| **Xiang Wei Gao v Chuen Lou, LLC** |
| --- |
| 2026 NY Slip Op 30740(U) |
| January 27, 2026 |
| Supreme Court, Kings County |
| Docket Number: Index No. 505616/2018 |
| Judge: Richard J. Montelione |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

At an IAS Term, Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of January 2026.

PRESENT:

HON. RICHARD J. MONTELIONE,
Justice.

---X

XIANG WEI GAO,
Plaintiff,

-against-

Index No. 505616/2018

CHUEN LOU, LLC, LU HOLDING, LLC, and DAVID A. HARPER, ESQ.,

MS#s 11-15

Defendants.

---X

CHUEN LOU, LLC,
Third-Party Plaintiff,

-against-

DUO JAPANESES CUISINE INC. and MING MEI LIN,
Third-Party Defendants.

---X

DAVID A. HARPER, ESQ.,
Second Third-Party Plaintiff,

-against-

DUO JAPANESE CUISINE, INC.,
Second Third-Party Defendant.

---X

| The following e-filed papers read herein: | NYSCEF Nos.: |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 254, 256, 258-259, 264, 295-296, 317, 319-320, 322, 342-343 |
| Opposing Affidavits (Affirmations) | 376, 383, 389, 395, 404, 420, 436, 392, 452 |
| Affidavits/ Affirmations in Reply | 402, 470, 472 |

Upon the foregoing papers, third-party defendants Duo Japanese Cuisine, Inc. (Duo) and Ming Mei Lin (Lin) move (in Motion Sequence [MS] # 11) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint of defendant/third-party plaintiff Chuen Lou, LLC (Chuen LLC). Defendant David A. Harper, Esq. (the Receiver), moves (in MS # 12) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the amended complaint of plaintiff Xiang Wei Gao as against him or, in the alternative, granting him indemnification on his second third-party claim against second third-party defendant Duo. Defendant Lu Holding, LLC (Lu LLC) moves (in MS #13 and #14) for an order granting leave to file a late summary judgment motion and, if leave is granted, granting summary judgment dismissing plaintiff's amended complaint and any and all cross claims as asserted against it. Chuen LLC cross-moves (in MS # 15) for an order, pursuant to CPLR 3212, granting (1) summary judgment dismissing the amended complaint and all cross claims as asserted against it, and (2) summary judgment on its third-party claims against Duo for contractual indemnification and breach of contract for failure to procure insurance.

Plaintiff commenced this action to recover damages for personal injuries sustained on January 27, 2018, when he slipped and fell on an icy pathway outside commercial premises located in Saratoga Springs, New York. At the time of the accident, plaintiff was employed by Duo, which operated a Japanese restaurant at the premises pursuant to a lease. According to the testimony provided by plaintiff at his examination before trial (EBT), at approximately 9:30 p.m. on the date of the accident, plaintiff and a coworker

were instructed by a superior to take out some garbage from the restaurant (Plaintiff's EBT, July 8, 2019, NYSCEF Doc No 274, at 25-26). After disposing of the garbage in a dumpster, plaintiff and his coworker carried the garbage can back to the restaurant, with the coworker pulling the garbage can from the front and plaintiff pushing it from the rear (*id.*, at 45). Plaintiff testified that he was looking down in front of where he was stepping and saw the ice, placed his left foot down and slipped toward his left, falling onto his buttock and left leg (*id.*, at 49-51). Plaintiff testified that ice had been at the location three or four days prior to the accident (*id.*, at 47). In a supplemental EBT, plaintiff testified that snow would slide down from an area of the sloped roof of the restaurant which collapsed more than one month prior to the accident and, because there was damage to the gutter, water would drip from the roof and turn to ice on the ground (Plaintiff's EBT, September 25, 2024, NYSCEF Doc No 278, at 53-56).

The commercial lease to the property was signed on July 30, 2010 by Lin, on behalf of Duo, and by Wen Fu Lu (Iris), as attorney-in-fact for Yuen Hsaing Lu (Yuen), the title owner of the property at the time. The term of the lease was ten (10) years, from August 1, 2010 through July 31, 2020, and was in effect at the time of plaintiff's accident. The lease contains the following relevant provisions:

> "7. The said Tenant agrees that the said Landlord and the Landlord's agents and other representatives shall have the right to enter into and upon said premises upon twenty-four hours prior [] notice, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof, provided said entry does not substantially interfere with the operation of Tenant's business.

