

**Attard v Kushner Cos.**

2007 NY Slip Op 31014(U)

April 27, 2007

Supreme Court, New York County

Docket Number: 0107342/2004

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **HON. ROLANDO T. ACOSTA**

PART 61

Index Number : 107342/2004

ATTARD, DOREEN

vs

KUSHNER COMPANIES

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2 (G.V. 1-13), 3, 4, 5 (Ex-A.P.)  
6, 7 (Ex 1), 8  
9 (Ex D), 10 (Ex A)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

THIS DOCUMENT IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/29/07

**SO ORDERED**  
*[Signature]*

**ROLANDO T. ACOSTA**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 61**

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Doreen Attard,

Plaintiff,

– against –

Kushner Companies, New York Caterers,  
Associates, L.L.C., Chinese American  
Planning, Ltd., Old West & Ye Old World  
Living History Foundation and Dusty Webb  
and its paid enrolled employees,

Defendants.

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Kushner Companies,

Third Party Plaintiff,

– against –

New York Caterers, Inc., Chinese American  
Cultural Affairs Incorporated, Old West & Ye  
Old World Living History Foundation and  
Dusty Webb and its paid enrolled members,

Third Party Defendants.

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Old West & Ye Old World Living History  
Foundation and Dusty Webb,

Fourth Party Plaintiffs,

– against –

**DECISION/JUDGMENT**

Index No. 107342/04

Motion Seq. 3

**Present:**

**Hon. Rolando T. Acosta**  
Supreme Court Justice

Third Party Index No:  
590681/05

**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Fourth Party Index No:  
590514/06

Chinese American Planning, Ltd.,

Fourth Party Defendants.

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Chinese American Planning, Ltd.,

Fifth Party Plaintiff,

– against –

Fifth Party Index No:  
590630/06

Clarendon National Insurance Company,

Fifth Party Defendants.

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The following documents were considered in reviewing Chinese American Planning, Ltd. i/s/a Chinese American Cultural Affairs Incorporated's motion for summary judgment and Kushner Companies and New York Caterers Associates, L.L.C. s/h/a New York Caterers, Inc.'s cross-motion for summary judgment:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion, Affirmation, Memorandum of Law</b>	<b>1, 2 (Ex. 1-13), 3</b>
<b>Notice of Cross-Motion, Affirmation in Support</b>	<b>4 ,5 (Ex. A-P)</b>
<b>Affirmation in Opposition to Motion and Cross-Motion</b>	<b>6</b>
<b>Reply Affirmation, Affirmation in Partial Opposition to Cross-Motion</b>	<b>7 (Ex. 1). 8</b>
<b>Affirmation in Partial Opposition,</b>	<b>9 (Ex. A-D)</b>
<b>Reply Affirmation</b>	<b>10 (Ex. A)</b>

Plaintiff Doreen Attard ("Attard") commenced this personal injury action arising out of an alleged slip and fall that occurred on November 1, 2003, at approximately 1:00 a.m. on a dance floor on the first floor of the Puck Building, located at 295 Lafayette Street, New York, New York. According to plaintiff, she was attending a Halloween party when, while dancing, she slipped and fell injuring herself. Defendant Chinese American Planning, Ltd. i/s/a Chinese American Cultural Affairs Incorporated ("Chinese") in turn moves for summary judgment dismissing Attard's complaint. Defendants Kushner Companies and New York Caterers Associations, L.L.C. s/h/a New York Caterers, Inc. likewise cross-move for summary judgment against Attard, or in the alternative, for summary judgment against Chinese on the grounds that Kushner is entitled to indemnification from Chinese.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New

York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717 (1986); Zuckerman v. City of New York, *supra*, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.*, at 562. In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, affording them the benefit of all reasonable inferences that can be drawn. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

In viewing the facts in the light most favorable to plaintiff, Chinese and Kushner's motion for summary judgment dismissing the complaint must be denied. Chinese and Kushner argue in their moving papers that plaintiff was unable to identify the substance she slipped on while on the dance floor, and was likewise unable to provide evidence as to how long the spill was on the dance

floor. Thus, Chinese and Kushner argue they did not have notice, either actual or constructive, of the dangerous condition, and therefore are not liable to plaintiff.

See Enrique v. Foodways, Inc., 186 A.D.2d 407 (1<sup>st</sup> Dept. 1992).

However, plaintiff has provided evidence in admissible form, viz, an affidavit of Brad Lerner, a friend of plaintiff who witnessed her fall. According to Lerner, there was a large puddle of liquid where plaintiff fell, and he observed the puddle for more than ½ hour. Thus, there is an issue of fact as to whether “the liquid was on the floor a sufficient length of time that defendants[s], in the exercise of due care, should have known of and corrected the condition”. Winecki v. West Seneca Post 8113, Inc., 227 A.D.2d 978 (4<sup>th</sup> Dept. 1996). The affidavit further raises issues of fact as to whether defendants created a dangerous condition on the night of plaintiff’s accident. For instance, according to Chinese, there were ten (10) bus boys at the party responsible to keep the party clean along with porters provided by New York to assist the bus boys should they need help. Moreover, according to deposition testimony given by Robert Chan, the sole owner of Chinese, he could not recall seeing any puddles on the dance floor. However, according to Lerner, he attended the party for more than four hours, and apart from the fact that, according to him, the dance floor was dimly lit and there was an excess of 1500 hundred people at the party, he never saw any maintenance employees or personnel remove any debris or clean up any spills throughout the

evening. Thus, there exists questions of fact as to whether there was a dangerous condition on the dance floor, whether defendants had sufficient time to have notice of the condition, and whether defendants acted reasonably in keeping the area clean.

Likewise, Kushner and New York's cross-motion for summary judgment against Chinese on the grounds that Kushner is entitled to indemnification is denied. Kushner and New York argue that pursuant to Paragraph 10<sup>th</sup> of a contract between Chinese and Kushner for use of the Puck Building by Chinese for the Halloween party stated, in part, that "Occupant [Chinese] shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses." However, Paragraph 10<sup>th</sup> further states that the Occupant shall indemnify the Owner to the extent that "Owner shall not be reimbursed by insurance." In the instant action, there is no evidence that Owner, i.e. New York Caterers, failed to obtain insurance, or that it was insured at the time of loss. Accordingly, based upon the foregoing, it is hereby

ORDERED that defendant Defendant Chinese American Planning, Ltd. i/s/a Chinese American Cultural Affairs Incorporated's motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that Defendants Kushner Companies and New York Caterers Associations, L.L.C. s/h/a New York Caterers, Inc.'s cross-motion for summary

judgment dismissing the complaint, or in the alternative, summary judgment against Defendant Chinese American Planning, Ltd. i/s/a Chinese American Cultural Affairs Incorporated's on the grounds that they are entitled to indemnification from Chinese is DENIED.

This constitutes the Decision and Order of the Court.

Dated: April 27, 2007

ENTER  
**SO ORDERED**  
*Rolando T. Acosta*  
Rolando T. Acosta, J.S.C.  
**ROLANDO T. ACOSTA**  
**J.S.C.**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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**FILED**  
MAY 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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