[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 115161/2005

EPPS, MARTHA

VS.

MARCO POLO CATERERS

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is 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 per attached

FILED

JAN 14 2009

COUNTY CLERK'S OFFICE
NEW YORK

IS HEREBY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/24/08

EMILY JANE GOODMAN 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: IAS PART 17

----------X

MARTHA EPPS,

Plaintiff,

-against-

Index No. 115161/05

MARCO POLO CATERERS, LLC, d/b/a
TOCQUEVILLE RESTAURANT,
MARCO POLO CATERERS, INC., d/b/a
TOCQUEVILLE RESTAURANT,
AJAX, LLC and REGELE BUILDERS, INC.,

Defendants.

----------X

EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

This is an action for personal injuries sustained by plaintiff Martha Epps when, on September 27, 2005, she allegedly fell through an open cellar door, which was located on the sidewalk in front of Tocqueville Restaurant at 15 East 15th Street in Manhattan.

Before the court are three motions for summary judgment by the defendants. In motion sequence number 003, defendant AJAX, LLC (AJAX) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence number 004, defendant Marco Polo Caterers, LLC moves for summary judgment dismissing the complaint as against it. In motion sequence number 005, defendant Marco Polo Caterers, Inc. moves for summary judgment dismissing the complaint insofar as against it. For the reasons discussed below, the first and second motions are granted, and the third motion is denied.

BACKGROUND

AJAX is the owner of the premises. On September 27, 2005, Marco Polo Caterers, Inc. was the operator of Tocqueville Restaurant and lessee of the basement and ground floor of the premises. Marco Polo Caterers, LLC currently operates a different restaurant at the premises.

Plaintiff testified at her deposition that, that morning, while walking east on 15th Street, she saw Tocqueville Restaurant's menu posted next to its front door (Plaintiff Dep., at 45, 50). The menu was posted to the right of the front door (*id.* at 50). Plaintiff crossed the street to read the menu (*id.* at 45). According to plaintiff, there were no safety signs, cones or barricades around the basement hatch doors on the sidewalk, and there was no delivery truck in front of the restaurant (*id.* at 46-47, 48). After plaintiff finished reading the information around the restaurant door, she took three steps before falling into the open hatch door (*id.* at 52). Plaintiff shattered her right leg and lost consciousness as a result of her fall (*id.* at 55, 66). She testified that she did not notice the doors because she was not looking down (*id.* at 51). When she regained consciousness, she noticed that her fall caused a bone to protrude from her skin, and that one of the workers in the basement was screaming at her (*id.* at 55, 58). She was later taken to the hospital by ambulance, and had three surgeries to repair her shattered right leg (*id.* at 63, 66).

Ernesto Dominguez, an employee of the restaurant, testified that he was receiving a delivery that morning (Dominguez Dep., at 69, 70, 89). Plaintiff fell on top of him while he was standing on the steps leading from the sidewalk hatch to the basement (*id.* at 70). At the time, Dominguez was pulling the left door of the hatch down, while the right door was still open (*id.* at 71). Although he saw plaintiff coming, he did not say anything to her (*id.* at 73). Dominguez

believed that she saw him, too, because the door was open and he testified that a warning sign was placed on the sidewalk (*id.* at 73, 87). He further testified that he had already removed one sign from the sidewalk and had placed it on the steps (*id.* at 87).

Marco Moreira, the principal owner of Marco Polo Caterers, Inc., testified that he did not recall seeing any signs in front of the open sidewalk door (Moreira Dep., at 102). He did, however, recall that the left hatch door was down and that the right hatch door was open (*id.*). Moreira testified that the restaurant's menu was placed in a window to the left of the front door, and that a New York Times review was posted to the right of the door (*id.* at 71-72; *see also* Moreira Aff., ¶ 6).