* * *

"13. That the Landlord is exempt from any and all liability for any damage or injury to person or property caused by or resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said premises or from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury [is] caused by or be due to the negligence of the Landlord.

"Tenant shall indemnify, defend and hold harmless Landlord, its agents and employees from and against any and all liability (statutory or otherwise), damages, claims, suits, demands, judgments, costs, interest and expense (including, but not limited to, attorney's fees and disbursements both at trial and appellate levels) arising, directly or indirectly, from any injury to, or death of, any person or persons or damage to property (including loss of use thereof) related to (a) Tenant's and/or Subtenant's use of the demised Premises and Trade Fixtures or conduct of business therein, without regard to fault or neglect on the part of the Tenant, (b) any work or thing whatsoever done, or any condition created (other than by Landlord, its employees, agents or contractors) by or on behalf of Tenant and/or Subtenant in or about the demised premises for the purpose of doing any work or making any installation, (c) any condition of the demised premises and Trade Fixtures due to or resulting from any default by Tenant in the performance of Tenant's obligations under this Lease, or (d) any act, omission or negligence of Tenant or its agents, contractors, employees, subtenants, licensees or invitees

* * *

"35. Landlord shall not be responsible for any repairs to the interior or exterior of the structure of the Premises including the roofs and exterior walls during the period of this Lease, or any extensions thereof . . . Tenant shall at Tenant's own expense, maintain and keep the interior and exterior of the Premises, including without limitation all electric, gas lines, plumbing, water pipes, water beaters, drains, grease traps, sewers, fire extinguishers, kitchen ansul system, grease

> exhaust fans, burglar and fire alarms, windows, plate glass, doors, ceilings, floors, signage, exterior and interior walls and roofs in good working order, repair and condition. . . ."

The lease also required, under paragraph 17, Duo to procure and maintain in force, prior to taking possession and during the term of the Lease and any extension, at Duo's expense, liability insurance for personal injury, property damage, and medical expense, and that

> "Landlord shall not be liable to Tenant for any damage to Tenant or Tenant's property unless caused by the Landlord's negligence; and Tenant waives all claims against Landlord for damage to person or property from any cause. Tenant shall hold Landlord harmless from all damages arising out of any damage to any person or property occurring in, on, or about the Premises and the building. Tenant's obligation under this section to indemnify and hold Landlord harmless shall be limited to the sum that exceeds the amount of insurance proceeds, if any, received by the Landlord."

By deed dated April 8, 2015, the property was conveyed by Yuen to his daughter, Wen Ying Gamba (Gamba). By deed dated April 15, 2015 and correction deed dated April 17, 2015, the property was purportedly conveyed by Yuen, through his other daughter and attorney-in-fact, Iris, to her company, Lu LLC. By deed dated January 13, 2017, the property was conveyed by Gamba to her company, Chuen LLC. The conflicting deeds from Yuen to his daughters and the question of ownership of the premises were the subject of a quiet title action brought in Supreme Court, Saratoga County (Saratoga Court) in 2016 (2016/2946). On July 14, 2017, prior to the date of the accident, the Saratoga Court issued an order appointing the Receiver to take possession of the property. The order provided that the Receiver shall have the power and duty to,

among other things, "act as manger and landlord of the [property], including the authority to take any actions the Receiver shall deem reasonably necessary to enforce and/or comply with any and all lease agreements concerning the [property]" (Order Appointing Temporary Receiver, NYSCEF Doc No 96). The order also provided that "Wen Ying Gamba, Yuen Hsiang Lu, and Wen Fu Lu, and any non-party entities under their control or ownership . . . be enjoined and restrained from collecting the rents, license fees and other charges of the [property] and from interfering in any manner with the [property] or possession thereof; and from transferring, removing or in any way disturbing any of the occupants or employees" (*id.*).

