[* 1]

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

PRESENT: WALTER B. TOLUB PART 15

Index Number : 117301/2005

**VOYD, BOBBY**

VS.

**8TH AVENUE DISCOUNT LIQUORS**

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

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

FILED

JUN 11 2009

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 6/1/09

WALTER B. TOLUB 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 15

----------X

BOBBY VOYD and LOUVENIA VOYD,

Plaintiffs,

Index No.: 117301/05
DECISION/ORDER

-against-

8TH AVENUE DISCOUNT LIQUORS, INC., and
301 WEST 151 REALTY CORP.,

Defendants.

----------X

8TH AVENUE DISCOUNT LIQUORS, INC.,

Third-Party Plaintiff,

Index No.: 591181/06

-against-

301 WEST 151 REALTY CORP., d/b/a 301 REALTY CORP. and 301 REALTY CORP.,

Third-Party Defendants.

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**HON. WALTER B. TOLUB, J.S.C.:**

In this personal injury action, defendant 8th Avenue Discount Liquors moves for summary judgment to dismiss the complaint and the cross claims asserted against it, while defendant, 301 West 151 Realty cross-moves for summary judgment to dismiss both the complaint and the third-party complaint (motion sequence number 007). For the following reasons, the motion and cross motion are denied.

BACKGROUND

The Parties

On August 28, 2004, plaintiff Bobby Voyd (Voyd) injured his left foot and ankle when he tripped and fell in front of a building located at 2835 8th Avenue in the County, City and State of New York (the building). *See* Notice of Motion, Exhibit A (complaint), ¶¶ 1, 4, 13. The

building is owned by defendant/third-party defendant 301 West 151 Realty Corp., d/b/a 301 Realty Corp (301). *Id.*, ¶¶ 3-4. Defendant/third-party plaintiff 8th Avenue Discount Liquors, Inc. (8th Ave.) occupies the first floor of the building pursuant to a commercial lease (the lease), and is a New York State-licensed liquor store. *Id.*, ¶ 6; Exhibit H.

The lease, which was executed on April 1, 2004, provides, in pertinent part, as follows:

> 4. Repairs.
> ... 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 in 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. ...
>
> 13. Access to Premises.
> 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 ... .
>
> RIDER
>
> 61. Indemnity.
> A. Tenant covenants and agrees to indemnify and save Owner harmless from and against any liability, loss, claims, cost, injury, damage and other expense whatsoever, arising from acts by or with respect to any person(s) ... on or about the Demised Premises during the term of this Lease for damages, losses ... including, but not limited to ... any personal injury or loss of life in, upon or about the Demised Premises or on the sidewalks adjoining the Demised Premises resulting directly or indirectly from the use, misuse, occupancy, possession or unoccupancy of the demised premises by Tenant, its agents, servants, employees, invitees, contractors or subcontractors, subtenants or other persons claiming through or under Tenant. ...
>
> B. Tenant will indemnify and save Owner harmless from and against any and all liabilities, obligations, damages, penalties, claims, costs, charges and expenses including reasonable attorney's fees, which may be imposed upon or incurred by or asserted against Owner by reason of any of the following occurring during the

term of this Lease: ...

(ii) any accident, injury or damage to any person or property occurring in the Demised Premises or any part thereof.

*Id.*; Exhibit H, at 1, 13 (pages not numbered). Notably, the lease was executed by 301's president, Rocco Longo (Longo), and by 8th Ave.'s president, Mohamed N. Hamza (Hamza), but named 301 - a corporate entity - as "owner," and Hamza - an individual - as "tenant." *Id.*

At his deposition on June 12, 2007, Voyd stated that he tripped as he was stepping onto the single step in front of the 8th Ave. Discount Liquors doorway. *Id.*; Exhibit E, at 24. He described the step as having "a metal piece" on top of it and "a metal grille," a "grating," or "a plate" at its base. *Id.*, at 24-25. Mr. Voyd specifically stated that he stepped onto the grating with his left foot and was placing his right foot on the step when he "slipped and tripped." *Id.*, at 25. Mr. Voyd stated that he did not recall whether the "slip" with his left foot or the "trip" with his right foot happened first, but he was certain that his left foot twisted under him. *Id.* Mr. Voyd further stated that he had consumed either "two small bottles" or "about three drinks" of Harvey's Bristol Cream at a baby shower for his granddaughter before going to 8th Ave. Discount Liquors, and that he went there with the intention of purchasing a third bottle. *Id.*, at 15-16, 21, 43. Finally, Mr. Voyd stated that "it had rained" on the day of his accident, that it had "just stopped" immediately prior to his accident, and that "there was water there" in the area where he slipped. *Id.*, at 52.

