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

Sequence No.: *002, 003, 004 & 005*
Index No.: 010212/07

JENNIFER SCIARETTA.

Plaintiff.

- against -

NASSAU COUNTY, TOWN OF HEMPSTEAD, VILLAGE OF MINEOLA, KP MINEOLA, LLC, and ACE BEAUTY SALON INC. a/k/a ACE BEAUTY SUPPLY a/k/a ACE BEAUTY SYSTEMS.

Defendants.

ACE BEAUTY SALON INC. a/k/a ACE BEAUTY SUPPLY a/k/a ACE BEAUTY SYSTEMS.

Third-Party Plaintiff.

- against -

IRVING TIRE COMPANY, INC.

Third-Party Defendant.

KP MINEOLA LLC.

Second Third-Party Plaintiff.

- against -

KEYSPAN CORPORATION and KEYSPAN ENERGY CORPORATION.

Second-Third-Party Defendants.

The following named papers have been read on this motion:

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

Defendants Village of Mineola (hereinafter "Village"), County of Nassau, Ace Beauty

Salon, Inc. a/k/a Ace Beauty Supply a/k/a Ace Beauty Systems (hereinafter "Ace"), KP Mineola, LLC (hereinafter "KP") and third-party defendant Irving Tire Company, Inc. (hereinafter "Irving") all move for summary judgment dismissing the complaint and any cross-claims herein under separate notices of motion with the exception of KP and Irving who collectively move for dismissal of both the complaint against defendant KP and third-party complaint against Irving.

The following facts are undisputed. On July 27, 2006 plaintiff Jennifer Sciaretta tripped and fell on the sidewalk in front of the premises located at 500 Jericho Turnpike, Village of Mineola, New York. Plaintiff alleges that she was caused to trip over an uneven asphalt patch which filled a portion of the sidewalk. Plaintiff commenced the instant action, asserting negligence against defendants Village, County, Ace and KP alleging that defendants negligently breached a duty to safely maintain the portion of the sidewalk where the accident occurred. Defendant Ace is a tenant whose business abuts the sidewalk in the area where the accident occurred. Defendant KP was the owner of real property which abuts the sidewalk where the accident occurred on the date of the accident. Defendant Irving is the present owner of said property. Defendant Ace commenced a third-party action in which it seeks indemnification and defense from its landlord, third-party defendant Irving as required by the lease agreement. Defendant KP commenced a third-party action against Keyspan Corporation and Keyspan Energy Corporation (hereinafter "Keyspan third-party defendants") in which KP alleges that the Keyspan third-party defendants negligently created the condition which caused the accident by performing work at the accident location.

Defendants Village and County separately move for summary judgment dismissing the complaint as asserted against them on the grounds that they did not have notice of the condition, did not create it and did not enjoy a special use of the property in the area where the accident occurred. Defendant County also moves on the basis that it did not have jurisdiction over the area where the accident occurred. Defendant Ace moves for summary judgment 1) dismissing the complaint as asserted against it on the grounds that it had no duty to maintain the sidewalk in front of the demised premises as there was no statute requiring said maintenance, and further, that it did not create the condition; and 2) on its third-party complaint against Irving for an order directing that Irving defend and indemnify Ace. Defendants KP and Iriving collectively move for summary judgement dismissing the complaint as asserted against these defendants on the grounds that KP, the landlord at the time of the accident, was an out-of-possession landlord with no actual or constructive notice of the condition and that KP did not create the condition. Defendant Irving also seeks summary judgment dismissing the third-party complaint asserted against it by defendant Ace on the basis that if summary judgment dismissing the complaint against Ace is granted, Irving, would also be entitled to dismissal of Ace's third-party complaint.

The parties herein have settled all claims with the exception of defendant third-party plaintiff Ace's claim for indemnification and defense costs against third-party defendant Irving. By stipulation dated July 18, 2008 Ace and Irving stipulated to Ace's withdrawal of its claim for indemnification, but recognized that the issue of Ace's defense costs remain outstanding. Accordingly, all motions and cross-motions herein are denied as moot with the exception of that portion of Ace's motion on the issue of defense costs from Irving.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a motion for summary judgment must demonstrate a triable issue of fact through admissible evidence. Id.