On or about October 21, 2020, plaintiff brought a motion before the Saratoga Court for leave to join the Receiver as a defendant in the instant action (Lu v Gamba, County of Saratoga, Index No. 2016/2946). The Saratoga Court denied plaintiff's motion by order dated April 29, 2021, determining, in essence, that joining the Receiver in the instant action would exceed the scope of the Receivership order and would result in prejudice considering the age of the instant action and the distance between venues (NYSCEF #203). Following appeal, the Appellate Division, Third Department, reversed the order of the Saratoga Court, stating in its 2022 decision and order, decided and entered on October 27, 2022 and served with a notice of entry on November 3, 2022 (Appellate Div., 533300, NYSCEF #20, #21, NYSCEF #204):

> "Generally, a temporary receiver appointed pursuant to CPLR article 64 'is a person appointed by the court to take control of designated property and see to its care and preservation during litigation' (Siegel & Connors, NY Prac § 332 at 606 [6th ed 2018]). Pertinent here, the appointment order

> authorized the receiver 'to immediately take charge and enter possession of the properties,' and empowered the receiver to 'act as manager and landlord of the properties.' Correspondingly, the receiver was 'authorized and obligated to keep the properties insured against loss by damage of fire . . . and to procure such . . . other insurance as may be reasonably necessary.' Given these directives, we cannot agree with Supreme Court's assessment that the receiver was accorded only a limited role that did not include property maintenance. To the contrary, the receiver was charged with both the authority and responsibility to assume control over the properties. Pursuant to CPLR 1017, "[i]f a receiver is appointed for a party . . . the court shall order substitution of the proper parties." That is the situation here. By the court's directive, responsibility over the management of the properties was passed from the disputing owners to the receiver (see Siegel & Connors, NY Prac § 184 at 355 [6th ed 2018]). As such, the receiver should have been substituted as the representative owner of the Duo property in the Kings County action. In so holding, we are mindful that the restaurant lease for the Duo property provides that the tenant is 'responsible for all snow removal' and further exempts the landlord 'from any and all liability for any damage or injury to person or property caused or resulting from . . . ice or snow.' The impact of these provisions as to liability of the receiver and/or the tenant for Gao's claim necessarily is an issue warranting resolution in the Kings County action" (*Wen Mei Lu v Wen Ying Gamba*, 209 AD3d 1191, 1192-1193 [3d Dept 2022]).

Plaintiff, thereafter, moved to join the Receiver in the instant action which was filed on December 20, 2022, which application was granted by this court by order dated March 1, 2023. (NYSCEF #212). The order directed plaintiff to serve an amended complaint and supplemental summons "as per CPLR," and directed the Receiver to answer within thirty days of service. A supplemental summons and amended complaint were filed by plaintiff on July 28, 2023. The Receiver filed an answer on August 25, 2023, wherein he set forth affirmative defenses which included statute of limitations, and

"Counter Claims or Cross Claims or Claims Over and Against" Chuen LLC, Lu LLC, Duo and Lin for indemnification and contribution. The Receiver recently and additionally interposed a third-party summons and complaint against Duo setting forth a claim for contractual indemnification. Following completion of discovery, a Note of Issue was filed on October 31, 2024.

On December 19, 2024, Duo and Lin brought a motion (MS # 11) seeking summary judgment dismissing the third-party complaint of Chuen LLC, which asserted third-party claims against Duo for contractual indemnification and breach of contract (failure to procure insurance) based on the indemnification and insurance provisions in sections 13 and 17 of the lease. The Receiver, Lu LLC and Chuen LLC subsequently brought dispositive motions (MS # 12, MS # 13, MS # 14 and MS # 15, respectively) for dismissal of the amended complaint and all cross claims as against them. Chuen LLC's cross-motion (MS # 15) further sought summary judgment against Duo on its third-party claims.

As an initial matter, the court notes that MS # 13 and MS # 14 are duplicate motions seeking the same relief. Accordingly, the initial motion (MS # 13) is denied as subsumed by the subsequent motion (MS # 14) (*see Deutsche Bank Natl. Trust Co. v Holler*, 56 Misc 3d 1214[A], 2017 NY Slip Op 50993[U], *5 [Sup Ct, Suffolk County 2017]).

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]). Failure to make such prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (*id.*). Where a prima facie showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). "[B]ald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]), as are merely conclusory claims" (*Putrino v Buffalo Athletic Club*, 82 NY2d 779, 781 [1993]).

