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

PRESENT: MARTIN SHULMAN J.S.C. PART 1
Justice

Index Number : 106388/2007
ZHAO, ZHI YAN
VS.
ALPHA HOLDING CORP.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 106388/07
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-X Notice of Cross-Motion +	1, 2
Answering Affidavits — Exhibits A	3
~~Replying~~ Answering Affidavits - Exhs. A-E	4
Replying Affidavits - Exhs. A-B	5

Cross-Motion: ☒ Yes ☐ No

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

FILED
OCT 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept. 28, 2010

MARTIN SHULMAN J.S.C.

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

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 1

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ZHI YAN ZHAO,

Plaintiff,

Index No.: 106388/07
DECISION/ORDER

-against-

ALPHA HOLDING CORP., SASSOON BEAUTY SALON, INC. and SWEET HOME FRANCHISE CORP.,

Defendants.

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ALPHA HOLDING CORP.,

Third-Party Plaintiff,

Index No.: 590148/10

-against-

SWEET HOME FRANCHISE CORP. d/b/a TACO BELL,

Third-Party Defendant.

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HON. MARTIN SHULMAN, J.S.C.:

In this personal injury/negligence action, the defendant/third-party plaintiff Alpha Holding Corp. ("Alpha") moves for: summary judgment dismissing the complaint and any cross-claims; 2) summary judgment on its cross claims against co-defendant Sassoon Beauty Salon, Inc. ("Sassoon"); and 3) summary judgment and/or a default judgment on its third party complaint against co-defendant/third-party defendant Sweet Home Franchise Corp. d/b/a Taco Bell ("Sweet Home").[1] Plaintiff and Sassoon oppose

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[1] As issue has not been joined, summary judgment is inappropriate and the court's analysis will focus on Alpha's entitlement to a default judgment pursuant to CPLR §3215 on the third party complaint and its cross-claims against Sweet Home. By prior short form order dated March 26, 2009, this court granted plaintiff's motion for a default judgment against Sweet Home as to liability, with the amount of damages to be determined at trial. *See* Notice of Motion at Exhibit I.

the motion and Sassoon cross-moves for summary judgment dismissing the complaint. For the following reasons, both motions are granted in part and denied in part.

BACKGROUND

On February 6, 2007 at approximately 9:00 a.m., plaintiff Zhi Yan Zhao ("Zhao") injured her right ankle when she slipped and fell on ice that had collected on the sidewalk in front of a building located at 136-15 Roosevelt Avenue in the County of Queens, City and State of New York (the "building"). *See* Notice of Motion, O'Connor Affirmation, ¶ 26. Alpha is the building's owner. *Id.*, ¶ 36. Sassoon is the tenant of the building's second-floor commercial unit. *Id.*, ¶ 45. Sweet Home is the tenant of the building's first-floor commercial unit. *Id.*, ¶ 36.

In December of 2006, Alpha's owner, Thomas Suh ("Suh") and Sassoon's owner, Yuan Di Liu ("Liu"), executed a commercial lease for Sassoon to occupy the building's second floor (the "Sassoon lease"). *Id.*, ¶ 23; Exhibit V. The relevant portions of the Sassoon lease provide as follows:

> 46. Insurance
>
> Tenant, at its sole cost and expense, but for the mutual benefit of Owner and Tenant, shall maintain personal injury and property damage liability insurance against claims for bodily injury, death or property damage, occurring ... in or about the adjoining streets, easement areas, property and passageways, parking areas, such insurance to afford minimum protection, during the term of this lease, of not less than $1 million in respect to bodily injury or death to any one person and $1 million in respect of any one occurrence and of not less than $250,000.00 for property damage in respect to any one occurrence. ...
>
> All policies of insurance required under this Section of this Article shall name Owner and Tenant as the assureds, as their respective interests may appear...
>
> ***
>
> 48. Repairs and Maintenance

> Tenant, at its own cost and expense, shall take good care of the demised premises, make all non-structural repairs to the interior of the demised premises, ordinary and extraordinary, foreseen and unforeseen, and shall maintain and keep the said demised premises in first-class order, repair and condition. The Tenant shall also keep the sidewalks in front of the demised premises free and clear from rubbish, and shall not encumber or obstruct the same or allow the same to be encumbered or obstructed in any manner. The Tenant shall indemnify and hold the Owner harmless from any and all claims and demands, upon or arising out of any accident, injury or damage to any person ... which shall or may happen ... upon the sidewalks about said premises, caused by Tenant ...

