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

PRESENT: HON. MILTON A. TINGLING J.S.C. PART 44

Index Number : 108953/2004

SHERIDAN, KAREN

VS.

VERY LTD

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/26/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/2/08

Mat
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

HON. MILTON A. TINGLING
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 44

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KAREN SHERIDAN,

Plaintiff,

INDEX NO.
108953/2004

-against-

VERY, LTD. d/b/a AU BAR, 625 MANAGEMENT COMMITTEE, SHEILA DALEY and 625 MADISON ASSOCIATES, L.P.,

Defendants.

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MILTON TINGLING, J.:

Defendants 625 Management Committee, Sheila Daley and 625 Madison Avenue Associates, L.P. s/h/a 625 Madison Associates, L.P. (collectively, the "landlord") move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint and all cross-claims against them. Alternatively, the landlord moves for summary judgment on its cross-claim for common-law and contractual indemnification against co-defendant Very, Ltd. d/b/a Au Bar ("Au Bar").

Plaintiff Karen Sheridan brought this action to recover damages for grievous personal injuries she allegedly sustained on November 2, 2002, at approximately 12:30 am when she fell on the steps leading down from the sidewalk into Au Bar, a nightclub in the cellar of 41 East 58th Street, premises leased by Au Bar from the landlord.

According to plaintiff, on the evening in question she attended a fundraiser for Cancer Care at Tavern on the Green (plaintiff's EBT, p 51, landlord's exhibit E), where she drank two or

three glasses of white wine (*id*, p 66). Around midnight she and several friends left the dinner and took a cab to go to Au Bar (*id*, pp 54-55), which had provided the benefit attendees with tickets waving the customary cover charge. Au Bar was located two flights below street level; after going through the street entrance there were two sets of stairs, separated by a platform or landing which housed Au Bar's ticket booth, that had to be traversed to reach the club's main floor. On the way down the stairs, plaintiff fell. She was taken unconscious to New York Presbyterian hospital, where she had multiple surgeries and procedures, including two operations involving removal of parts of her skull (*id*, p 87), and muscle and artery transplants (*id*, p 88). From New York Presbyterian she was transferred to Mt. Sinai, where she stayed in a therapy program until December 31, 2002 (*id*, pp 80, 74, 15).

After her release from Mt. Sinai, plaintiff contracted an infection in her head (*id*, p 17) which caused some kind of liquid to ooze out of a hole in her head that grew from the size of a pea to the size of a walnut and required further hospitalization and multiple brain and vascular surgeries (*id*, pp 17-22, 30, 33-37). As a result of her injuries she was out of work for 11-1/2 months (*id*, p 40), and when she returned had a hard time doing her job (*id*, p 41-42). Plaintiff also lost her sense of smell, some of the hearing in her right ear (*id*, p 45-48, 101-102), and so much hair she required a hair transplant (*id*, pp 49-50). In November 2004, she began to have seizures and was diagnosed with epilepsy (*id*, pp 7-8).

As a result of her brain injuries and trauma, plaintiff has no memory of how or why she fell. In fact, she does not remember anything that happened from when she was waiting for a cab with her friends at Tavern on the Green until she awoke in New York Presbyterian Hospital days later (plaintiff's EBT, pp 71, 74). The friends who accompanied plaintiff to Au Bar did not

witness the start of her fall (*id*, pp 72-73). Based on this lack of direct evidence, the landlord is now moving to dismiss plaintiff's complaint on the ground that she will not be able to prove a *prima facie* case of negligence against it because she cannot establish the proximate cause of her fall, and even if she could, the landlord, as an out-of-possession landlord, would not be held liable absent a structural defect in the stairs.

"It is well settled that an out-of-possession landlord ... is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Reyes v Morton Williams Associated Supermarkets, Inc.*, 50 AD3d 496, 497 [1st Dept 2008], citations omitted). "An out-of-possession landlord with a general right of reentry is not liable for general maintenance defects" (*Del Rosario v 114 Fifth Ave. Associates*, 266 AD2d 162, 163 [1st Dept 1999]).

It is undisputed that at the time of plaintiff's accident the landlord was out of possession and had a general right of reentry: Article 13 of the lease (landlord's exhibit K) gives the landlord the right to re-enter the premises "to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable." However, the landlord was not as distanced from the premises as it contends. In addition, to the right of reentry, the landlord had various, less commonplace, rights and obligations with respect to the premises and particularly the stairs. The same Article 13 gave the landlord "the right at any time ... to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs ... or other public parts of the building." Article 4 provides

that the landlord "shall maintain and repair the public portions of the building both exterior and interior." The landlord also had the right to prior approval of all "fixtures, furnishings, decorations or equipment" installed in Au Bar's premises (May 11, 1987 lease rider, ¶ 48[b][vii]), which would arguably encompass the runner on the stairs. Whether or not the landlord availed itself of its contractual rights of access to the premises and approval of the conditions therein (see Robinson EBT, landlord's exhibit F, at pp 24-25) is immaterial to the issue of liability (see *Tkach v Montefiore Hospital for Chronic Diseases*, 289 NY 387 [1943]).

