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SCANNED ON 2/3/2011

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

HON. JUDITH J. GISCHE

PART 10

Index Number : 103321/2009

SPORTSWEAR REALTIES ASSOC.

VS.

WELSH, HELEN

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

n this motion to/for _____

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 2/1/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Sportswear Realities Associates,

Plaintiff (s),

-against-

Helen Welsh and The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC,

Defendant (s).

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DECISION/ ORDER
Index No.: 103321/09
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Helen Welsh and
The Helen Welsh Group, LLC,

Defendants/3rd Party Plaintiff

-against-

USPA Accessories, LLC d/b/a Concept One and Concept 2 Accessories, LLC,

3rd Party Defendants,

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T.P. Index:
590633/09

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

USPA Accessories LLC d/b/a Concept One and Concept 2 Accessories, LLC,

3rd Party Defendants/
4th Party Plaintiffs,

-against-

A&L Sales, Inc.,

4th Party Defendants.

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F.P. Index:
590848/09

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Sportswear n/m (3212) w/KK affid, WRS affirm	1
Welsh opp w/RLR affirm, HW affid, exhs	2

Welsh x/m (3212) w/RLR affirm, HW affid, exhs[1] 3
USPA opp to Sportswear and Welsh motions w/BH affid, exhs 4
Welsh reply w/RLR affirm, exhs 5
Sportswear reply/further support w/WRS affirm, KK affid 6

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action for breach of a commercial lease and to enforce a personal guaranty. Issue was joined by the defendants in the main and 3rd party actions. Although the 4th party complaint was served, issue was not joined as that action. Plaintiff has not yet filed the note of issue. Since summary judgment relief is available once issue has been joined, plaintiff's motion and defendants' cross motion for summary judgment can and will be considered on their merits (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept 2001]). They are decided as follows:

Arguments Presented

Plaintiff Sportswear Realties Associates ("landlord") owns the building located at 141 West 36th Street, New York, New York ("building"). Defendant/ 3rd party plaintiff Helen Welsh Group, LLC ("HWG") entered into a commercial loft lease ("lease") with the landlord. The lease, dated May 16, 2001, was for part of the 19th floor ("premises") was initially for the five year period commencing May 1, 2001 and ending April 30, 2006 ("lease") at the annual rate of $93,000, payable in monthly installments of $7,750 per

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[1]Rule 12 of the Rules of Court states that exhibits to motions should be tabbed. While the court accepts the cross motion papers submitted by Welsh and their other papers, none of the exhibits are separately tabbed as they should have been.

month. Defendant Helen Welsh (Ms. Welsh), the president of HWG, signed a personal guaranty dated "March 2001" ("guaranty"). The guaranty recites that the "owner is concerned . . . that if Tenant [HWG] defaults under the Lease, Tenant (or other occupants) may continue to occupy the Demised premises, to the detriment of the Owner . . ." The guaranty further provides that "if Tenant and all other occupants vacate the Demised premises at the time of the default, Principal [Ms. Welsh] will have no obligation or liability under this Agreement (although the obligation and liability of the Tenant under the Lease will continue in accordance with the Lease)."

Pursuant to an agreement among the parties dated December 14, 2004, the lease was amended so that it was extended to December 31, 2012 and the rent/additional rent was increased. Under the lease, as amended, HWG was permitted have three additional occupants --designated as "Users" – occupy the premises, provided the demised premises were not partitioned. The amended lease also provides that:

> "Such use shall be subject to all of the covenants, agreements, terms, provisions and conditions contained in this lease. Notwithstanding any such use and/or acceptance of rent or additional rent by Owner from the Users, Tenant shall remain in fully liable for the payment of the fixed rent and additional rent due and to become due hereunder and for the performance of all the covenants, agreements, terms, provisions and conditions contained in this lease on the part of Tenant to be performed and all acts and omissions of the Users or anyone claiming under or through the Users which shall be in violation of any of the obligations of this lease, and any such violation shall be deemed a violation by Tenant."