Id., Exhibit V.

Alpha claims that Sassoon breached paragraph 46 by failing to obtain the specified insurance. *Id.*; O'Connor Affirmation, ¶¶ 58-63. However, Sassoon has provided a copy of a $1 million property and business liability policy that it obtained from Harleysville Insurance Company of New York ("Harleysville") that was in effect for the period January 19, 2007 through January 19, 2008 (the "Harleysville policy"). *See* Notice of Cross Motion, Exhibit A. Alpha, nonetheless, claims that Harleysville has thus far failed to provide it with a defense and indemnification in this action. *See* O'Connor Reply Affirmation, ¶ 35.

On April 1, 1997, Suh and non-party Zura, Inc. executed a commercial lease for the building's first floor, which was later assigned three times, with Sweet Home eventually becoming the tenant of record on March 23, 2004 (the "Sweet Home lease"). *See* Notice of Motion, O'Connor Affirmation, ¶ 24; Exhibit W. The provisions of the Sweet Home lease are identical to those of the Sassoon lease, with the exception that the second sentence of paragraph 48 of the Sweet Home lease reads as follows:

> The Tenant shall also keep the sidewalks in front of the demised premises free and clear from rubbish, *snow and ice* and shall not encumber or

> obstruct the same or allow the same to be encumbered or obstructed in any manner [italics added].

Id., Exhibit W. Sassoon notes that the words "snow and ice" are crossed out in its lease, but were left in Sweet Home's lease. *See* Notice of Cross Motion, Grimes Affirmation, ¶ 4.

At her deposition on September 10, 2009, Zhao stated that, on the day of her accident, she was walking past the building on her way to an English class when first her left foot slipped, followed by her right foot, after which she fell. *See* Notice of Motion, Exhibit N, at 25-28. Zhao also stated that she only noticed the ice that she slipped on after she had fallen to the ground. *Id.* at 27-28. Zhao further stated that, while she was on the ground, she observed that water had collected near the door that led to the building's upper-floor stairway, and also observed a yellow-haired Asian man (whom she assumed to be an employee of Sassoon) sweeping the water away from the doorway with a broom. *Id.* at 38-40.

At his deposition on September 17, 2009, Suh stated that he had informed Sweet Home's owner, Sulin Wu ("Wu"), that Sweet Home was responsible for clearing snow and ice from the front of the building. *Id.*; Exhibit P, at 21-23. Suh also stated that he had never received any complaints or notices of violation regarding the condition of the sidewalk in front of the building, or about water leaks emanating therefrom. *Id.* at 36-39, 42-43. Suh further stated that he usually visited the building on Fridays, but that he could not remember either the last time that he had gone there prior to Zhao's accident or having ever observed any ice or water collected in front of it. *Id.* at 34, 36-37, 46. Suh finally stated that he had never hired anyone to perform snow or

ice removal at the building, but that he had never observed any employees of Sweet Home perform these tasks either. *Id.* at 21-24.

At his deposition on September 25, 2009, Liu stated that he had observed Zhao's accident, the ice on which she had fallen and the water that had collected near the doorway of the entrance leading to the building's second floor. *Id.*; Exhibit R, at 23-24, 29, 31. Liu opined that the water had collected as a result of a drip from the building's roof, although he denied having ever previously seen either such a drip or such a collection of water. *Id.* at 31-34. Liu also stated that, on the day of Zhao's accident, he had swept near the entrance of the building, but denied having swept the sidewalk in front of the building that day. *Id.* at 21-23.

At her deposition on February 17, 2010, Zhao's friend, Judy Fan Lee ("Lee"), stated that, on February 6, 2007, she received a call from her husband (who had received a call from Zhao's husband) telling her of Zhao's accident and asking her to go to the building and help. *Id.*; Exhibit S, at 13-20. Lee further stated that, when she arrived she herself slipped on the ice in front of the building, and then proceeded upstairs to Sassoon's salon where she found Zhao with Liu, called 911 and accompanied Zhao to the hospital for treatment. *Id.* at 24-26.

Alpha has presented a copy of the February 6, 2007 weather report for Queens County, which indicates that the average temperature during the eight-hour period preceding Zhao's accident was between 12 degrees and 17 degrees Fahrenheit. *Id.*; Exhibit X.