In a lease agreement dated September 3, 1999, AJAX, as the building owner, leased "portions of the ground floor and basement, as more particularly described in Exhibit 'A' annexed hereto" to Marco Polo Caterers, Inc. (Weiner Affirm. in Opp. to AJAX's Motion, Exh. 2). The terms of the lease provide, in relevant part, that:

> Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

(*id.*, Exh. 2, ¶ 4). The lease further states that:

> Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

(*id.*, Exh. 2, ¶ 13). A rider to the lease agreement provides that:

> Access. Tenant shall provide access to the bathroom in the basement to Landlord, its employees, agents and contractors during business hours. Landlord shall provide access to the staircase on the west side of the basement and to the service vestibule on the west side of the Building to Tenant, its employees, agents and contractors during business hours, for egress and emergency use only.
>
> Sidewalk Cleaning. Tenant shall be responsible for maintaining the sidewalk (to the curb) in front of the demised premises free of loose debris, trash, snow and garbage. Tenant shall sweep and/or hose the sidewalk on at least a daily basis.

(*id.*, Exh. 2, ¶¶ 63, 64).

Plaintiff commenced the instant negligence action against Marco Polo Caterers, LLC, Marco Polo Caterers, Inc., AJAX, and Regele Builders, Inc. The complaint and bill of particulars allege that defendants created a defective, hazardous and dangerous condition by opening the hatch without warning or a barricade. In a letter dated March 2, 2007, plaintiff supplemented the bill of particulars, claiming that the following were violated in the operation and maintenance of the cellar doors: "ANSI a 12.1-1973 Section 3; ANSI a 1264.1-1995; OSHA 29 CFR 1910.23a1; OSHA 1910.23-a (3); OSHA 1910.23-a5; Building Construction Code of the City of New York and the Administrative Code of the City of New York (27-127 and 27-128)" (Weiner Affirm. in Opp. to AJAX's Motion, Exh. 3). By stipulation of discontinuance filed on November 28, 2007, plaintiff discontinued the action as against Regele Builders, Inc.

Previously, plaintiff moved, pursuant to CPLR 3126, for discovery sanctions against Marco Polo Caterers, LLC and Marco Polo Caterers, Inc. On March 3, 2008, the court ordered these defendants to produce an employee of the restaurant, JoAnn Makovitsky, for a deposition limited to information concerning the condition of the accident scene. Makovitsky testified at that deposition that, when she arrived at the restaurant within an hour of the accident, she

observed yellow warning signs in front of the basement hatch door (Makovistky Dep., at 17, 39-40).

DISCUSSION

The standards for summary judgment are well settled.

> "[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]). "'[I]ssue-finding, rather than issue-determination, is the key to (reviewing a motion for summary judgment)'" (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008], quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957]).

Motion by AJAX

AJAX seeks summary judgment on the ground that it is an out-of-possession landlord. An out-of-possession landlord is generally not liable in negligence with respect to the condition of the demised property (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 569 [1987]; *Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]; *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept], *lv denied* 88 NY2d 814 [1996]). However, there are two exceptions to this general rule at issue here: where the landlord "(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" (*Vasquez*, 40 AD3d at 266 [emphasis supplied]; *see also Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141 [1st Dept 2000]).

The interpretation of unambiguous lease provisions is an issue of law for the court (*401 W. 14th St. Fee LLC v Mer du Nord Noordzee, LLC*, 34 AD3d 294, 295 [1st Dept 2006]). In the instant case, AJAX leased "a portion of the ground floor and basement" of the premises to Marco Polo Caterers, Inc. (Weiner Affirm. in Opp. to AJAX's Motion, Exh. 2). The eastern hatch door, where the accident occurred, leads to the portion of the basement leased by Marco Polo Caterers, Inc. (Regele Dep., at 45). The lease agreement states, in pertinent part, that "Tenant shall . . . take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto" (Weiner Affirm. in Opp. to AJAX's Motion, Exh. 2, ¶ 4). The agreement also states that "Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements" (*id.*, Exh. 2, ¶ 13). Additionally, in a rider to the lease, Marco Polo Caterers, Inc. was required to maintain the sidewalks, where the cellar door was located (*id.*, Exh. 2, Rider to Lease, ¶ 63). While the lease permits AJAX to make repairs if Marco Polo Caterers, Inc. fails to make such repairs, it does not require AJAX to do so. Therefore, AJAX was not contractually obligated to maintain the area of the property containing the sidewalk cellar door.

