SHORT FORM ORDER INDEX NO. 25322/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

URSULA RIVERA,

Plaintiff,

-against-

1620 NEW YORK AVENUE, LLC, JACQUES MEDICAL SERVICES, MARIE JACQUES and HIJO DEL MONTE CORPORATION,

Defendants.

ORIG. RETURN DATE: AUGUST 7, 2008
FINAL SUBMISSION DATE: OCTOBER 2, 2008
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: AUGUST 7, 2008
FINAL SUBMISSION DATE: OCTOBER 2, 2008
MTN. SEQ. #: 003
CROSS-MOTION: XMD

ORIG. RETURN DATE: NOVEMBER 3, 2008
FINAL SUBMISSION DATE: NOVEMBER 6, 2008
MTN. SEQ. #: 004
MOTION: MD

PLAINTIFF'S ATTORNEYS:
CANNON & ACOSTA, LLP
1923 NEW YORK AVENUE
HUNTINGTON STATION, NEW YORK 11746
631-271-6363

ATTORNEYS FOR DEFENDANT 1620 NEW YORK AVENUE, LLC:
FRIEDMAN, HARFENIST, KRAUT & PERLSTEIN, LLP
3000 MARCUS AVENUE - SUITE 2E1
LAKE SUCCESS, NEW YORK 11042
516-775-5800

ATTORNEYS FOR DEFENDANTS JACQUES MEDICAL SERVICES & MARIE JACQUES:
EPSTEIN & GRAMMATICO
1393 VETERANS MEMORIAL HIGHWAY
SUITE 414
HAUPPAUGE, NEW YORK 11788
631-265-9191

DEFENDANT HIJO DEL MONTE CORPORATION:
1618A NEW YORK AVENUE
HUNTINGTON STATION, NEW YORK 11746

Upon the following papers numbered 1 to 14 read on these motions TO AMEND PLEADINGS, FOR PARTIAL SUMMARY JUDGMENT, FOR DEFAULT JUDGMENT, AND TO PRECLUDE. Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Affirmation in Opposition and supporting papers 5, 6; Replying Affirmation and supporting papers 7; Notice of Cross-motion and supporting papers 8-10; Notice of Motion and supporting papers 11-13; Affirmation in Opposition and supporting papers 14; it is,

ORDERED that this motion by defendant 1620 NEW YORK AVENUE, LLC ("1620") for an Order: (a) pursuant to CPLR 3025 (b), granting 1620 leave to amend its answer to assert a cause of action for contractual indemnification against MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES; (b) pursuant to CPLR 3212 (b), granting 1620 partial summary judgment on its cross-claims for the defense of common law indemnification and contractual indemnification from defendants MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES; and (c) granting a default judgment against defendant HIJO DEL MONTE CORPORATION ("Hijo") on its cross-claim for common law indemnification, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received an affirmation in opposition to this motion from defendants JACQUES MEDICAL SERVICES and MARIE JACQUES ("Jacques defendants"); and it is further

ORDERED that this cross-motion by plaintiff for an Order, pursuant to the CPLR, precluding the testimony of 1620, the Jacques defendants, and Hijo for their alleged failure to comply with the Court's prior Order of discovery, and allowing plaintiff to place this matter on the trial calendar, is hereby **DENIED** for the reasons set forth hereinafter. The Court has not received opposition to this cross-motion; and it is further

ORDERED that this motion by plaintiff for an Order, pursuant to the CPLR, precluding the testimony of the Jacques defendants and Hijo for their alleged failure to comply with the Court's prior Order of discovery, and allowing plaintiff to place this matter on the trial calendar, is hereby **DENIED** for the reasons set forth hereinafter. The Court has received an affirmation in opposition to this motion from the Jacques defendants.

The Court has consolidated these three applications for the purpose of rendering the within decision and Order.

This action was filed by plaintiff on or about August 6, 2007, to recover damages for personal injuries allegedly sustained by plaintiff on February 15, 2007, when she slipped and fell on snow and/or ice on the sidewalk in front of the premises commonly known as 1618 New York Avenue, Huntington Station, New York. Plaintiff alleges that as a result of the slip and fall she sustained "extremely serious personal injuries," including displaced left tibia and proximal fibular fractures requiring open reduction and internal fixation.

1620, by affidavit of its member DAVID MEHRARA, informs the Court that it is the out-of-possession owner of the premises located at 1618-1620 New York Avenue, Huntington Station, New York ("premises"). JACQUES MEDICAL SERVICES is the tenant in possession of the ground floor storefront, known as 1618 New York Avenue. Hijo is the tenant in possession of the second floor of the premises, known as 1620 New York Avenue. 1620 alleges that on or about November 1, 2003, the former owner of the premises, "Merimac Enterprises," as landlord, entered into a lease agreement with "Jacques Medical Services & Carline Prevale," as tenant, for the premises known as 1618 New York Avenue ("Lease"). The term of the Lease expired on October 31, 2006; however, JACQUES MEDICAL SERVICES remained a tenant in possession, becoming a month-to-month tenant, and was in possession on the date of plaintiff's accident. 1620 further alleges that it leased to Hijo the premises known as 1620 New York Avenue, and that Hijo was also in possession on February 15, 2007. The Court notes that 1620 has not submitted a written lease agreement relative to Hijo's tenancy.