Mr. Voyd was accompanied to 8th Ave. by his friend, Melvin Howell (Howell), who was deposed on June 13, 2008. *See* Notice of Cross Motion, Exhibit E. Mr. Howell testified that it had been "raining during the course of the day," and that "it wasn't raining, but the ground was wet" at the time that he and Mr. Voyd went to 8th Ave. *Id.*, at 17, 40.

8th Ave. was deposed on November 21, 2007 through its president Mr. Hamza. *See* Notice of Motion; Exhibit F. Mr. Hamza identified photographs of his store that show that there is a metal plate resting on the sidewalk in front of it and a protective metal strip on the lip of the stair step in front of the doorway. *Id.*, at 60-61; Exhibit D. Mr. Hamza stated that the metal plate covered a door that led to a stairway into the basement of the building, but that he did not use the stairway, and that he had had the door sealed before he opened his business in 2004. *Id.*, at 26-27, 97. Mr. Hamza also stated that the top part of the step leading into the store's entrance door had a metal "cover," "edge" or "saddle" on it. *Id.*, at 66-68. Mr. Hamza further stated that he himself had applied cement around the metal plate in front of the store because water would drip through it. *Id.*, at 68, 71, 99. Hamza was not questioned about whether or not it was raining at the time Mr. Voyd was injured.

Defendant 301 was deposed on April 15, 2008 through its president Mr. Longo. *Id.*; Exhibit G. Mr. Longo stated that the metal plate in front of the building sat slightly below street level. *Id.*, at 63. Mr. Longo also stated that 301 had never done any repair, maintenance or cleaning work on the metal plate, and that 8th Ave. was "responsible for the sidewalk" in front of the building. *Id.*, at 85-86.

Prior Proceedings

Mr. Voyd initially commenced this action on December 9, 2005 by serving a summons and complaint that set forth one cause of action for negligence (for Voyd), and one for loss of services (for Voyd's wife, co-plaintiff Louvenia Voyd [Louvenia]). *Id.*; Exhibit A. 8th Ave. served its answer on March 16, 2006, and later served a third-party complaint (naming 301 as a third-party defendant) on December 14, 2006. *Id.* That third-party complaint sets forth causes of

action for: (1) contractual indemnification (against "301 West 151 Realty Corp., d/b/a 301 Realty Corp."); (2) contribution and common-law indemnification (against "301 West 151 Realty Corp., d/b/a 301 Realty Corp."); (3) negligence based on breach of contract (against "301 West 151 Realty Corp., d/b/a 301 Realty Corp."); (4) contractual indemnification (against "301 Realty Corp."); (5) contribution and common-law indemnification (against "301 Realty Corp."); and (6) negligence based on breach of contract (against "301 Realty Corp."). 301 initially failed to answer either complaint, and this court entered default judgments against 301 in both of the initial actions on January 12, 2007 and May 18, 2007, respectively. *See* Notice of Cross Motion, Exhibit A. Thereafter, plaintiffs filed another action against "Mohamed N. Hamza d/b/a 8th Avenue Discount Liquors" on August 23, 2007 (Index No. 111697/07), and Hamza filed another third-party action against 301 on June 30, 2008 (Index No. 590598/08). *Id.*; Exhibits B, C. In the interim, 301 moved to vacate the two earlier default judgments and for leave to interpose answers in the original actions (motion sequence number 004), and this court granted that motion in a decision dated September 11, 2007. *Id.*; Thompson Affirmation, ¶ 15. At that time, 301 served an answer with counterclaims against Voyd and cross claims against 8th Ave. *See* Notice of Motion, Exhibit A. 301 also eventually served an answer to 8th Ave.'s second third-party complaint on September 3, 2008. *Id.*; Exhibit D. In June 2009, 8th Ave. moved to consolidate the initial actions with the later ones, and for leave to assert indemnification cross-claims against 301 (motion sequence number 005). The parties stipulated to consolidate the original action and the original third-party action. *Id.*; Thompson Affirmation, ¶ 21. By decision dated August 7, 2008, the court denied 8th Ave.'s motion, and granted 301's cross motion to the extent of dismissing several of the causes of action in 8th Ave.'s initial third-party complaint. *See* Roher