Zhao initially commenced this action on May 11, 2007 by filing a complaint against Alpha and Sassoon. *Id.*; Exhibit A. Later, on May 5, 2008, Zhao filed an amended complaint that added Sweet Home as a defendant. The amended complaint sets forth a single cause of action for negligence. *Id.*; Exhibit G. Both Alpha and Sassoon filed timely answers to the amended complaint; however, Sweet Home did not. *Id.*; Exhibit H. Alpha's amended answer asserted cross claims for: 1) breach of lease (against Sassoon); 2) contractual indemnity (against Sassoon); 3) breach of lease (against Sweet Home); and 4) contractual indemnity (against Sweet Home). *Id.* On March 26, 2009, the court granted Zhao's motion for the entry of a default judgment against Sweet Home (motion sequence number 004). *Id.*; Exhibit I.

On February 22, 2010, Alpha filed a third-party complaint against Sweet Home that sets forth a single cause of action for contribution/indemnification. *Id.*; Exhibit L. Sweet Home also failed to file an answer to the third-party complaint. Alpha now moves for summary judgment dismissing the amended complaint and Sassoon's cross claims in the primary action, and for the entry of a default judgment on its third-party complaint against Sweet Home. Sassoon cross-moves for summary judgment dismissing the amended complaint.

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 Transit Auth.*, 304 AD2d 340 (1st Dept 2003). Here, the court finds that neither Alpha nor Sassoon is entitled to summary judgment dismissing the complaint, but that Sassoon is entitled to summary judgment dismissing Alpha's cross claim for breach of contract based upon failure to procure insurance. Further, Alpha is entitled to judgment on default on all of its claims against Sweet Home.

Alpha's Motion

Alpha first argues that there is no evidence that it had either actual or constructive notice of the condition that caused Zhao's injury (i.e., ice), or that Alpha caused that condition. *See* Notice of Motion, O'Connor Affirmation, ¶¶ 51-57. Alpha contends that the ice Zhao slipped on "was created immediately prior to" her accident, and that the deposition testimony "suggests that ... water may either have dripped from the [building's] roof surface ... or was due to water being swept across the sidewalk by [Liu]." *Id.*, ¶ 56. Alpha then specifically argues that there are no triable issues regarding actual or constructive notice because: "[u]nder either ... scenario, the thin layer of ice, which was rapidly formed due to temperatures well below freezing, did not exist for a sufficient length of time for [Alpha] to discover ... and become aware of it," and because "no complaints were made about the [ice] to [Alpha] at any time before" Zhao's accident. *Id.*

Zhao responds that Alpha's notice argument is inapposite because Alpha was under a statutory duty to remove snow and ice from the front of the building and argues that Alpha has failed to meet its burden of demonstrating that it discharged that duty. *See* Maceira Affirmation in Opposition, ¶¶ 10-13, 15-18. Alpha's reply papers merely restate its original argument. *See* O'Connor Reply Affirmation, ¶¶ 4-28. After reviewing the governing law, the court agrees with Zhao.

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). Alpha cites a number of Appellate Division, Second Department, cases to support its argument that it did not owe Zhao any duty of care because of lack of notice. However, Zhao correctly notes that section 7-210 of the Administrative Code of the City of New York ("Administrative Code") imposes a non-delegable duty on owners of commercial real property to maintain the sidewalks in front of said property in "a reasonably safe condition." *See, e.g., Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447 (1st Dept 2008). Subparagraph (b) of the statute specifically provides as follows:

> Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to ... *the negligent failure to remove snow, ice, dirt or other material from the sidewalk* [italics added].

The Second Department has noted that the statute's effective date of September 14, 2003 operates to impose this duty of care in the context of accidents that occur

after that date. *See Martinez v City of New York*, 20 AD3d 513 (2d Dept 2005). Here, because Zhou's accident occurred on February 6, 2007, Administrative Code § 7-210 certainly imposed the duty of care regarding "reasonably safe" sidewalk maintenance upon Alpha.