**Duo's Motion for Summary Judgment (MS # 11)**

"A party that moves for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim" (*Meadowbrook Pointe Dev. Corp. v F & G Concrete & Brick Indus., Inc.*, 214 AD3d 965, 970 [2d Dept 2023] [internal quotation marks omitted]). "Summary judgment dismissing a cause of action alleging failure to procure additional insured coverage is warranted where the movant demonstrates, prima facie, that it procured the requisite insurance" (*id.* at 969). The essential argument of Duo in its summary judgment motion is that since the lease was only signed by it and Yuen as landlord, Chuen LLC has no standing to enforce its provisions as it is not a signatory. However, where a property is conveyed without reservation, the grantee is entitled to all the rights which the previous owner, as grantor, had in the premises and in any lease in effect at the time of conveyance (*see 507 Madison*

*Avenue Realty Co. v Martin*, 200 App Div 146 [1st Dept 1922], *affd* 233 NY 683 [1922]; *see also* Real Property Law [RPL] § 223). Further, because the property was "conveyed without reservation, a formal assignment of the lease was not necessary to transfer all of the grantor's rights in and under the lease" (*Clemente Bros., Inc. v Peterson-Ashton Fuels. Inc.*, 29 AD2d 908, 910 [3d Dept 1968], *appeal denied*, 24 NY2d 737 [1969]; *see also Rdtron Com. v Voxakis Enterprises, Inc.*, 57 AD2d 134 [4th Dept 1977]). Yuen conveyed the subject property without reservation to Gamba, who subsequently conveyed it to Chuen LLC, prior to the date of the accident and while the lease was in effect.

Accordingly, the court finds Duo has not established, as a matter of law, entitlement to summary judgment dismissing the third-party claims for contractual indemnification and breach of contract as against it. As a result, that branch of the motion is denied as to Duo.

However, because the lease is expressly between Yuen and Duo, and signed by Lin only in her capacity as an officer of Duo, and there being no issue of fact raised in opposition, that part of Duo's motion for summary judgment dismissing the third-party complaint as against Lin is granted (*see Metropolitan Switch Bd. Co., Inc. v Amici Assoc., Inc.*, 20 AD3d 455, 455-456 [2d Dept 2005]).

**The Receiver's Motion for Summary Judgment (MS # 12)**

The primary argument of the Receiver in support of his motion for summary judgment is that plaintiff's sole cause of action against him for negligence is barred by the three-year statute of limitations.

By way of background, this court by order dated December 21, 2022 denied defendant Lu Holding, LLC's motion for summary judgment (MS#4), third party defendants Duo Japanese Cuisine and Ming Mei Lins motion for summary judgment (MS#5), and defendant Cheun Lou, LLC's motion for summary judgment (MS#6), and plaintiffs' cross motions, without prejudice, as the receiver, David A. Harper, Esq., was a necessary party to the action. The court noted that plaintiff filed a motion to join the receiver David A. Harper, Esq. in the Saratoga matter. (NYSCEF #206).

The accident occurred on January 27, 2018. The defendant Receiver was appointed by Order from Saratoga Supreme Court dated July 6, 2017, and entered on July 14, 2017. Plaintiff filed a motion on October 21, 2020, in Saratoga Supreme Court, for leave to join the Receiver as a defendant in the Lu v Gamba, County of Saratoga, Index No. 2016/2946. *At the time the motion to join the receiver was filed, 2 years, 7 months, 24 days had passed from the date of the accident.* Although the trial court denied the application on the basis that the Order of Appointment was limited in scope regarding the receiver's duties, this decision and order was reversed on appeal, and a Notice of Entry was served and filed on November 3, 2022 (NYSCEF #204).

Because the motion in Saratoga Supreme Court and the subsequent appeal "stopped the clock" in terms of the three years statute of limitations for personal injury law suits (CPLR 214 [5]), the clock again began to toll with Notice of Entry of the Appellate Divisions decision on November 3, 2022, leaving the plaintiff four months and six days to file the supplemental summons and amended complaint and thereafter to have it served (last day if the clock was not again stopped, was Thursday, March 9, 2023).

Plaintiff filed a motion in the instant action to join David A. Harper, Esq., as a necessary party defendant on December 20, 2022 (NYSCEF #197), which again stopped the clock, leaving a period of one month, 17 days, excluding the end date, in which to file a Supplemental Summons and Amended Complaint upon the court granting the plaintiff's motion. On March 1, 2023, the court granted the plaintiff's motion (NYSCEF #212) which necessitated plaintiff filing the Supplemental Summons and Complaint *no later than Tuesday, April 18, 2023*, excluding the last day. The Supplemental Summons and Complaint were not filed *until July 28, 2023* (NYSCEF #217), and therefore outside the three-year statute of limitations under CPLR 214 [5]).

