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SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

PAMELA MERRICK.

Plaintiff.

- against -

Sequence No.: 004 & 005
Index No.: 014268/05

NATA LAUNDROMAT and/or NATA LAUNDRY/FOREST AVENUE LAUDROMAT and GLEN STAR REALTY, LLC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Motion by defendant Nata Laundromat and/or Nata Laundry/Forest Avenue Laundromat (collectively referred to herein as "Nata") for summary judgment dismissing all claims and cross-claims against it pursuant to CPLR 3212 is denied.

Motion by defendant Glen Star Realty, LLC. ("Glen"), for an order discontinuing the action against it pursuant to CPLR 3217(b), and granting summary judgment dismissing the cross-claim against it by Nata, is granted.

Glen's informal request for summary judgment on its cross-claim against Nata for common law and contractual indemnification is denied as premature with respect to common law indemnification, and granted as to contractual indemnification, to the extent that Glen shall not be reimbursed by insurance. Glen's further informal request for summary judgment against Nata for breach of its contractual obligation to procure insurance is denied as Glen has failed to allege such a cross-claim.

Plaintiff was seriously injured when she fell down a flight of stairs at a laundromat owned by defendant Glen and operated by defendant Nata. The subject stairway was located in the non-

customer area of the laundromat, where plaintiff was directed to look for the duffel bag in which she had delivered clothes to be laundered. Plaintiff testified that she walked through the doorway into the non-customer area, and then was stepping to the right and looking straight ahead at the shelves as she went (Merrick transcript, p.22). As she was moving to the right and looking at the shelves, she did not see the stairs to her right and fell down (Merrick transcript, p.24). In her amended bill of particulars (Exhibit Q to Nata's moving papers) plaintiff alleges that her fall was caused by a "trap" consisting of "the negligent installation, design and placement of shelving in the rear room and laundry baskets, filled bags with laundry and other accumulated debris which hid the staircase" from her view.

Nata moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that the subject staircase was "open and obvious." Nata argues that it has no liability for conditions that are open and obvious and not inherently dangerous [Salerno v .Street Retail, Inc., 38 A.D.3d 515 (2nd Dept. 2007); Webber v. Miller, 17 A.D.3d 352 (2nd Dept. 2005)]. The issue presented by this case is whether or not the staircase at issue was obvious, or whether it was a trap for the unwary.

Summary judgment is the procedural equivalent of a trial [Capelin Associates Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 341 (1974)]. This drastic remedy should not be granted where there is any doubt as to the existence of triable issues of fact [Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957)]. The evidence must be viewed in the light most favorable to the opponent [Negri v. Stop and Shop, Inc., 65 N.Y.2d 625, 626 (1985)], and the court should refrain from resolving issues of credibility [Capelin Associates at 341].

At the outset the Court must advise the parties that the copies of the photos of the subject laundromat, annexed as Exhibit J to Nata's moving papers, are of such poor quality that they were of no evidentiary value.

In opposition to Nata's motion plaintiff submits a lengthy affidavit, which essentially supplements her deposition transcript. In the affidavit she states that from her view, at the time of the accident, she could not see the staircase (Merrick affidavit, par. 13), and she walked sideways looking straight ahead at the shelving and bags extending from it, in search of her daughter's green duffel bag (Merrick affidavit, par. 14). Then,

> at the end of the shelving there were still stacked bags and baskets in front of me on the floor which bags I was looking at. When I took one or two more steps (I had already taken approximately five steps), suddenly without warning my body started to fall to my right and sideways into the air going down the cement staircase that was still perpendicular to me.
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> * * *
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> I did not trip. I did not slip. I avoided the encumbrances in front of me. I looked in the direction that I was supposed to look in. I did not look elsewhere which is where the unknown staircase was. I was not supposed to look elsewhere. Rather than being inattentive, I was attentive. I was looking where I was going and where I was going was along the shelving in front of me.

(Merrick affidavit, par. 16 and 32).

This is not a case where the plaintiff is unable to identify the cause of her fall [cf. Reed v. Piran Realty Corp., 30 A.D.3d 319 (1st Dept. 2006), lv app den 8 N.Y.3d 801 (2007); Hennington v. Ellington, 22 A.D.3d 721 (2nd Dept. 2005)].