Following the enactment of this statute, the Appellate Division, First Department has held that "one who attempts to remove snow from a sidewalk is not subject to liability simply because he or she failed to remove all of the snow. However, one may be held liable if his or her snow removal efforts made the sidewalk more dangerous, i.e., increased the hazard posed by the snow." *Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 (1st Dept 2007), citing *Sanders v City of New York*, 17 AD3d 169, 169 (1st Dept 2005), citing *Spicehandler v City of New York*, 303 NY 946 (1952). The First Department has upheld grants of summary judgment dismissing complaints where the defendant/property owner was able to establish that it undertook at least some snow/ice removal efforts, and did not "exacerbate" the hazardous condition on the sidewalk thereby. *Id.*; *see also Gleeson v New York City Transit Auth.*, 74 AD3d 616 (1st Dept 2010); *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 (1st Dept 2008).

These precedents appear to indicate that, following the enactment of Administrative Code § 7-210, a property owner now bears the burden of establishing at least partial compliance with the sidewalk law and may no longer merely disclaim notice of a hazardous condition thereon and place the burden of proving non-compliance on the plaintiff. Thus, the court rejects Alpha's "actual or constructive notice" argument.

Zhou further notes that Suh testified that Alpha did not hire anyone to remove snow and ice from the front of the building, and that Sweet Home was responsible for such snow and ice removal. *See* Maceira Affirmation in Opposition, ¶ 16; Notice of Motion, Exhibit P, at 21-24. This testimony indicates that Alpha undertook *no* efforts to discharge its snow/ice removal duty pursuant to Administrative Code § 7-210, and instead improperly attempted to delegate that duty in full to Sweet Home. Thus, the court finds that Alpha has failed to establish entitlement to summary judgment because it has not demonstrated compliance with Administrative Code § 7-210 or that its actions did not exacerbate the sidewalk's icy condition. Accordingly, the branch of Alpha's motion that seeks summary judgment dismissing Zhao's negligence claim against it is denied.

Alpha next argues that it is entitled to summary judgment on its cross claims for breach of lease against both Sassoon and Sweet Home on the ground that they both failed to obtain required insurance. *See* Notice of Motion, O'Connor Affirmation, ¶¶ 58-63. Sassoon responds that it did, in fact, obtain the insurance specified in paragraph 46 of the Sassoon lease, and presents a copy of the Harleysville policy, which was in effect for the period January 19, 2007 through January 19, 2008. *See* Notice of Cross Motion, Grimes Affirmation, ¶ 7; Exhibit A.

Alpha replies that "despite a tender letter served on November 7, 2008, a defense to this action and a promise to provide indemnification ... has not been provided." *See* O'Connor Reply Affirmation, ¶ 35. Clearly, this reply argument does not

demonstrate any breach by Sassoon, although it may indicate a breach by Harleysville. If that is the case, then Alpha must seek separate declaratory relief against Harleysville.

With respect to Sassoon, the court notes that "'the burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it.'" *Eden Temp. Servs., Inc. v House of Excellence Inc.*, 270 AD2d 66, 67 (1st Dept 2000), quoting *Paz v Singer Co.*, 151 AD2d 234, 235 (1st Dept 1989). Here, however, Alpha has failed to demonstrate that Sassoon breached paragraph 46 of the Sassoon lease. Therefore, the court finds that the branch of Alpha's motion that seeks summary judgment on its cross claim for breach of lease against Sassoon should be denied.

With respect to Sweet Home, however, the court notes that paragraph 46 of the Sweet Home lease plainly required Sweet Home to obtain a $1 million personal injury and property damage liability insurance policy naming Alpha as an additional insured. *See* Notice of Motion, Exhibit W. Alpha claims that Sweet Home has failed to do so. *Id.*; O'Connor Affirmation, ¶ 61. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach and resulting damages. *See, e.g., Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Alpha has presented sufficient evidence to establish all of these elements and, as Sweet Home has failed to appear in this action, the third party complaint's allegations are deemed admitted. See *Woodson v Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003)(defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow therefrom). Therefore, the

court finds Alpha is entitled to judgment on default on its cross claim for breach of lease against Sweet Home and grants this branch of Alpha's motion.

Alpha next argues that it is also entitled to judgment on its cross claim against Sweet Home for contractual indemnification.[2] *Id.*; ¶¶ 64-70. The court notes that paragraph 48 of the Sweet Home lease plainly sets forth a contractual indemnity provision. *Id.*; Exhibit W. Therefore, for the same reasons above, the court grants the branch of Alpha's motion that seeks a default judgment on its cross claim for contractual indemnification against Sweet Home.