"Reservation of a right of re-entry for inspection and repair in a lease may, under certain circumstances, constitute sufficient retention of control to impose liability for injuries caused by an alleged hazard" (*Kane v Port Auth. of N.Y. & N.J.*, 49 AD3d 503, 503-504 [2d Dept 2008],

citing *Guzman*, 69 NY2d at 566). As noted above, AJAX reserved a right under the lease to inspect the premises and make necessary repairs (Weiner Affirm. in Opp. to AJAX's Motion, Exh. 2, ¶ 13). Thus, the issue is whether AJAX's reservation of the right to reenter the leased portion of the premises is sufficient to impose constructive notice on it.

In opposition to AJAX's motion, plaintiff submits an affidavit from William Marletta, Ph.D., a certified safety professional, who opines that AJAX violated New York City Building Code, Administrative Code of the City of New York (Administrative Code) §§ 27-127 and 27-128[1] (Marletta Aff., ¶ 10). Specifically, Marletta claims that AJAX failed to prevent the tenant's access to the sidewalk doors after observing unsafe operating practices on numerous occasions (*id.*). Marletta also states that AJAX violated ANSI standards (ANSI §§ a 12.1-1973, a 1264.1-1995) and OSHA regulation 29 CFR 1910.23 by failing to install a railing with toeboard on all exposed sides and by failing to cover the hole with a sufficient covering (*id.*, ¶ 8).

In *Guzman* (69 NY2d 559, *supra*), the Court of Appeals held that an out-of-possession landlord could be held liable where the defendant violated the general provisions of Administrative Code §§ 27-127 and 27-128 and two specific regulations requiring minimum handrail clearance and minimum illumination. However, subsequent cases have made clear that the alleged violation of the general duty of maintenance and repair in Administrative Code §§ 27-127 and 27-128, without more, is insufficient to constitute constructive notice to a landlord (*Boateng v Four Plus Corp.*, 22 AD3d 323, 324 [1st Dept 2005]; *Dixon v Nur-Hom Realty*

---

[1]Section 27-128 provides that "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities." Section 27-127, entitled "Maintenance requirements," states that "[a]ll buildings and all parts thereof shall be maintained in a safe condition."

Corp., 254 AD2d 66, 67 [1st Dept 1998]; *Plung v Cohen*, 250 AD2d 430, 431 [1st Dept 1998]; *Manning v New York Tel. Co.*, 157 AD2d 264, 269-270 [1st Dept 1990]).

Moreover, an out-of-possession landlord cannot be liable for the failure to provide additional safeguards such as a railing or covering for a trap door improperly left open by a tenant. For example, in *Brown v Weinreb* (183 AD2d 562 [1st Dept 1992]), the plaintiff was injured when he fell into an opening in a video store owned by the defendants. It was undisputed that the opening was normally covered by a trap door. In reversing a jury's finding of liability against the defendants, the First Department stated that:

> There was no evidence that defendants negligently or defectively constructed, maintained or repaired the premises or that there was any violation of Administrative Code of the City of New York § 27-128. Specifically, there is no evidence that the trap door itself was an unsafe construction, nor is there any claim that, with the door in place, there was even a negligent condition. It could only become unsafe by an improper use, i.e., left in an open position. Nor can liability be imposed on defendants for their failure to provide other safeguards to prevent injury.

(*id.* at 562-563 [citation omitted]). Similarly, in *Almanzar v Picasso's Clothing* (281 AD2d 341 [1st Dept 2001]), the plaintiff was injured after he tripped and fell through an open trap door leading to a basement. Although the plaintiff argued that the trap door was a significant structural defect, the First Department rejected this argument, finding that the door was "improperly left open by the store" (*id.* at 342). The Court also noted that the landlord could not be held liable for failing to provide additional safeguards (*id.*).

Moreover, plaintiff's reliance on the ANSI code and OSHA regulations is misplaced, since these cannot serve as a predicate for constructive notice to AJAX. In *Conti v Kimmel* (255 AD2d 201 [1st Dept 1998]), plaintiff, who fell through an open trap door, argued that the out of possession landlord was negligent, citing ANSI code and OSHA regulations. However, the First

Department affirmed the dismissal of the complaint, noting that "[p]laintiff's reliance on OSHA regulations and the ANSI Code . . . is... unavailing since these non-statutory provisions cannot be the basis of constructive notice imputed to the landlord" (*id.* at 201-202).