Viewing the evidence in the light most favorable to the plaintiff, the Court finds that triable issues of fact are presented as to: (1) whether Nata's employee directed plaintiff to inspect the shelving without any warning of the existence of the stairway, (2) whether the subject stairs were a dangerous trap for the unwary because of the close proximity of the shelving and baskets and bags to the unprotected entrance to the stairway [Wrubel v. Rose Boutique II, Inc., 13 A.D.3d 264 (1st Dept. 2004); see, Chafoulias v. 240 E. 55th Street Tenants Corp., 141 A.D.2d 207 (1st Dept. 1988)], and (3) the role of plaintiff's comparative fault [Holly v. 7-Eleven, Inc., 40 A.D.3d 1033 (2nd Dept. 2007); Luksch v. Blum-Rohl Fishing Corp., 3 A.D.3d 475 (2nd Dept. 2004)]. Consequently Nata's motion for summary judgment dismissing the complaint and all cross-claims against it must be denied.

Glen is the out-of-possession owner, against whom plaintiff has agreed to discontinue the action with prejudice (Exhibit F to Glen's moving papers). However Nata refused to discontinue its cross-claim against Glen for common law indemnification (Exhibit C to Glen's moving papers). For this reason Glen seeks an order pursuant to CPLR 3217(b) discontinuing the action against it and pursuant to CPLR 3212 for summary judgment dismissing the cross-claims asserted against it.

An out-of-possession property owner is not liable for injuries that occur on the property unless the owner retained control over the premises or is contractually obligated to perform maintenance and repairs [Nikolaidis v. La Taerna Restaurant, 40 A.D.3d 827 (2nd Dept. 2007); Chery v. Exotic Realty, Inc., 34 A.D.3d 412 (2nd Dept. 2006)]. Reservation of a right to enter the premises for purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect [Nikolaidis; Chery].

In this case, Glen did reserve a right to enter for inspection and repairs (*see,* Lease annexed as Exhibit E to Glen's moving papers, at par. 13). However no evidence has been presented that the subject staircase violated a specific statutory provision and no expert has opined that there is a significant structural or design defect in the stairs. Furthermore, there is no indication that Glen played any role in designing the store, including the placement of shelves [*Wrubel* at 265]. Under these circumstances, Glen is entitled to dismissal of both the complaint and Nata's cross-claim against it. Therefore, Glen's requests for an order pursuant to CPLR 3217(b) discontinuing plaintiff's action against it, and for an order pursuant to CPLR 3212 granting summary judgment dismissing Nata's cross-claim against it, are both granted.

Although absent from the notice of motion, in its moving papers Glen also requests summary judgment on its cross-claim for common law and contractual indemnification. Nata has

opposed such relief in its opposition papers, as though it were in the notice of motion. For this reason, notice is not a problem and this Court can address this matter.

Common law indemnification is warranted where the party seeking indemnity proves not only that it was not guilty of any negligence, but also that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident [Perri v. Gilbert Johnson Enterprises, Ltd., 14 A.D.3d 681, 685 (2nd Dept. 2005)]. Here, where triable issues of fact are presented as to Nata's negligence and plaintiff's comparative negligence, summary judgment on Glen's cross-claim for common law indemnification is denied as premature.

In contrast the lease provides for contractual indemnification of Glen by Nata against all liabilities, costs and expenses "for which Owner shall not be reimbursed by insurance" as a result of the "negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees" (Lease par. 8). One who enters upon land at the express invitation of those lawfully upon the premises and who confers a benefit upon the owner is an invitee, sometimes referred to as a business invitee [Mendez v. Goroff, 25 Misc.2d 1013, 1015 (Sup Ct., Kings Cty 1960), affd 13 A.D.2d 705 (1961), lv app den 12 N.Y.2d 842 (1962)]. Plaintiff, a customer of the laundromat, was a business invitee of Nata. In this case the triable issues of fact that remain all involve the negligence and/or comparative negligence of Nata and/or its business invitee, plaintiff. Under these circumstances, the broad indemnification provision in Nata's lease with Glen would be triggered whether the jury finds against Nata or plaintiff, or both.

Contrary to Nata's contention, the prohibition against indemnifying a party for its own negligence pursuant to General Obligations Law 5-322.1 does not apply where, as here, the party seeking indemnification is found to be free of any negligence [Rogers v. Rockefeller Group International Inc., 38 A.D.3d 747, 751 (2007)].

Based on the foregoing, contractual indemnification is available now, to the extent that Glen is not reimbursed by insurance.

Finally, Glen informally seeks summary judgment against Nata for breach of its contractual obligation to procure insurance. In the absence of any such cross-claim, this Court may not grant such relief.

So Ordered.

A.J.S.C.

Dated: September 26, 2007

ENTERED

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NASSAU COUNTY

COUNTY CLERK'S OFFICE