Pursuant to the terms of the Lease, JACQUES MEDICAL SERVICES was responsible for the removal of all snow and ice from the sidewalk abutting the premises (*see* ¶ 43 [B] of Rider to Lease). In addition, JACQUES MEDICAL SERVICES was to keep and maintain the sidewalks free from the accumulation of ice and snow (*see* ¶ 59 of Rider to Lease). Moreover, the Lease provides that the "[l]andlord shall not be liable for damage or injury to person or property caused by or due to the negligence of Landlord or its agent unless written notice of any defect alleged to have caused such damage or injury shall have been given to Landlord a sufficient time prior to such occurrence to have reasonably enabled the Landlord to correct such defect. Nothing herein contained shall impose on Landlord any additional obligations to make repairs" (*see* ¶ 60 of Rider to Lease). Notably, paragraph "SECOND" of the Lease provides in pertinent part, "the Tenant will . . . forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages,

expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto" (*see* ¶ "SECOND" of Lease).

1620 has now filed the instant application for the relief described hereinabove. The Court will address each branch of 1620's motion *seriatim*.

Initially, 1620 seeks to amend its answer to assert a cause of action for contractual indemnification against MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES. In support thereof, 1620 has submitted a copy of the aforementioned Lease agreement in which JACQUES MEDICAL SERVICES is the tenant named therein. Although the term of the Lease expired on October 31, 2006, JACQUES MEDICAL SERVICES remained a tenant in possession, thereby creating a month-to-month tenancy (*see* Real Property Law § 232-c). "When a tenant remains in possession after the expiration of a lease 'pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument' " (*Lynch v Savarese*, 217 AD2d 648 [1995], quoting *City of New York v Pennsylvania R. R. Co.*, 37 NY2d 298 [1975]). Therefore, the provisions in the Lease remained in force for as long as JACQUES MEDICAL SERVICES remained in possession (*see City of New York v Pennsylvania R. R. Co.*, 37 NY2d 298, *supra*).

Moreover, Real Property Law § 223 gives the grantee or assignee of the landlord of property the same rights and remedies against the tenant for nonperformance of the agreements contained in a lease as the original landlord would have had (*see 507 Madison Ave. Realty Co. v Martin*, 200 AD 146 [1922], *affd mem* 233 NY 683 [1922]; *ISLAND PROPS. v MUZIO*, 2002 NY Slip Op 40540[U] [App Term, 9th & 10th Jud Dists]; *Tower Mineola Ltd. Partnership v Potomac Ins. Co. of Ill.*, 14 Misc 3d 1238[A] [Sup Ct, New York County 2007]; *Rosemberg v Brens*, 19 Misc 3d 1142[A] [Civ Ct, Kings County 2008]). Therefore, 1620, as grantee of the premises, retained the rights and remedies against JACQUES MEDICAL SERVICES contained in the Lease.

CPLR 3025 (b) provides in pertinent part that, "[a] party may amend his pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (CPLR 3025 [b]). Leave to

amend a pleading is to be freely given absent surprise or prejudice resulting from the delay. Whether to grant such leave is within the trial court's discretion, the exercise of which will not be lightly disturbed (*Pergament v Roach*, 41 AD3d 569 [2007]; *Madeline Lee Bryer, P.C. v Samson Equities, LLC*, 41 AD3d 554 [2007]; *Surgical Design Corp. v Correa*, 31 AD3d 744 [2006]).

In opposition to the motion to amend, the Jacques defendants have not alleged surprise or prejudice resulting from the delay, but merely that 1620 waited over one year to seek to amend its answer, with no reasonable excuse given. However, after service of its answer, 1620 indicates that it attempted to obtain a defense and indemnification from the Jacques defendants' insurance company, to wit: Nationwide Insurance Company, to no avail. In view of the foregoing, and in light of the applicable case law and the provisions of the Lease, that branch of 1620's motion to amend its answer to assert a cause of action for contractual indemnification against MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES, is hereby **GRANTED**.

Next, 1620 seeks partial summary judgment on its cross-claims for the defense of common law indemnification and contractual indemnification from defendants MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES. 1620 argues that it does not control the premises and did not create the condition complained of, as it did not undertake any snow and/or ice removal from the premises on or about the date of plaintiff's accident.