Even more unusual is the degree of control over Au Bar's actual business that the lease vested in the landlord. For example, Au Bar had to pay the landlord a percentage of its profits (lease, at landlord's exhibit K, ¶ 42). When that provision resulted in the State Liquor Authority's rejection of Au Bar's application for a liquor license because the landlord would have had to be a joint licensee with Au Bar, the landlord amended the lease to provide for Au Bar making the payments directly to one of its officers, Stephen Ross, who in turn agreed to pay the landlord $400,000 owed by Au Bar under the lease, contingent on Au Bar's getting a liquor license (Jan 6, 1988 third amendment to lease). The lease also gave the landlord the right to hire and fire Au Bar personnel "whose duties include the handling of money, the preparation and handling of charge account slips or the recording, processing or reporting of any financial transactions" (lease, ¶ 48[a]). Au Bar was also forced by the landlord to hire Howard Stein ("Stein") to run the business, and firing him constituted a breach of the lease (*id*, ¶ 49). The landlord had the right to 50% of the proceeds from a sale of Au Bar's "fixtures, equipment or furnishing" (*id*, ¶ [h][ii]). While the court is not prepared at this point to espouse plaintiff's characterization of the landlord's involvement with Au Bar as a joint venture, it notes that it is sufficiently different from

the traditional landlord-tenant relationship as to dispel any doubts about the landlord's continued control after Au Bar gained possession of the premises. In view of this continuing control over the premises and the stairs, the court finds that Au Bar's tenancy does not shield the landlord from liability to plaintiff.

"In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (i) the existence of a duty on defendant's part as to plaintiff; (ii) a breach of this duty; and (iii) that such breach was a substantial cause of the resulting injury" (*Merino v New York City Transit Authority*, 218 AD2d 451, 457 [1st Dept 1996], affd 89 NY2d 824 [1996], citations omitted). An accident may have more than one proximate cause (*Nunez v Recreation Rooms and Settlement, Inc.*, 229 AD2d 359, 360 [1st Dept 1996]).

The landlord had "a common-law and statutory obligation to maintain [the] premises in a reasonably safe condition" (*Delosangeles v Asian Americans for Equality, Inc.*, 40 AD3d 550, 553 [1st Dept 2007], citing NYC Admin Code § 27-128). This duty was owed to plaintiff, a member of the public. "Where ... premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress" (*Backiel v Citibank, N.A.*, 299 AD2d 504, 506-507 [2d Dept 2002]), "which includes a duty to provide adequate lighting" (*Shirman v New York City Transit Authority*, 264 AD2d 832, 833 [2d Dept 1999]).

It is plaintiff's position that the landlord breached this duty by allowing the stairs to Au Bar to be kept in an unsafe condition which caused her fall.

The court finds that plaintiff has adduced sufficient evidence to raise an issue of fact as to whether the stairs were hazardous or defective. Two of plaintiff's friends, Lisa Sollitto

("Sollitto") and Kelly Winter ("Winter"), testified about the condition of the stairs on the night in question.

Sollitto described the stairs as "very dark and narrow and steep.... [I]t wasn't a lot of space on the stair, I just remember them being very narrow and there wasn't a lot of space" (Sollitto EBT, p 21, at plaintiff's exhibit E). "The whole thing was very dark. It was very dark when you walk, it was also dark in the actual club. I just remember it was darker than most places I've ever been to" (*id*, p 32). Winter's description of the stairs was consistent with Sollitto's. "It was very dark.... I remember going very cautiously and slowly, the steps were very narrow, almost -- I was worried about tripping, and I held onto the railing I believe on the left side.... I didn't feel like my whole foot would fit on it straight forward when I went down the steps, like I had to turn my feet sideways" (Winter EBT, p 25, at plaintiff's exhibit F). In addition, Stein, Au Bar's president and chief executive officer at the time of plaintiff's accident, testified that there was a height differential between the runner in the middle and the exposed wood part on the sides of each step (i.e., the height of the rug) (Stein EBT, pp 33, 54-55, at landlord's exhibit G), and that the lighting on the stairs, comprised of some lamps and ceiling spotlights of unknown wattage, were always kept on a dimmer and were not bright enough for him to read a newspaper even with glasses on (*id*, pp 29-32).