Here, there is no evidence that the sidewalk door was structurally defective. The door only became unsafe because it was left open by an employee of Marco Polo Caterers, Inc. Plaintiff's expert's reliance on the general duty in Administrative Code §§ 27-127 and 27-128 and the ANSI code and OSHA regulations, without more, is insufficient as a basis for liability against AJAX.

Although plaintiff argues that there are issues of fact as to whether AJAX retained control of the demised premises, the record does not support that claim. AJAX does not have an office or any employees, and only stores some records within one file cabinet on the second floor of the building (Regele Dep., at 11, 13, 14). While there is evidence that AJAX's principal, Joseph Regele, informed the restaurant when he saw one hatch door open and the other door closed (*id.* at 58-65)[2], this evidence does not show that AJAX agreed to maintain this portion of the premises (*see McComish v Luciano's Italian Restaurant*, 56 AD3d 534 [2d Dept, Nov 12, 2008] [control "may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises"] [internal quotation marks and citation omitted]). *Kolmel-Hayes v South Shore Cruise Lines., Inc.* (23 AD3d 530 [2d Dept 2005]), upon which plaintiff

---

[2]Contrary to plaintiff's contention, this evidence does not indicate that AJAX "transmitted" operating rules to the restaurant. It is also unclear whether AJAX procured warning signs (Regele Dep., at 64). Furthermore, Regele did not testify that he managed all aspects of the building (*id.* at 21).

relies, is also distinguishable because the landlord in that case maintained an office within the leased premises. Here, there is no evidence that AJAX used any of the space within the leased portion of the premises.

In addition, AJAX has established that plaintiff's injuries were caused not by a defective or dangerous condition concerning the cellar doors when closed (*see Fobbs v Rahimzada*, 39 AD3d 811 [2d Dept 2007] [defendant established its summary judgment burden by showing that plaintiff's fall was the result of employee opening cellar doors from the inside, and not from a defective or dangerous condition with the door]; *Davison v Wiggand*, 259 AD2d 799, 802 [3d Dept], *lv denied* 94 NY2d 751 [1999] [out-of-possession landlord is not responsible for unsafe conditions brought about through the act of its tenant]).

Accordingly, AJAX's motion for summary judgment is granted.

Motion by Marco Polo Caterers, Inc.

Marco Polo Caterers, Inc. argues that it can only be liable if the door was not in use or was being improperly used at the time of the accident.

Marco Polo Caterers, Inc. further contends that the open sidewalk door was open and obvious as a matter of law, and that plaintiff was only injured because she was not looking where she was going. This defendant submits color photographs of the exterior of the restaurant and an affidavit from Marco Moreira, the restaurant's president, who avers that they represent how the outside of the restaurant looked in September 2005 (Moreira Aff., ¶¶ 5-8). The photographs show the restaurant's menu to the left of the front door, large stone planters on each side of the front door, and that the sidewalk hatch doors were located to the right of the door, approximately eight feet away from the front door and 12 feet from the restaurant's menu in the window (*id.*,

Exhs. 1-3). Moreira states that when he arrived at the scene of the accident, he noticed that the right hatch door was open, and the left hatch door was closed (*id.*, Exh. 3).

A lessee in possession and control of premises is under a duty to maintain the property in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003] [citation and internal quotation marks omitted]). To establish a breach of this duty, the plaintiff must prove that the lessee either created or had actual or constructive notice of a dangerous condition that caused the injury, i.e., the open sidewalk door (*see Khamis v CG Foods, Inc.*, 49 AD3d 606, 607 [2d Dept 2008]). Here, there are issues of fact as to whether Marco Polo Caterers, Inc. created a dangerous condition.

Plaintiff testified that the open sidewalk door was unguarded at the time of her injury (Plaintiff Dep., at 48). Plaintiff also testified that a menu was posted to the right of the front door, about three steps away from the open sidewalk door (Plaintiff Dep., at 50, 52). An issue of fact is raised as to whether placement of the menu, so close to the sidewalk door, rendered the condition a trap (*see Maureillo v Port Authority of NY and NJ*, 8 AD3d 200 [1st Dept 2004] [an open and obvious condition could be rendered a "trap" when obscured or when a person's attention was otherwise distracted]; *see also Femenella v Pellegrini Vineyards, LLC* (16 AD3d 546 [2d Dept 2005] [where plaintiff fell from a chair placed by defendant too close to the edge of a platform surrounded by hedges, the issue of whether condition was open and obvious was an issue of fact for the jury, and, even if the condition was open and obvious, the defendant still had duty to maintain premises in a reasonably safe condition, raising only an issue of comparative negligence]); *Chambers v Maury Povich Show* (285 AD2d 440 [2d Dept 2001] [where plaintiff

fell from a chair placed by defendant too close to the aisle, defendant was not relieved of liability even if the condition was open and obvious, but an issue was raised as to plaintiff's comparative negligence]).