Finally, Alpha argues that it is entitled to the entry of a default judgment against Sweet Home on the single cause of action for contribution/indemnification set forth in its third-party complaint. *Id.*; O'Connor Affirmation, ¶ 71. For the same reasons discussed above, the court grants this branch of Alpha's motion on default. Determination of the amount of damages shall await trial.

Sassoon's Cross Motion

In its cross motion, Sassoon also argues that Zhao will be unable to establish the "duty" element of her negligence claim against it as a result of the plain language of paragraph 48 of the Sassoon lease. *See* Notice of Cross Motion, Grimes Affirmation, ¶¶ 4-6. Zhao responds that questions of fact exist as to whether Sassoon created or exacerbated the dangerous condition (i.e., ice) by Liu's actions. *See* Maceira Affirmation in Opposition, ¶ 19. After reviewing the evidence, the court agrees.

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[2] Alpha's motion does not request summary judgment on its cross claim against Sassoon for contractual indemnification.

As previously discussed, "one may be held liable if his or her snow removal efforts made the sidewalk more dangerous, i.e., increased the hazard posed by the snow." *Joseph v Pitkin Carpet, Inc.*, 44 AD3d at 463. Here, although paragraph 48 of the Sassoon lease exempts Sassoon from performing snow and ice removal at the building, Liu testified that, on the day that Zhao was injured, he had observed both ice in front of the building and collected water dripping from the building, and that he had swept near the building's entrance. *See* Notice of Motion, Exhibit R, at 21-24, 31-32. Further, Zhao testified that she had observed Liu sweeping the collected water away from the building's entrance toward the ice that she slipped on. *Id.*; Exhibit N, at 38-40. Although Liu denies having done so, it is clear that this is a factual issue that turns on the credibility of the respective witnesses. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See, e.g., Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218 (1st Dept 2002). Thus, the court finds that Sassoon has failed to demonstrate an absence of triable issues of fact with respect to whether or not it exacerbated the dangerous condition that caused Zhao's injury, and thereby breached a duty of care not to do so. Accordingly, the branch of Sassoon's motion seeking summary judgment dismissing Zhao's negligence claim against it is denied.

Sassoon's cross motion also requests summary judgment dismissing Alpha's cross claim for contractual indemnification against it on the same ground - i.e., that Sassoon owed no duty to Zhao. However, because the court has found that there is an open issue as to whether Sassoon undertook such a duty to Zhao, the issue of what, if

any, indemnity Sassoon owes to Alpha is also open. Therefore, the portion of Sassoon's cross-motion seeking summary judgment dismissing Alpha's cross claim for contractual indemnification is denied.

The balance of Sassoon's cross motion requests summary judgment dismissing Alpha's cross claim against it for breach of lease on the ground that it did, in fact, obtain the insurance specified in the Sassoon lease. *See* Notice of Cross Motion, Grimes Affirmation, ¶ 7. Sassoon has presented a copy of the Harleysville policy, which plainly satisfies the terms set forth in paragraph 46 of the Sassoon lease. *Id.*; Exhibit A. Further, as previously discussed, the court has rejected Alpha's complaint that Harleysville has thus far failed to provide it with a defense and indemnification as immaterial to its breach of contract claim against Sassoon. The court now finds that that claim cannot stand, as a matter of law, because Alpha has failed to demonstrate a triable issue of fact with respect to its allegation that Sassoon breached its lease by failing to obtain insurance. Therefore, the branch of Sassoon's cross-motion seeking summary judgment dismissing Alpha's cross claim against it for breach of lease is granted.

For all of the foregoing reasons, it is hereby

ORDERED that the portions of defendant/third-party plaintiff Alpha Holding Corp.'s motion and defendant Sassoon Beauty Salon, Inc.'s cross-motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the portion of Alpha's motion seeking a default judgment on its third and fourth cross claims against co-defendant/third-party defendant Sweet Home Franchise Corp. d/b/a Taco Bell is granted as to liability; and it is further

ORDERED that the portion of Alpha's motion seeking a default judgment against Sweet Home in the third-party action bearing Index No. 590148/10 is granted as to liability; and it is further

ORDERED that the portion of Alpha's motion seeking summary judgment on its second cross-claim against Sassoon is denied; and it is further

ORDERED that defendant Sassoon Beauty Salon, Inc.'s cross-motion is granted solely to the extent of awarding said defendant partial summary judgment dismissing Alpha's second cross claim, and is otherwise denied; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York
September 28, 2010

Hon. Martin Shulman, J.S.C.