While "inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provisions" (*Peck v 2-J, LLC*, * AD3d *, 2008 WL 4821749, *1 [1st Dept 2008]), poor lighting coupled with other "factors, such as inadequate warning of the drop, ... inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" may support a finding of liability by the landlord

(*Schreiber v Philip & Morris Restaurant Corp.*, 25 AD2d 262, 263 [1st Dept 1966], affd 19 NY2d 786 [1967]). For example, a dimly lit staircase with a faulty handrail may form the basis of liability against an out-of-possession landlord (see *Guzman v Haven Plaza Housing Development Fund Co.*, 69 NY2d 559 [1987]). Here, in addition to the poor lighting in the stairs, Winter testified that the steps themselves were too narrow to be safe.

Plaintiff also offers the affidavit of Denise P. Bekaert ("Bekaert"), an architect who visited the Au Bar premises on July 27, 2006, and examined the witness depositions and photographs of the scene (at plaintiff's exhibit D) taken immediately after the accident. The court finds Bekaert's affidavit and report are admissible (compare, *Higgins v D & S Plaza Inc.*, 8 Misc 3d 1028(A), *2-*3 [Sup Ct, NY Co, York, J, 2005]). Bekaert avers that based on the foregoing she determined that at the time of plaintiff's accident "there was an unsecured tie-down bar on the carpet runner on the stairs permitting the runner to become loose and creating a false edge" (Bekaert affidavit, ¶ 4, at plaintiff's exhibit D). She concluded "that (a) the dark curtains, walls, carpet, and wooden stairs created conditions that reduced the delineation and conspicuity of the tread edge creating a hazardous condition for persons using the stairs, (b) that there was a failure to comply with New York City Building Code §§ 27-127 and 27-128; and (c) the hazardous conditions did not comply with recognized standards for stair safety" (*id*, ¶ 6). Her report also notes that at the time of the accident the stairs were covered with patterned runner in dark red and had torn and worn edges. The walls were also painted a dark red (Architect's Report, p 3, at plaintiff's exhibit D).

"On this record, it could be found that the stairway constituted a significant structural or design defect in violation of Administrative Code of the City of New York § 27-127 (New

York City Building Code), and thus a basis may be present upon which liability might be imposed upon defendant landlord entities, which, although out-of-possession of the subject premises, retained the right to re-enter to make repairs" (*Kraus v Caliche Realty Estates, Inc.*, 289 AD2d 9 [1st Dept 2001]). "[T]he breath of the Administrative Code § 27-128 is not limited to the structure of the building itself.... [I]f an unsafe condition is maintained with regularity anywhere on the premises of the building the owner is responsible" (*Sergio v Benjolo N.V.*, 146 Misc 2d 1011, 1013 [Sup Ct, NY Co, Saxe, J, 1990]).

Having met her burden of proof on this motion with respect to the first two elements required to establish a *prima facie* case of negligence against the landlord (see *Merino v New York City Transit Authority, supra*, 218 AD2d at 457), the dispositive question becomes, is "[p]laintiff's claim ... so speculative on the issue of causation as to mandate dismissal as a matter of law" (*Clinger v New York City Transit Authority*, 85 NY2d 957, 959-960 [1995]). "Rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment.... Even if the plaintiff suffers memory loss as a consequence of the slip and fall, [s]he still must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment.... Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate" (*Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189, 190 [1st Dept 2004], citations omitted).

Although plaintiff's lack of memory is certainly an obstacle to surviving the landlord's summary judgment motion, it is not an insurmountable one. First of all, contrary to the landlord's contention, there were four eyewitnesses to plaintiff's accident, who may not have seen what was happening with plaintiff's feet the precise instant they left the stairs, but who can testify about the extant circumstances in detail.

All four witnessed at least part of the accident. Sollitto did not see plaintiff fall -- only land. She was at the landing between the two stairs joking with another friend "and the next thing I knew Karen was on the floor and there was a big commotion. I didn't actually see Karen fall" (Sollitto EBT, p 22, at plaintiff's exhibit E). "There was blood coming from behind her head, and she was laying on the floor, and the skirt part of her dress was up above where it should have been" (*id*, pp 27-28).