Furthermore, there are issues of fact as to whether Marco Polo Caterers, Inc. is liable for a failure to warn. "'[T]he duty to maintain premises in a reasonably safe condition is analytically distinct from the duty to warn'" (*Juoniene*, 6 AD3d at 201, quoting *Cohen v Shopwell, Inc.*, 309 AD2d 560, 562 [1st Dept 2003]). Liability may be predicated on a failure to warn of an open sidewalk door (*see e.g. Lowenstein v Normandy Group, LLC*, 51 AD3d 517, 518 [1st Dept 2008]). There is no duty to warn of open and obvious conditions (*Tagle v Jakob*, 97 NY2d 165, 169 [2001]). The First Department reviewed the "open and obvious" doctrine in *Westbrook v WR Activities-Cabrera Mkts.* (5 AD3d 69, 71 [1st Dept 2004]), stating that:

> If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to *warn* a visitor of the danger. . . .Where a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided. Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning.

(internal citations and quotation marks omitted). Whether a condition is open and obvious is generally an issue for the jury, which may only be determined as a matter of law where the established facts compel that conclusion (*Schulman v Old Navy/Gap, Inc.*, 45 AD3d 475, 476 [1st Dept 2007]; *Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004]; *Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 200 [1st Dept 2004]).

There is a dispute as to whether Marco Polo Caterers, Inc. warned plaintiff of the open sidewalk door. While Dominguez testified that there was one warning sign on the sidewalk,

plaintiff stated that she did not observe any signs there (Domingez Dep., at 73, 87; Plaintiff Dep., at 46-47). In any event, it cannot be determined as a matter of law that the open sidewalk door was an open and obvious condition. The photographs offered by Marco Polo Caterers, Inc. do not inescapably lead to the conclusion that the opening was visible from all directions or that it might not be overlooked by a pedestrian who is reading the menu. "Some visible hazards, because of their nature or location, are likely to be overlooked" (*Juoniene*, 6 AD3d at 200-201). Thus, it is for the jury to determine whether this condition was readily apparent to an individual making reasonable use of his or her senses.

Jang Hee Lee v Sung Whun Oh (3 AD3d 473 [2d Dept 2004]), relied upon by Marco Polo Caterers, Inc., can be distinguished on its facts. There, the plaintiff tripped and fell into a three-meter by one-meter artificial cement pond. In determining this hazard to be open and obvious as a matter of law, the Court noted that the accident occurred on a clear day, that the cement pond was plainly visible, and that the plaintiff had visited the premises on approximately 15 prior occasions (*id.* at 474). Here, in contrast, it cannot be said that the opening was plainly visible based on the photographic evidence or that it could not have been reasonably overlooked given its location. There is also no evidence that plaintiff was actually aware of this condition like the plaintiff in *Lee*.

Motion by Marco Polo Caterers, LLC

Finally, Marco Polo Caterers, LLC submits uncontroverted evidence that it currently operates a restaurant at the premises, but did not own, lease, control or have any connection with the premises on the date of plaintiff's accident. "'Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises'"

(*Sew Wai Yong v City of New York*, 41 AD3d 212, 212-213 [1st Dept 2007], quoting *Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]; *see also Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept], *lv dismissed in part and denied in part* 73 NY2d 783 [1988]). Therefore, Marco Polo Caterers, LLC is entitled to summary judgment.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 003) by defendant AJAX, LLC for summary judgment is granted and the complaint and all cross claims are hereby severed and dismissed with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the motion (sequence number 004) by defendant Marco Polo Caterers, LLC for summary judgment is granted and the complaint is hereby severed and dismissed with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the motion (sequence number 005) by defendant Marco Polo Caterers, Inc. for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: December 24, 2008

ENTER:

J.S.C.
EMILY JANE GOODMAN