In opposition, the Jacques defendants, by affirmation of counsel, argue that summary judgment is premature, as discovery is not yet complete. Further, the Jacques defendants allege that lease agreements exist with respect to other tenants of the premises, which have not yet been produced and are necessary to properly defend 1620's motion. Moreover, the Jacques defendants allege that 1620 has not submitted a copy of the deed transferring ownership of the premises to 1620.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to

demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, 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 (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

"An out-of-possession landlord is not liable for personal injuries sustained on the premises unless the landlord retains control of the property or is contractually obligated to perform maintenance and repairs" (*Dominguez v Food City Mkts.*, 303 AD2d 618 [2003]; *see also Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121 [2008]; *Ingargiola v Waheguru Mgmt.*, 5 AD3d 732 [2004]; *Reidy v Burger King Corp.*, 250 AD2d 747 [1998]). Under the circumstances presented, 1620 relinquished control over the premises, and was not obligated under the terms of the Lease to maintain the sidewalk upon which plaintiff fell (*see Stark v Port Auth. of N.Y. & N.J.*, 224 AD2d 681 [1996]; *Reidy v BurgerKing, Corp.*, 250 AD2d 747, *supra*). As discussed hereinabove, the Lease provided that the Jacques defendants were to indemnify and save harmless the Landlord for and against any and all liability arising from injury to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, with specific reference made to the sidewalks adjacent to the premises.

Here, the Court finds that 1620 has made a *prima facie* showing of entitlement to judgment as a matter of law on its claim for contractual indemnification (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]), and the Jacques defendants have failed to rebut 1620's *prima facie* showing with evidence in admissible form. In opposition, the Jacques defendants have not submitted an affidavit of someone with personal knowledge, but rather have merely submitted an affirmation of counsel. Counsel's affirmation, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]).

As 1620 established its right to indemnification based upon an express contract, that branch of 1620's application for summary judgment on its cross-claim for the defense of contractual indemnification from defendants MARIE C. JACQUES d/b/a JACQUES MEDICAL SERVICES is **GRANTED** to the extent that conditional summary judgment is granted (*see Eagle v Chelsea Piers, L.P.*, 46 AD3d 367 [2007]; *Cunningham v Alexander's King Plaza, LLC*, 22 AD3d 703 [2005]; *Ingargiola v Waheguru Mgmt.*, 5 AD3d 732, *supra*; *Martinez v Fiore*, 90 AD2d 483 [1982]).

With respect to 1620's claim for common law or implied indemnification, the general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong (*Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]; 23 NY Jur Contribution, Indemnity, and Subrogation § 2). One whose liability is premised upon active negligence cannot obtain common law or implied indemnity (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]). "The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee" (*Kagan v Jacobs*, 260 AD2d 442 [1999]; *see Barry v Hildreth*, 9 AD3d 341 [2004]; *Tulley v Straus*, 265 AD2d 399 [1999]).

To establish a claim for common law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident. Where a proposed indemnitee's liability is purely vicarious, conditional summary judgment for common law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor was negligent (*Martinez v Mullarkey*, 41 AD3d 666 [2007]; *Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2006]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2005]). On this record, the Court cannot find that the Jacques defendants were negligent as a matter of law. Accordingly, that branch of 1620's motion for summary judgment on its cross-claim for the defense of common law indemnification is **DENIED** as premature.

Finally, 1620 seeks a default judgment against Hijo on its cross-claim for common law indemnification. 1620 alleges that it served Hijo with its answer containing a cross-claim on August 31, 2007, pursuant to BCL 306, and that Hijo failed to appear or respond to the cross-claim, and the time to do so has since expired. As such, that branch of 1620's motion for a default judgment against Hijo is **GRANTED**, without opposition

With respect to plaintiff's cross-motion to preclude the testimony of 1620, the Jacques defendants, and Hijo for their alleged failure to comply with the Court's prior Order of discovery, and allowing plaintiff to place this matter on the trial calendar, plaintiff's notice of cross-motion seeks the aforementioned relief, yet the affirmation submitted in support thereof seeks a default judgment against Hijo. As such, the Court finds this cross-motion procedurally defective. Therefore, this cross-motion is **DENIED**.

Plaintiff subsequently filed a motion to preclude the testimony of the Jacques defendants and Hijo for their alleged failure to comply with the Court's prior Order of discovery, and allowing plaintiff to place this matter on the trial calendar. Plaintiff alleges that while plaintiff's deposition has been completed, these defendants have failed to appear for their respective depositions. In opposition, the Jacques defendants indicate that Marie Jacques was deposed on October 27, 2008. Moreover, by Stipulation dated November 6, 2008, and correspondence from plaintiff's counsel dated November 19, 2008, plaintiff withdrew her application with respect to the Jacques defendants.

Hijo has not appeared in this action, and as Hijo is a corporation, it must appear by attorney (see CPLR 321 [a]). Therefore, the appropriate application at this juncture is one for a default judgment against Hijo. As discussed, plaintiff filed a cross-motion in an attempt to obtain a default judgement against Hijo, but the Court finds that application procedurally defective.

Accordingly, this motion to preclude the testimony of Hijo is **DENIED** with leave to submit an application for a default judgment against Hijo upon proper papers.

The foregoing constitutes the decision and Order of the Court.

Dated: February 13, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court