Winter, the first one of plaintiff's group to go down the stairs, testified that she was standing at Au Bar's ticket window, which was on the platform between the two stairs, and "I saw out of the corner of my eye, I saw Karen standing behind me, and then when I turned to talk to her, she was already in the middle of falling" (Winter EBT, p 24, at plaintiff's exhibit F). "She was facing me so her back had somehow turned, she was just in a slow-motion fall.... Her arms weren't flailing.... I did not see her trip, I did not see her start falling. She was just -- I just remember that she was facing me 'cause I saw her face as she fell backwards" (*id*, p 28). "It was a very slow motion fall, there was no tumbling, there was nobody around to help her stop her fall or break her fall. It was as if she kind of just fell over and down the steps like slow motion and landed in a heap at the bottom.... Her dress had flown off up her legs.... She was unconscious and there was some blood coming out of her ear" (*id*, pp 30-31).

In direct contrast to this testimony, Roger Savage ("Savage"), Au Bar's head of security, testified that he personally broke plaintiff's fall. Savage first saw plaintiff when he was on the landing and she was a few steps up from the landing. Plaintiff did not appear drunk or impaired (Savage EBT at landlord's exhibit H, pp 34, 50). He "saw her lose her balance and head towards [him].... She was all the way on the left -- her left. On her left-hand side off the runner, on the wood" (*id*, p 51). "She was using the handrail" (*id*, p 54). When she fell, she "came right at me; coming down the stairs right at me.... She was coming down head-first, pretty much. I was -- you know, it's hard to explain, but an angle like ... [a] 45-degree angle.... I turned toward her and -- she fell right into me. And I grabbed her. And I think she probably tried to grab me. And the next thing I know, we were -- were turned and we were heading down the short flight of stairs.... And at one point we -- I lost my grip on her, and whatever -- if she was holding onto me, she lost me too, because she went flying head-first down those stairs. I was alongside of her. In fact, she propelled me past her. I wound up about eight feet past her" (*id*, pp 27-29).

Stein's testimony is consistent with Savage's. He too observed plaintiff when she was a few steps above the landing. When plaintiff fell Stein saw "her tumbling on top of the people in front of her and barreling through Roger [Savage] who wound up falling off the landing onto the level of the club, and then this horrible picture of the young lady lying there unconscious with blood coming out of her ear" (Stein EBT at landlord's exhibit G, p 25).

Based on the foregoing, particularly Savage's testimony, which supports the inference that plaintiff's forceful fall while she was holding onto the handrail was prompted by something other than a mere stumble, the court finds that plaintiff has raised triable issues of fact about whether the landlord negligently allowed the stairs to be in a hazardous condition which caused

her accident. Where the particular cause of an accident is unknown, the plaintiff may proceed under the doctrine of *res ipsa loquitur*. To establish a negligence claim based on *res ipsa loquitur*, plaintiff must establish that the accident (i) is of a kind that does not ordinarily occur absent someone's negligence, (ii) was caused by an agency or instrumentality within the exclusive control of the defendant, and (iii) was not caused by plaintiff's negligence (*Dermatossian v New York City Transit Authority*, 67 NY2d 219, 226 [1986]). "However, plaintiff need not conclusively eliminate all other possible explanations. It is enough to present evidence from which a reasonable jury could conclude that it is more likely than not that defendant's negligence caused the injury" (*Pavon v Rudin*, 254 AD2d 143, 145 [1st Dept 1998]). "[T]he precise manner in which the harm occurred need not be foreseeable ... [as long as] the harm is within the class of reasonably foreseeable hazards that the duty exists to prevent" (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]). As discussed above, plaintiff has met this burden.

There is an additional factor to consider. "[W]here the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within [its] power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present" (*Griffin v Manice*, 166 NY 188, 193-194 [1901]). The landlord no longer has an interest in the leasehold to the premises (see Robinson EBT, at landlord's exhibit F, p 9) and Au Bar has gone out of business and lost its lease to the premises (Stein EBT, at landlord's exhibit G, pp 8-10, 17), although the new tenant seems to be running the same business under the same name with Stein still at the helm (*id*, pp 8, 60). As a result, documentary evidence potentially helpful to plaintiff, such as Au Bar's original incident report about plaintiff's accident,

appears to have been discarded and the available copies are incomplete (see Stein EBT, p 58; Savage EBT, pp 14-15). Furthermore, immediately after the accident, both defendants, unlike plaintiff, had the ability and opportunity to examine the stairs for the existence of a defect which could have caused plaintiff's fall but chose not to do so (see Savage EBT, pp 32-33). Given this inequity in accessibility to the facts of the accident (see *Wright v New York City Housing Authority,* 208 AD2d 327, 332 [1st Dept 1995]), plaintiff's amnesia being "clearly a result of the accident" (*Schechter v Klanfer*, 28 NY2d 228, 233 [1971]), and "plaintiff's showing of facts from which negligence may be inferred, ... a relaxed standard of proof [must] be applied" (*Stankowski v Kim*, 286 AD2d 282, 287 [1st Dept 2001], app dism 97 NY2d 677 [2001], citing *Noseworthy v City of New York*, 298 NY 76 [1948]).