The statute of limitations states that a personal injury action "must be ***commenced*** within three years" (CPLR 214 [5] [emphasis added]). CPLR 304 (a) provides that "[a]n action is commenced by filing a summons and complaint or summons with notice in accordance with [CPLR 2102 ('Filing of Papers')]." The claims against the Receiver are untimely and subject to dismissal (*see Brady v 5644 Ave. U Assoc.*, 291 AD2d 523, 524 [2d Dept 2002]). The cases cited by plaintiff in his Appellate Brief in Reply (NYSCEF Doc No 450) and omnibus affirmation in opposition (NYSCEF Doc No 404) are inapposite as they involved the issue of whether the failure to seek leave before commencing an action against a Receiver constituted a jurisdictional defect. The courts in those cases did not so hold, stating that leave may be granted nunc pro tunc. However, the fact that leave may be properly granted nun pro tunc following joinder of a Receiver without leave has no bearing on whether or not the actual claim interposed against the Receiver is timely.

Also, the claims against the Receiver may not be deemed timely under the "relation back doctrine." To assert this doctrine to add a new defendant, three conditions must be satisfied: "'(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him [or her] as well'" (*Buran v Coupal*, 87 NY2d 173, 178 [1995], quoting *Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981] [citations omitted]). "'[I]nterests will be united . . . only where one is vicariously liable for the acts of the other'" (*Brady*, 291 AD2d at 524, quoting *Connell v Hayden*, 83 AD2d 30, 45 [2d Dept 1981]). "Because the Receiver and the other defendants are not vicariously liable for the acts of one another, plaintiff cannot invoke the relation-back doctrine (*see Bertolino v Town of N. Elba*, 16 AD3d 805, 806 [3d Dept 2005]; *Brady*, 291 AD2d at 524)," *see Brady v 5644 Ave. U Assoc., L.P.*, 291 AD2d 523, 737 NYS2d 640, 2002 NY Slip Op 01467, 2002 WL 272308 [2d Dept 2002].

Accordingly, the Receiver's motion for summary judgment dismissing the amended complaint as against him is granted on statute of limitations grounds. In light of this disposition, the Receiver's alternative request for an order granting indemnification is rendered moot.

**Summary Judgment Motions of Lu LLC (MS # 14) and Chuen LLC (MS # 15)**

"'Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property'" (*Smith v 4 Empire Mgt. Group, Inc.*, 208 AD3d 811, 812 [2d Dept 2022], quoting *Donatien v Long Is. Coll. Hosp.*, 153 AD3d 600, 600-601 [2d Dept 2017]; *see Jeffrey v City of New York*, 194 AD3d 701, 702 [2d Dept 2021]). "In the absence of ownership, occupancy, control, or special use, a party generally cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Dalpiaz v McGuire*, 176 AD3d 779, 780 [2d Dept 2019] [internal quotation marks omitted], quoting *Bartlett v City of New York*, 169 AD3d 629, 630 [2d Dept 2019]; *see Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 820 [2d Dept 2008]).

"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (*Casson v McConnell*, 148 AD3d 863, 864 [2d Dept 2017] [internal quotation marks omitted]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 566 [1987]; *Byrd v Brooklyn 46 Realty, LLC*, 129 AD3d 882, 883 [2d Dept 2015]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2d Dept 2011]). "Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where liability is based on a significant structural or design defect that violates a specific statutory provision" (*Seney v Kee Assoc.*, 15 AD3d 383, 384 [2d Dept 2005]; *see Tragale v 485 Kings Corp.*, 39 AD3d 626, 627 [2d Dept 2007];

*Ingargiola v Waheguru Mgt.*, 5 AD3d 732, 733–734 [2d Dept 2004]; *Dominguez v Food City Mkts.*, 303 AD2d 618, 619 [2d Dept 2003]). General maintenance of a premises and a failure stemming therefrom, is not akin to a structural defect (*Manning v New York Tel. Co.*, 157 AD2d 264, 270 [1st Dept 1990]).

