent.

Hakimisefat, in opposition to Gemstar’s motion, argues that Gemstar, the general contractor for the entire renovation project, may have exercised control over Dangriga’s work on the allegedly dangerous staircase because Gemstar: (1) hired and paid Dangriga; (2) reviewed the shape and design of the staircase; (3) inspected and approved of the finished staircase; and (4) was paid a management fee for the project by Chana and Hershey Krausz. Hakimisefat contends that there are questions of fact as to whether Gemstar may be held liable as the general contractor.

Chana and Hershey Krausz, in opposition to Gemstar’s motion, contend that “Gemstar has failed [to] proffer *prima facie* evidence that it did not breach a duty owed to plaintiff” and “[t]o the extent that a hazardous condition is alleged to exist, Gemstar could have, and should have, recognized the risk,”¹⁷ as the general contractor responsible for oversight and ultimate approval of the staircase and handrail construction.

¹⁵ See Gemstar’s December 29, 2016 memorandum of law in support of its summary judgment motion (Gemstar Memorandum) at 5.

¹⁶ Hess Affirmation at ¶ 43.

¹⁷ Frittola Opposition Affirmation at ¶ 6.

Discussion

(1)

Summary Judgment Standard

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“The proponent of a motion for summary judgment 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” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562).

The court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). “[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment” (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

(2)

Dangriga's Summary Judgment Motion

“A contractor may be held liable for injuries to a third party where, in undertaking to render services, the contractor, *inter alia*, negligently creates or exacerbates a dangerous condition” (*Batts v IBEX Const., LLC*, 112 AD3d 765, 767 [2013]; *see also Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 139 [2002] [holding that a contractor may be held liable to a third party where the contractor has launched a force or instrument of harm]).

While Dangriga correctly argues that it was not responsible for the slippery nature of the stairs, since it installed an *unfinished* staircase, Hakimisefat also alleges that she fell because the handrail that was fabricated and installed by Dangriga was inadequate. Hakimisefat's deposition testimony, that she was unable to stop her fall when she reached out to the sides of the staircase, raises an issue of fact as to whether the location, configuration and design of the handrail in relation to the first winder tread was a proximate

cause of Hakimisefat's injuries, which precludes summary judgment dismissing Hakimisefat's cause of action for negligence against Dangriga.

(3)

Chana And Hershey Krauszes' Cross Motion

Chana and Hershey Krausz, as the owners of the Premises, owe to those on the Premises a duty of reasonable care under the circumstances to maintain the Premises in a safe condition (*see Tagle v Jakob*, 97 NY2d 165 [2001]). "The owner of property has a duty to maintain his or her property 'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk'" (*Lee v Acevedo*, 152 AD3d 577 [2017] [quoting *Basso v Miller*, 40 NY2d 233, 241 (1976)]). "The owner, however, has no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous" (*Salomon v Prainito*, 52 AD3d 803, 805 [2008]). "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury" (*Gordon v Pitney Bowes Mgmt. Servs., Inc.*, 94 AD3d 813, 814 [2012]).

Here, Chana and Hershey Krausz have failed to submit evidence establishing their prima facie entitlement to summary judgment dismissing Hakimisefat's negligence claim. The submission of their own deposition testimony regarding their regular use of the staircase without incident fails to eliminate all triable issues of fact as to whether the absence of a proper handrail where the first winder tread of the staircase was located was inherently dangerous (*see DeCarlo v Vacchio*, 147 AD3d 724, 725 [2017] [holding that plaintiff raised triable issue of fact as to whether the absence of handrails was a breach of defendants' duty to maintain the staircase in a reasonably safe condition]). Chana and Hershey Krausz have not proven that the allegedly inadequate handrail was open and obvious and not inherently dangerous to a visitor such as Hakimisefat, who was unfamiliar with the configuration of the

staircase and handrail at the Premises. While a period of time passed between the time the installation was completed and plaintiff's accident, it is unclear from the record whether any people other than the Krauszes' and plaintiff had ever descended these stairs to the basement exercise room.