Summary judgment should not be granted if there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). The function of summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957], rearg den 3 NY2d 941 [1957]). "The question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 312 [1980]). "The absence of direct evidence does not require a ruling in defendants' favor, for proximate cause may be inferred from the facts and circumstances surrounding the event" (*Ellis v County of Albany*, 205 AD2d 1005, 1007 [3d Dept 1994]). "[I]nferences reasonably capable of being drawn as to whether defendant's conduct was negligent under the circumstances are matters exclusively for the trier of the facts, not for the court in a fact-finding determination" (*Myers v Fir Cab Corp.*, 100 AD2d 29, 33-34 [1st Dept 1984]), dissent by Kassal, J. based upon which majority was reversed at 64 NY2d 806 [1985]).

The alternative branch of the landlord's motion seeks summary judgment on its cross-claim for indemnification against Au Bar. In opposition, Au Bar argues that there is no evidence it was actively negligent, and there is a possibility that plaintiff's fall was caused by a structural defect in the stairs, which the landlord would be responsible for under both the lease and the Building Code.

The indemnification provision in Au Bar's lease (Article 54) makes no mention of personal injury. It obligates Au Bar (Tenant) to

> indemnify and save harmless Landlord and its agents against and from all liabilities, obligations, damages, penalties, actions, proceedings, claims, costs and expenses (including, without limitation, attorneys' fees and disbursements) suffered, paid or incurred by Landlord as a result of (a) any breach of any covenant or condition of this lease by Tenant or Tenant's ... employees, agents, contractors, subtenants, licensees or invitees, (b) any and all claims (i) arising from (x) the conduct or management of the demised premises or of any business therein, or (y) any work or thing whatsoever done, or any condition created (other than by Landlord for Landlord's or Tenant's account) in or about the demised premises during the term of this lease ..., or (ii) arising from any negligent or otherwise wrongful act or omission of Tenant or any of its ... employees, agents, contractors, subtenants, licensees or invitees. In case any action or proceeding be brought against Landlord by reason of any such breach or claim, Tenant, upon notice from Landlord, shall resist and defend such action or proceeding by legal counsel approved by Landlord.

Thus, under this clause Au Bar's duty to indemnify is not triggered until it is determined that either (i) Au Bar breached its lease, (ii) the claim arose from Au Bar's management of its premises or business, (iii) the claim arose from something done in or to the premises by someone other than the landlord, or (iv) the claim arose from Au Bar's negligence. At this juncture, none of these things can be determined as a matter of law; indeed, such determinations are intertwined with the findings to be made by the jury adjudicating plaintiff's claims. "Whether plaintiff's injuries were proximately caused by the negligence of [Au Bar, the landlord], or a combination of the foregoing cannot be

determined by the court as a matter of law. Even where the facts are undisputed, issues relating to foreseeability and proximate cause should be resolved by the trier of fact (*Thomas v James Wu & Sons, Inc.*, 184 AD2d 440, 440-441 [1st Dept. 1992]).

Absent a clear contractual expression to the contrary, a cause of action for indemnification does not arise until the indemnitee has actually sustained a loss, generally the date payment is made to the injured third party (*Bay Ridge Air Rights v State of New York*, 44 NY2d 49, 54-55 [1978]). The indemnification clause at issue "does not evince an 'unmistakable intent' to obligate tenants to indemnify the landlord for injuries to third persons caused by the landlord's own negligence with respect to its non-delegable duty under Building Code ... § 27-128.... An ambiguity in this regard is raised by lease provisions which, although obligating the tenant to make both structural and non-structural repairs, give the landlord a right of reentry to perform repairs required by the Building Code, and which require the landlord's consent before any structural alterations are done" (*Putter v Sued*, 292 AD2d 222 [1st Dept 2002]).

The same issues bar summary judgment on the landlord's cross-claim for common-law indemnification, since in order to state such a claim "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). No finding of negligence by anyone has yet been made in this case.

Accordingly, the landlord's motion for summary judgment dismissing plaintiff's complaint and all cross-claims against it is denied in its entirety. The landlord's alternative request

for relief, summary judgment on its cross-claim for indemnification against Au Bar, is denied as premature.

This decision constitutes the order of the court.

DATED: 12/2, 2008

J.S.C.

HON. MILTON A. TINGLING