Affirmation in Opposition, Exhibit A. 8th Ave. thereafter moved in September, 2008 for leave to renew and reargue the prior motion (motion sequence number 006). By decision dated October 24, 2008, the court again denied 8th Ave.'s motion. *Id.*; Exhibit B. In both of those decisions, the court noted that 8th Ave. and Mr. Hamza are distinct entities, and that plaintiff's second action, which names "Hamza d/b/a 8th Ave.," is improper in that, while Hamza - in his individual capacity - is a signatory to the lease with 301, 8th Ave. - Mr. Hamza's corporation - is not. The status of the secondary actions (i.e., Voyd's against "Hamza d/b/a," and 8th Ave.'s second third-party complaint against 301) is now uncertain. 8th Ave. now moves for summary judgment to dismiss Voyd's complaint and the 301's cross claims, while 301 cross moves for summary judgment to dismiss both Voyd's complaint and 8th Ave.'s third-party complaint (motion sequence number 007).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because it deprives the litigant of his or her day in court, summary judgment it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of such triable issues. *See e.g. Andre v Pomeroy*, 35 NY2d 361

(1974); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated'." *Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50, 51 (1st Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Here, both the motion and the cross-motion must be and are denied.

8th Ave.'s Motion

As previously mentioned, Voyd's complaint sets forth one cause of action for negligence, and a dependent claim for loss of services. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218 (1st Dept 2005). In its motion, 8th Ave. first argues that Mr. Voyd is unable to prove the duty of care element of his claim because of the "active storm doctrine." *See* Notice of Motion, Rohrer Affirmation, ¶¶ 29-33. With respect to this doctrine, the Appellate Division, First Department, held that:

> it is settled that the duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended.

*Pippo v City of New York*, 43 AD3d 303, 304 (1st Dept 2007), citing *Thompson v Menands Holding, LLC*, 32 AD3d 622, 623-624 (3d Dept 2006); *Martin v Wagner*, 30 AD3d 733, 734 (3d Dept 2006). 8th Ave. argues that Mr. Voyd's deposition testimony - that it had just stopped raining at the time he was injured - shifts the burden of proof to him to establish a triable issue of fact as to the applicability of the "active storm doctrine," and that he has failed to do so. *See* Notice of Motion, Rohrer Affirmation, ¶ 30. Mr. Voyd responds that the foregoing doctrine is

inapplicable because his and Mr. Howell's deposition testimony confirmed that "there was no storm-in-progress here." *See* Shapiro Affirmation in Opposition, ¶ 31. The court notes that neither defendant has presented any countervailing deposition testimony or meteorological evidence to establish that it was raining at the time Mr. Voyd was injured. Thus, the court finds that Mr. Voyd's argument more persuasive.

The Appellate Division, First Department, held that, "[o]nce there is a period of inactivity after cessation of [a] storm, it becomes a question of fact as to whether the [landowner's] delay in commencing the cleanup was reasonable." *Powell v MLG Hillside Associates*, 290 AD2d 345, 346 (1st Dept 2002); *see also Mosley v General Chauncey M. Hooper Towers Hous. Dev. Fund Co.*, 48 AD3d 379, 380 (1st Dept 2008) (summary judgment to dismiss complaint held improper where there was a conflict between plaintiff's deposition testimony and defendant's meteorological evidence). Here, both Mr. Voyd and Mr. Howell testified that the rain had stopped at some point before they went to 8th Ave., and defendants have presented no countervailing evidence. Thus, there exists here a question of fact as to whether the delay (if any) in remedying the wet condition in front of 8th Ave. was reasonable. This question of fact precludes a grant of summary judgment to defendants at this juncture. *Powell v MLG Hillside Associates*, 290 AD2d at 346. In their reply papers, both defendants nonetheless argue that Mr. Voyd's and Mr. Howell's testimony that it had "just stopped raining" immediately prior to Mr. Voyd's accident, should give rise to an inference that there was no opportunity to remedy the wet condition. *See* Roher Reply Affirmation, ¶ 3; Thompson Affirmation in Further Support of Cross Motion, ¶¶ 43-44. However, this argument rests solely on defendants' characterization of the testimony. In any event, it is axiomatic that issues of witness credibility are not appropriately

resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Industries, Inc.*, 295 AD2d 218 (1st Dept 2002). Accordingly, the court rejects 8th Ave.'s "active storm doctrine" argument as a basis for 8th Ave.'s request for summary judgment.

8th Ave. next argues that the complaint should be dismissed because Mr. Voyd's deposition testimony discloses that he did not know what caused his fall. *See* Notice of Motion, Roher Affirmation, ¶¶ 36-39. 8th Ave. specifically cites the decision by the Appellate Division, First Department, in *Telfeyan v City of New York* (40 AD3d 372, 373 [1st Dept 2007]) that reversed the trial court's denial of summary judgment on the ground that plaintiff's affidavit describing the circumstances of her injury was insufficient to create a triable issue of fact in light of her previous deposition testimony that she "did not know" what had caused her accident. 8th Ave. argues that here, similarly, "plaintiff's deposition testimony evinces that he does not know what caused his fall." *See* Notice of Motion, Roher Affirmation, ¶ 36. Mr. Voyd denies this, and recounts his testimony that his right foot tripped on the metal door saddle while his left foot slipped on the metal plate, although he was uncertain which foot gave way first. *See* Shapiro Affirmation in Opposition, ¶ 26. Mr. Voyd argues that 8th Ave. might make its argument at trial after the submission of evidence, but that 8th Ave.'s argument is not the basis for a grant of summary judgment at this juncture. After reviewing the applicable case law, the court agrees.

In *Telfeyan v City of New York*, the Appellate Division, First Department, attached great weight to the trial court's finding that "[w]hen specifically asked what caused her to fall, plaintiff testified "I really don't know what happened, honestly." 40 AD3d at 373. The Appellate Division held that an affidavit that plaintiff's later submitted, which purported to recount the cause of her injury, "creates only a feigned issue of fact, and is insufficient to defeat a properly

supported motion for summary judgment." *Id.*, quoting *Harty v Lenci*, 294 AD2d 296, 298 (1st Dept 2002). In each of the cases that 8th Ave. cites to support its argument here, the plaintiff also testified that he or she was unable to recall the cause of his or her accident. *See e.g. Rudner v New York Presbyterian Hosp.*, 42 AD3d 357 (1st Dept 2007) (plaintiff's deposition testimony was that she did not know what caused her to fall as she passed through the doorway, and that she just assumed it was something that caught the front of her shoe); *Reed v Piran Realty Corp.*, 30 AD3d 319 (1st Dept 2006) (due to a brain injury sustained in a fall, plaintiff did not remember the surrounding events, and was unable to identify the cause of the fall); *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 (1st Dept 2006) (on three separate occasions, plaintiff testified that she did not know, and did not find out, what caused her to fall as she was sidestepping a tractor); *Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189 (1st Dept 2004) (plaintiff's decedent testified that he did not remember or know why he fell on a staircase, or if he had fallen on the staircase itself; he only knew that he was found at the bottom of the staircase). Here, however, Mr. Voyd never testified that he did not know why or on what he fell. Instead, he stated at his deposition that he "slipped and tripped" on wet metal plating in front of 8th Ave.'s store. He further stated that his left foot was on the metal floor plate and his right foot on the stair step at the time of his accident. His only uncertainty seemed to be which of his feet left the ground first when he fell. This certainly does not amount to an admission of a lack of knowledge as to the cause of Mr. Voyd's accident. Accordingly, the court finds that Mr. Voyd has adequately proven the causation element of his negligence claim for the purposes of this motion, and, therefore, rejects 8th Ave.'s second argument for dismissal.