Furthermore, Chana and Hershey Krausz have failed to establish, prima facie, that the allegedly inadequate handrail was not a proximate cause of Hakimisefat's slip and fall accident. Hakimisefat's deposition testimony that the handrail was not within her reach as a means of recovery to prevent her fall when she slipped and reached both hands out to the sides presents a triable issue of fact as to whether the location, configuration and design of the handrail in relation to the first winder tread was a proximate cause of Hakimisefat's injuries (*Boudreau-Grillo v Ramirez*, 74 AD3d 1265, 1267 [2010] [holding that a triable issue of fact exists as to whether the absence of the handrail was a proximate cause of the plaintiff's injury where plaintiff testified that there was nothing to grab onto to prevent her fall]; *Antonia v Srour*, 69 AD3d 666, 667 [2010] [same]; cf. *Plowden v Stevens Partners, LLC*, 45 AD3d 659 [2007] [plaintiff failed to present evidence connecting the absence of a handrail to her fall where plaintiff did not testify at her deposition that the lack of handrails contributed to her accident]).

(4)

Gemstar's Summary Judgment Motion

"A general contractor that has control of a work site during the progress of a construction or renovation project may properly be held liable based on its having failed to correct a dangerous condition of which it had actual or constructive notice" (*Tilford v Sweet Home Real Prop. Tr.*, 40 AD3d 966 [2007]). "[T]he core inquiry is whether the defendant had the 'authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition'" (*Myles v Claxton*, 115 AD3d 654, 655 [2014])

[quoting *Rodriguez v JMB Architecture, LLC*, 82 AD3d 949, 951 (2011)]). A general contractor's authority to supervise or control the activity in question may present an issue of fact to preclude summary judgment (see *Manicone v City of New York*, 75 AD3d 535, 537 [2010] [finding issues of fact as to whether defendant could be liable in its role as general contractor because it exercised control over the work site and had notice of the allegedly dangerous condition]).

Here, there are issues of fact regarding Gemstar's authority to supervise or control Dangriga's fabrication and installation of the allegedly inadequate handrail on the staircase. According to the record, Gemstar retained and paid Dangriga, Gemstar reviewed the architectural plans for the staircase. Gemstar inspected and approved of Dangriga's finished work product and Gemstar was paid a management fee for the renovation project by Chana and Hershey Krausz. Gemstar, as the general manager of the renovation project, may have exercised sufficient control over Dangriga's subcontracting work on the handrail to be held responsible for Hakimisefat's accident.

(5)

The Indemnification Claims

The court denies both the motions and cross motion insofar as they seek relief concerning the claims, cross claims and third-party claims for indemnification. Presently, this court is not making a finding of negligence; it is simply rejecting the arguments that defendants have made for summary judgment dismissing Hakimisefat's negligence claims. Since the court does not make any findings with respect to negligence, if any exists, on the part of Dangriga, Chana and Hershey Krausz or Gemstar, an award of summary judgment on a claim for indemnification would be premature (*Davis v All State Associates*, 23 AD3d 607 [2005]; *Brennan v R.C. Dolner, Inc.*, 14 AD3d 639 [2005]; *Maxwell v Toys "R" Us*, 258 AD2d 630 [1999]; *Medina v New York El. Co.*, 250 AD2d 656 [1998]).

Accordingly, it is

ORDERED that Dangriga's summary judgment motion (motion seq. 6) is denied; and it is further

ORDERED that Chana and Hershey Krauszes' cross motion for summary judgment (motion seq. 7) is denied; and it is further

ORDERED that Gemstar's summary judgment motion (motion seq. 8) is denied.

This constitutes the decision and order of the court.

E N T E R,



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**

11/20/2017 2:36 PM
KINGS COUNTY CLERK