Lu LLC has demonstrated prima facie that it did not own or control the subject property at the time of the accident. While there was a dispute over the validity of the deeds from Yuen, resulting in a quiet title action in Saratoga County, it was adjudged by the Saratoga Court that the 2015 deed from Yuen to Gamba and the 2017 deed from Gamba to Chuen LLC were valid and effective, and that the 2015 deed and correction deed purporting to convey the property from Yuen to Lu LLC were invalid and ineffective (Saratoga Court Decision, Order and Judgment, July 8, 2016, NYSCEF Doc No 357). Plaintiff's argument that Lu LLC is estopped from denying ownership in the instant action by affirmatively claiming ownership in prior litigation is unavailing. "The doctrine of judicial estoppel, or estoppel against inconsistent positions, precludes a party who assumed a position in one legal proceeding and prevailed in maintaining that position from assuming a contrary position in another proceeding simply because the party's interests have changed" (*Ghatani v AGH Realty, LLC*, 181 AD3d 909, 911 [2d Dept 2020]; *see Cussick v R.L. Baxter Bldg. Corp.*, 228 AD3d 614, 616 [2d Dept 2024]; *Cruz v Bank of N.Y. Mellon*, 218 AD3d 638, 640 [2d Dept 2023]). However, "[f]or the doctrine to apply, there must be a final determination endorsing the party's inconsistent position in the prior proceeding" (*Ghatani*, 181 AD3d at 911; *see Cruz*, 218 AD3d at 640). The July 8, 2016 order and judgment of the Saratoga Court clearly did not endorse

Lu LLC's position that its deeds from Yuen were valid but rather held that same were invalid and that Gamba was the owner of the property. While Lu LLC subsequently commenced a separate action seeking, among other things, a constructive trust over the property, and was awarded a judgment on September 15, 2021, following a jury trial, the judgment awarding a constructive trust did not have the effect of invalidating Chuen LLC's exclusive ownership of the property at the time of the accident.

At any rate, assuming Lu LLC is deemed to have owned the premises at the time of the accident, it demonstrated, prima facie, that it was an out-of-possession landlord that was not contractually obligated to maintain the property and/or remove snow and ice and, accordingly, cannot be liable in negligence for conditions upon the property after transfer of possession and control to Duo (*see Del Giacco v Noteworthy Co.*, 175 AD2d 516, 516-517 [3d Dept 1991]). Notably, in addition to the clear terms of the lease shifting all obligations for maintenance and repair from landlord to tenant, the Receivership order, issued prior to and in effect on the date of the accident, expressly authorized the Receiver to immediately enter into possession of the premises.

The only proof offered as to Lu LLC's alleged assumption of a duty through a "course of conduct" is the testimony of Duo's shareholder, Jun Sheng, who stated that Iris, Lu LLC's principal, made promises to fix the roof and other parts of the property (EBT Duo, January 21, 2021, NYSCEF Doc No 237, at 12-13, 19), and the affidavit of plaintiff's coworker, Jin Yuan Liu, who vaguely asserted that "[t]he building owner inspected and promised to replace the roof many time[s] but never did. All he did would make small temporary patches" (NYSCEF Doc No 419). The court finds that without

evidence Lu LLC endeavored to keep the property free of snow and ice or correct the alleged conditions in the roof and gutter that plaintiff testified allowed snow and water to drip to the ground, there is no sufficient showing that Lu LLC assumed any duty to remedy those problems through a "course of conduct" (*see Vijayan v Bally's Total Fitness*, 289 AD2d 224, 225 [2d Dept 2001] [regular visits of landlord's managing agent to the premises for the purposes of collecting rent, leasing space, and addressing tenants' concerns did not establish that the landlord retained control over the premises]; *Michaelov v 632 Kings Highway Realty Corp.*, 36 Misc 3d 1228[A], 2012 NY Slip Op 51540[U] [Sup Ct, Kings County 2012]). Moreover, at the time of the accident the receiver was appointed and movant had no right to control the property. *See Brady v 5644 Ave. U Assoc., L.P.*, 291 AD2d 523, 524, 737 NYS2d 640, 642, 2002 NY Slip Op 01467, 2002 WL 272308 [2d Dept 2002]:

> Where an owner of property is no longer in possession and control of the property, and retains no right to re-enter for purposes of inspection and repair, the owner cannot be held liable for defects in the property (*see, Mazurick v. Chalos,* 172 A.D.2d 805, 806, 569 N.Y.S.2d 174). At the time of the accident, a year after the receiver had been appointed, Associates had been divested of possession and barred from taking any role in the management of the property. These facts sufficed to make out a prima facie case of entitlement to summary judgment which the plaintiffs did not controvert by providing evidentiary proof in admissible form sufficient to require a trial (*see, Zuckerman v. City of New York,* 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Gomez v. Walton Realty Assocs.*, 258 A.D.2d 307, 308, 685 N.Y.S.2d 201). Therefore, Associates was properly granted summary judgment.

