

Sumjdg-denied
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART 13
Justice

RASHER FATIRIAN,

Plaintiff,

-against-

MONTI'S HOLDING INC., CREST HOLLOW
COUNTRY CLUB AT WOODBURY, INC. and
CREST HOLLOW CORPORATE SERVICES, INC.,
JOSEPG MONTI, JON H.I. GROUP and CHARLES
MONTI, as Trustees of the said trust for
the benefit of ANN MONTI, ANN MONTI,
Individually and DONNA MONTI TRINKO
a/k/a DONNA MONTI TRINBO,

Defendants.

Index No: 27066/03

Motion Date: 10/31/07

Motion Cal. Nos.: 13 & 14

Motion Seq. Nos.: 1 & 2

MONTI'S HOLDING INC., CREST HOLLOW
COUNTRY CLUB AT WOODBURY, INC. and
CREST HOLLOW CORPORATE SERVICES, INC.,
JOSEPH MONTI, JON H.I. GROUF, as trustee
for the benefit of ANNA MONTI,
incorrectly sued herein as "JON H.I.
GROUP", ANN MONTI, and DONNA MONTI
TRINKO,

Third-Party Plaintiffs,

-against-

LEDERMAN CATERERS, LTD. d/b/a
LEDERMAN CATERERS,

Third-Party Defendant.

Third-Party Index No.:
350710/04

Motions bearing calendar numbers 13 and 14 of October 31, 2007
are hereby consolidated for disposition. The following papers
numbered 1 to 18 read on these motions by defendants Monti's
Holding Inc., Crest Hollow Country Club at Woodbury, Inc. and
Crest Hollow Corporate Services, Inc., Joseph Monti, Jon H.I

Group, as trustee for the benefit of Ann Monti, Ann Monti and Donna Monti Trinko ("the Crest Hollow defendants") for an Order, pursuant to CPLR 3212, granting summary judgment in their favor and dismissing the complaint; and by third-party defendant Lederman Caterers, LTD. d/b/a Lederman Caterers ("Lederman Caterers") for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint, the Third Party Complaint, and any and all cross claims.

	<u>PAPERS NUMBERED</u>
<u>Cal. No. 13</u>	
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Memorandum of Law.....	
Answering Papers-Affidavits-Exhibits.....	5 - 7
Reply Affirmation-Exhibits.....	8 - 9
 <u>Cal. No. 14</u>	
Notice of Motion-Affidavits-Exhibits.....	10 - 13
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Upon the foregoing papers it is ordered that the branch of this motion by the Crest Hollow defendants for an Order granting summary judgment in their favor and dismissing the complaint is denied. Questions of fact exist, including but not limited to, whether the Crest Hollow defendants had actual notice of or constructive notice of the flower petals which allegedly caused the accident of plaintiff Rasher Fatirian ("Fatirian"), which may require resolution at trial.

The branch of this motion by third-party defendant Lederman Caterers for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint and any and all cross claims is denied as moot. Based on the papers submitted with the within motion, the Court finds that plaintiff Fatirian did not assert any cause of action against third-party defendant Lederman Caterers in the complaint. Therefore, naturally, the Crest Hollow defendants did not assert any cross claim against third-party defendant Lederman Caterers.

Subsequently, the Crest Hollow defendants commenced this third-party action against third-party defendant Lederman Caterers, asserting causes of action in common law indemnification, common law contribution, and contractual indemnification.

The branch of this motion by third-party defendant Lederman Caterers for an Order pursuant to CPLR 3212, granting summary

judgment and dismissing the Third Party Complaint under the cause of action for common law indemnification is granted.

The principle of common-law, or implied indemnification, permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. In the classic case, implied indemnity permits one held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer. However, a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine of indemnification. Thus, to be entitled to indemnification, the party seeking indemnity must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought. (See, Paul Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]; 17 Vista Assoc. v Teachers Ins. and Annuity Assoc. of Am., 259 AD2d 75 [1st Dept 1999]; Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc., 2007 NY Slip Op 9352 [2nd Dept 2007].)

In the case at bar, the Crest Hollow defendants alleged in their first cause of action that if plaintiff was caused to sustain damages as alleged in her complaint by the negligence of third-party defendant Lederman Caterers, then third-party defendant Lederman Caterers will be liable to the Crest Hollow defendants by way of indemnification. The Crest Hollow defendants alleged that if they are being held vicariously liable solely on the account of third-party defendant Lederman Caterers' negligence, then common law indemnification permits them to shift the entire burden of the loss to the actual wrongdoer, third-party Lederman Caterers. However, Lawrence Wen, the Crest Hollow defendants' manager, testified that "it is our [Crest Hollow's] responsibility to sweep those [dance] floors" (see, Exhibit H Deposition transcript of Lawrence Wen, p. 30 ll. 5-15 annexed to moving papers). Based upon this testimony, the doctrine of common law indemnification is inapplicable.

The branch of this motion by third-party defendant Lederman Caterers for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the Third Party Complaint under the cause of action for common law contribution is denied. Questions of fact exist, including but not limited to, whether third-party defendant Lederman Caterers assumed the responsibility for cleaning the dance floor when catering a party at Crest Hollow, which may require resolution at trial. Wen testified that he had "seen them [Lederman Caterers] help [when there are things on the floor], but [he does] not know if that's part of [their] responsibility" (see, Exhibit H Deposition transcript of Lawrence Wen, p. 27 ll. 16-24 annexed to moving papers).

The branch of this motion by third-party defendant Lederman Caterers for an Order pursuant to CPLR 3212, granting summary judgment and dismissing the Third Party Complaint under the cause of action for contractual indemnification is granted.

Third-party defendant Lederman Caterers contends the agreement does not obligate it to indemnify Crest Hollow because the plain language of the clause in question does not demonstrate a clear, unequivocal, and unmistakable intent by Lederman Caterers to indemnify Crest Hollow. Paragraph 5 of the agreement states:

"Host [Lederman Caterers] assumes responsibility for any and all losses, damages and bodily injury caused by them or any of their guests, invitees, or any other persons attending."
"When a party is under no legal duty to indemnify . . . [t]he promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (See, Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491-492 [1989].) "[A] contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Id.* at 491; Sumba v Clermont Park Assoc., 2007 NY Slip Op 9020 [2nd Dept 2007].)

The indemnification clause at issue did not specifically include the claims of plaintiff Fatirian. Since it cannot be said that indemnification for claims by plaintiff Fatirian was "the unmistakable intent of the parties" (see, Solomon v City of New York, 111 AD2d 383, 388 [1985]), third-party defendant Lederman Caterers is not required to indemnify the Crest Hollow defendants under the circumstances herein. (See, Vigliarolo v Sea Crest Constr. Corp., 16 AD3d 409 [2nd Dept 2005]; Sumba v Clermont Park Assoc., 2007 NY Slip Op 9020 [2nd Dept 2007].)

Accordingly, the Third Party Complaint asserting the causes of action in common law indemnification and contractual indemnification against third-party defendant Lederman Caterers is dismissed.

Dated: December 17, 2007

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J.S.C.