Finally, 8th Ave. argues that, pursuant to the lease, it owes Mr. Voyd no duty of care

because the owner (i.e., 301) and not the tenant (i.e., 8th Ave.) is responsible for structural repairs to the public portions of the building. *See* Notice of Motion, Roher Affirmation, ¶ 35. The court rejects this argument for the reasons discussed in the following portion of this decision. Accordingly, the court finds that 8th Ave. has failed to meet its burden of proving that there are no triable issues of fact with respect to the duty of care and causation elements of Mr. Voyd's prima facie case, and 8th Ave.'s motion is denied.

301's Cross Motion

301 cross moves for summary judgment dismissing both Mr. Voyd's complaint and 8th Ave.'s third-party complaint. The majority of the first portion of 301's motion, which seeks to dismiss Mr. Voyd's complaint, merely adopts the arguments that 8th Ave. had raised in its motion. The court rejects those arguments for the same reasons discussed above. However, 301 also raises the additional argument that it cannot be liable to Mr. Voyd because it is an out-of-possession landlord. *See* Notice of Cross Motion, Thompson Affirmation, ¶¶ 55-62. Mr. Voyd disputes this. *See* Shapiro Affirmation in Opposition, ¶¶ 10-25.

In *Vasquez v The Rector* (40 AD3d 265, 266 [1st Dept 2007]), the Appellate Division, First Department reiterated that:

> A landlord is generally not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless 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.

Here, since there is no contention that 301 was under a contractual obligation to make repairs in the building, the second prong of the foregoing test is at issue. Here, paragraph 13 of the lease

plainly affords 301 the right to reenter 8th Ave.'s premises in order to inspect and repair in that it specifically provides that the:

> Owner ... 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 ...

Thus, the remaining question is whether there is sufficient evidence that 301's purported liability to Mr. Voyd "is based on a significant structural or design defect that is contrary to a specific statutory safety provision." After careful consideration, the court concludes that it is.

301 initially argues, without offering any evidence, that "no triable issue of fact exists regarding whether the allegedly defective wet metal grate involved a significant design defect contrary to a specific statutory safety provision." *See* Notice of Cross Motion, Thompson Affirmation, ¶ 59. In response, Mr. Voyd presents an affidavit from engineer Frederick Levine (Levine), who opines that the placement of the metal grate over the sidewalk in front of the building constituted both a structural defect and a violation of New York City Administrative Code §§ 19-152 (a) (4) and (a) (6), and New York City Building Code §§ 27-127, 27-128, 27-370, 27-371 (h) and 27-375. *See* Levine Affidavit in Opposition, ¶¶ 4-6. In reply, 301 does not offer an expert's affidavit to make a factual rebuttal, but instead cites *Torres v West Street Realty Co.* (21 AD3d 718 [1st Dept 2005]) for the purely legal argument that "[t]he fact that a metal grate is merely 'wet' does not affect the structural integrity of the building." *See* Thompson Affirmation in Further Support, ¶ 25. However, *Torres v West Street Realty Co.* does not stand for this proposition. Instead, the Appellate Division, First Department, there found dispositive the plaintiff's failure to "state that the absence of a nonslip border and drainage system violated

any statute or significantly affected the structural integrity of the loading docks [where plaintiff was injured]," and that "[n]ot a single Building Code violation [was] cited." 21 AD3d at 721. Here, by contrast, Levine specifically states that:

> ... the condition of the metal vault cover constituted a substantial hardware defect in violation of Administrative Code § 19-152 in that, inter alia, the hardware or other appurtenance was not flush within ½ inch of the sidewalk surface, that the metal cellar vault cover deflected greater than one inch when walked on, is not skid resistant and [was] otherwise in a dangerous defective condition (each of which conditions is defined as a substantial "hardware defect" under Administrative Code § 19-152 (6)).

*See* Levine Affidavit in Opposition, ¶ 6. Further, New York City Administrative Code § 19-152 (6) does indeed provide that:

> a. ... The [C]ommissioner [of Transportation] shall direct the owner to install, reinstall, construct, reconstruct, repave or repair only those sidewalk flags which contain a substantial defect. For the purposes of this subdivision, a substantial defect shall include any of the following: ...
>
> 6. hardware defects which shall mean (I) hardware or other appurtenances not flush within ½" of the sidewalk surface or (ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition; ...