As a result, Lu LLC's motion for summary judgment is granted. The complaint and all cross claims are dismissed as against Lu LLC.[1]

Similarly, Chuen LLC has established, prima facie, that it was an out-of-possession owner which had not retained control over the premises, nor had a duty imposed by statute or assumed by contract or a course of conduct. The Receivership order, issued prior to and in effect on the date of the accident, expressly authorized the Receiver to immediately enter into possession of the premises and enjoined Gamba and entities under her control (i.e., Chuen LLC) from interfering in any manner with the property or the possession thereof. Under the circumstances, Chuen LLC could not be charged with liability as owner since "responsibility over the management of the propert[y] was passed from the disputing owners to the receiver" (*Wen Mei Lu*, 209 AD3d at 1192; *see Brady*, 291 AD2d at 524; *Mazurick v Chalos*, 172 AD2d 805, 806 [2d Dept 1991]). There is also no evidence that Chuen LLC assumed any duty to maintain the property or make repairs by a course of conduct. Jun Sheng testified only that Gamba refused Duo's request to make repairs (Duo EBT, NYSCEF Doc No 237, at 15). Such cannot be deemed to constitute a "course of conduct" on the part of Gamba and/or Chuen LLC sufficient to demonstrate an assumption of a duty to maintain the property.

Accordingly, that part of Chuen LLC's cross-motion for summary judgment dismissing the complaint and all cross claims is granted.

[1] The court finds Lu LLC demonstrated good cause under *Brill v City of New York* (2 NY3d 648 [2004]) for bringing its summary judgment motion more than 60 days after the filing of the Note of Issue.

Turning to that branch of Chuen LLC's cross-motion for summary judgment on its third-party complaint, "[t]he right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George*, 61 AD3d at 930; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). In addition, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]; see General Obligations Law § 5-322.1). The clear language of the indemnification clause requires Duo to indemnify the landlord for all damages arising from any damage or injury to person or property caused by or resulting from ice or snow, or any leak or flow from or into any part of said premises, which damages include attorney's fees and costs of litigation. Moreover, Chuen LLC has established that it is free from negligence as it had no duty to maintain or repair the premises as an out-of-possession owner. As addressed earlier, Duo's argument that Chuen LLC was not a signatory to the lease is unavailing as it assumed Yuen's rights thereunder under Real Property Law § 223. Duo has not offered proof to raise an issue of fact as to its contractual obligation to indemnify Chuen LLC.

Accordingly, that part of Chuen LLC's cross-motion for summary judgment on its contractual indemnity claim is granted.

However, as Chuen LLC has not submitted any admissible proof showing, as a matter of law, that Duo did not comply with its insurance obligation, that part of Chuen LLC's cross-motion for summary judgment on its breach of contract claim is denied.

Accordingly, it is hereby

ORDERED that the motion of Duo and Lin (MS # 11) for summary judgment dismissing the third-party complaint of Chuen LLC (MS # 11) is denied as against Duo; and it is further

ORDERED that that part of the motion of Duo and Lin (MS # 11) for summary judgment dismissing the third-party complaint against them is granted to respect to Lin and denied with respect to Duo; and it is further

ORDERED that the third-party complaint is hereby dismissed as against Lin; and it is further

ORDERED that the Receiver's motion for summary judgment dismissing the amended complaint as against him (MS # 12) is granted; and it is further

ORDERED that Lu LLC's motion for summary judgment dismissing the amended complaint as against it (MS # 13) is denied as subsumed by (MS # 14); and it is further

ORDERED that Lu LLC's motion for summary judgment dismissing the amended complaint and all cross claims against it (MS #14) is granted; and it is further

ORDERED that that part of Chuen LLC's cross-motion (MS # 15) for summary judgment dismissing the amended complaint and all cross claims against it is granted; and it is further

ORDERED that the amended complaint and all cross claims are hereby dismissed as against the Receiver, Lu LLC and Chuen LLC; and it is further

ORDERED that that part of Chuen LLC's cross-motion (MS # 15) for summary judgment on its contractual indemnification claim is granted; and it is further

ORDERED that that part of Chuen LLC's motion (MS # 15) for summary judgment on its breach of contract claim is denied; and it is further

ORDERED that the third-party action is hereby severed and shall proceed to trial.

The foregoing constitutes the decision, order and judgment of the court.

ENTER,

Hon. Richard J. Montelione
J.S.C.