In support of the motion Ace points to paragraph 4 of the rider to the lease pursuant to which the landlord:

> "Agrees to indemnify, defend and hold harmless tenant from any claim or loss by reason of an accident or damage to any person or property happening on any common area (including without limitation...sidewalks...) Of the shopping center except for those claims and losses due to the negligence of tenant, and for any accident or damage in the premises caused by landlord's negligence."

The interpretation of a contract is a matter of law and as such is within the province of the court and is properly determined by motion for summary judgment. W.A. Olson Enterprises, Inc. v. Agway, Inc., 55 N.Y.2d 659 (1981); Automotive Management Group, Ltd. v. SRB Management Co., Inc., 239 A.D.2d 450 (2nd Dep't 1997).

The contract is "...to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." Automotive Management Group, Ltd., supra at 55.; Morlee Sales Corp. v. Manufacturers Trust Co., 9 N.Y.2d 16 (1960). "[C]lear, complete writings should generally be enforced according to their terms." Automotive Mangagement Group, Ltd., supra at 55; Wallace v. 600 Partners Co., 86 N.Y.2d 543 (1995).

When the contract is ambiguous and "...determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact." Amusement Business Underwriters v. American International Group, Inc., 66 N.Y.2d 878 (1985). See, also, Icon Motors, Inc. v. Empire State Datsun, Inc., 178 A.D.2d 463 (2nd Dep't 1991). Whether the contract is ambiguous is to be determined by the court. Amusement Business Underwriters, supra.

It appears from the language of the lease rider that Irving was obligated to defend Ace in the event of an accident in the common areas which include the sidewalk where the subject accident occurred. There is an exception to this provision, however, that being where the accident is due to the tenant's negligence. Although this matter has been settled with the Keyspan defendants paying the plaintiff her damages, the fact remains that negligence on defendant Ace's part as the tenant has not been determined. The issue now to be determined is whether an issue of fact exists as to Ace's own negligence.

Ace first moves for summary judgment dismissing the complaint upon the grounds that there is no municipal statute which imputes a duty to maintain the sidewalk and liability as a result of a dangerous condition thereon to the occupier of adjoining property.

As pointed out by third-party Irving in opposition to the motion, however, there is a

statute which imposes a duty to maintain the sidewalk and imposes liability on abutting owners and occupiers for failing to properly maintain the sidewalk. The Code of the Village of Mineola provides at section 44.22:

> "No person owning and/or occupying any premises shall allow any sidewalk, path and/or public thoroughfare in front of or contiguous to such premises to become or remain in any condition which might reasonably endanger any person, after receiving actual or constructive notice thereof."

Section 44.23 of the code provides:

> "In the event that the owner and/or occupant of any premises abutting a sidewalk, path and/or public thoroughfare shall fail to comply with the provisions of section 44.22 of this article, and personal injury or property damage shall result from such failure, said owner and/or occupant of the premises shall be liable to all persons who are injured."

Liability may be imposed upon an owner or occupier of real property which abuts a public sidewalk which has a dangerous condition where there is a municipal statute which imposes liability on the owner or occupier for its failure to maintain the sidewalk. See, Nicilo v. B.F.N. Realty Associates, Inc., 19 A.D.3d 666 (2nd Dep't 2005).

In his affidavit submitted in support of Ace's motion, James Morgan, Ace's director of real estate avers in addition to the contents of the lease set forth above, that Ace did not perform or engage anyone to perform any work on the sidewalk.

Notably absent from Mr. Morgan's affidavit, however, is any averment that defendant Ace had no notice of the condition prior to the accident. Plaintiff succeeds in demonstrating negligence on the part of a defendant who occupies land where the occupier of the property had actual or constructive notice of the condition. See, Golding v. Powell & Dempsey, Inc., 247 A.D.2d 510 (2nd Dep't 1998). Thus, the mere fact that Ace may not have itself created the condition is not the only way by which it may be held liable. The court therefore finds that an issue of fact exists as to whether defendant Ace itself was negligent and whether it would be entitled to defense.

That branch of the motion seeking defense costs on the part of Ace is therefore denied.

So Ordered.

A.J.S.C.

Dated: September 22, 2008