Finally, in *Gonzalez v Iocovello* (93 NY2d 539, 552 [1999]), the Court of Appeals recognized that "Administrative Code § 19-152 ... provides that the duty and obligation for sidewalk repair falls on property owners ... ." Thus, in the absence of any countervailing evidence or argument from 301, the court concludes from the foregoing that Mr. Voyd has presented prima facie proof to satisfy the second prong of the constructive notice test set forth in *Vasquez v The Rector*, supra. Accordingly, the court rejects 301's argument,[1] and also finds that the portion of 301's

[1]The court here notes that 301 raised a number of arguments regarding the "special use doctrine" in its' reply papers. However, the court need not reach those arguments because Mr. Voyd does not appear to have ever asserted the applicability of the special use doctrine.

cross motion that seeks to have Mr. Voyd's complaint dismissed should be denied.

With respect to 8th Ave.'s third-party complaint, 301 first argues that the lease requires that Mr. Hamza indemnify 301 for any liability that 301 may be found to have toward Mr. Voyd. *See* Notice of Cross Motion, Thompson Affirmation, ¶¶ 63-67. 8th Ave. replies that "[t]he adjudication of liability ... against Mr. Hamza [is] based upon his status as signatory of the subject lease, [and] must await resolution of plaintiff's second lawsuit." *See* Roher Affirmation in Opposition, ¶ 11. The court agrees. Mr. Hamza - in his individual capacity - is not a party to this action, even though he is a signatory to the lease. Although CPLR 3212 (b) certainly empowers the court to search the record and award summary judgment to any party, including a non-moving party, this court believes that it would be improvident to exercise such discretion here, since 301 will have a full and fair opportunity to adjudicate its rights against Mr. Hamza in the second action that Mr. Voyd commenced against him. Accordingly, the court rejects 301's argument and finds that the branch of 301's motion that seeks summary judgment against Mr. Hamza is denied.

Finally, 301 argues that 8th Ave.'s second and fifth third-party causes of action, which assert claims for contribution and indemnification, should be dismissed because there is no contractual relationship between 301 and 8th Ave. *See* Notice of Cross Motion, Thompson Affirmation, ¶¶ 68-71. Although it does not consent to such dismissal, 8th Ave. does concede that it "is not a signatory to the lease," and argues that "since the sole lease signatory is not a party to the current action, no cross claims for indemnity can be maintained" by 301 against 8th

Ave. herein.[2] *See* Roher Affirmation in Opposition, ¶ 11. In its reply papers, 301 repeats its original argument, citing to the court's earlier decisions of August 7 and October 24, 2008, and arguing that "any claim against 301 ... by [8th Ave.] must fail since there is no contract" between them. *See* Thompson Affirmation in Further Support, ¶ 58. The court finds that 301's argument lacks merit. In its' prior two decisions, the court first dismissed 8th Ave.'s first, third, fourth and sixth third-party causes of action, and later denied 8th Ave.'s application to reargue the grounds for said dismissal. At this juncture, the court notes that the dismissed causes of action were all predicated upon a non-existing contractual relationship between 301 and 8th Ave., whereas the two remaining causes of action now at issue are tort based. As such, 301's argument that said causes of action should fail because it has no contractual relationship with 8th Ave. is unavailing, and affords no basis for the relief requested in this motion. Accordingly, the court rejects 301's argument and finds that the branch of 301's motion that seeks summary judgment dismissing the balance of 8th Ave.'s third-party complaint is denied.

Accordingly, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant/third-party plaintiff 8th Avenue Discount Liquors, Inc. is, in all respects, denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants/third-party defendants 301 West 151 Realty Corp., d/b/a 301 Realty Corp. and 301 Realty Corp. is, in all respects, denied; and it is further

ORDERED that the balance of this action shall continue.

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[2] 8th Ave. evidently mistakenly believes that 301's cross motion seeks summary judgment on 301's cross claims against 8th Ave. However, 301's cross motion makes no such request.

This constitutes the decision and Order of the Court.

Counsel for the parties are directed to appear for a pre-trial conference on August 14, 2009 at 11:00 AM in room 335 at 60 Centre Street.

Dated: 6/11/09

ENTER:

Hon. Walter B. Tolub, J.S.C.