These occupants or "Users" occupied the premises were defendants USPA

Accessories, LLC d/b/a Concept One ("C1") and Concept Two Accessories, LLC ("C2"), companies that later acquired an interest in HWG. In 2005, HWG entered into a sublease with another company, A&L Sales, Inc. ("A&L").

When HGW's lease with plaintiff was amended, Ms. Welsh's personal guaranty was also extended in writing. The guaranty contains a so-called "Good Guy" clause which provides, in relevant part, as follows:

> "Until Tenant and all other occupants vacate the entire demised premises (for any reason and at anytime), Principal guarantees to Owner the payment and performance of Tenant's obligations under and in accordance with the Lease, including, without limitation, the payment of fixed and additional rent (the "Obligations"), so that Principal will have no obligation or liability for Obligations which accrue under the Lease following the date Tenant and all other occupants vacate the entire Demised Premises... If, however, Tenant defaults and does not vacate, Owner may proceed against Principal under this Agreement without commencing any suit or proceeding of any kind against Tenant, without having obtained any judgment against Tenant."

Plaintiff alleges there are no triable issues of fact because HWG has admitted that it did not surrender possession of the premises to the landlord until April 2009, after the landlord had commenced a non-payment action against HGW in Civil Court. Plaintiff relies on a letter dated February 10, 2009 ("surrender letter") sent by Ms. Welsh on behalf of HWG. In the surrender letter, Ms. Welsh states: "this will confirm that The Helen Welsh Group, LLC surrenders all legal possession of the Premises and that you agreed to promptly institute holdover proceedings against the subtenant." The owner alleges that after HWG moved out, it left behind C1 and/or C2 and/or A&L, all of which

remained at the premises until after the landlord brought a holdover proceeding against them. The last occupant surrendered the premises sometime in April 2009, after the warrant of eviction had issued and it was about to be executed. Plaintiff argues that HWG and Ms. Welsh remained legally responsible for all the unpaid rent due up to April 2009, when the last user surrendered the premises and the landlord regained possession.

Plaintiff denies that it consented to any assignment of the lease in writing or otherwise. Landlord relies upon Articles 11 of the lease, requiring that any assignment of the lease be "by prior written consent" of the landlord, which landlord denies that defendants obtained. In addition to prior written notice, Article 72 of the lease requires that the tenant provide the landlord with a copy of the proposed lease, a statement setting forth the nature of the business that the proposed assignee is engaged in and, financial information about the proposed assignee, including the proposed assignee's most recent business report.

HWG and Ms. Welsh have set forth seven (7) affirmative defenses in their answer but they consent to the dismissal of their 3rd, 4th and 5th affirmative defenses, leaving the following defenses which plaintiff argues should be stricken because they do not state available defenses: 1st AD - release, 2nd AD - waiver, 6th AD - novation and; 7th AD - absence of a necessary party.

While admitting that there is unpaid rent due to the landlord, HGW and Ms. Welsh deny it is their responsibility to pay it. They argue C1 and C2 are responsible for the unpaid rent because C2 acquired all of HWG's assets and liabilities and C2 was controlled by C1. Thus, according to Ms. Welsh, after the merger occurred, there were

attempts to get the lease assigned because neither C1 nor C2 wanted the space. The landlord was, however, unreceptive to letting them assign it. Ms. Welsh argues that after the merger, it was up to C1 to figure out how to surrender the premises and get out of the lease. Thus, HWG and Ms. Welsh contend that the landlord should only look to C1 and C2 for payment of the unpaid rent because the landlord knew or should have known HGW had moved out of the premises and surrendered it.

HWG and Ms. Welsh claim that they assigned their lease to C1 and C2 by operation of law and since the landlord agreed to send rent bills addressed to HGW and the Concept entities, the landlord constructively consented to the assignment, although not in writing. Defendants argue that through discovery they can establish this defense and, therefore, plaintiff's motion is premature because they need to obtain copies of any correspondence among the landlord, C1 and C2.

Ms. Welsh claims that the statements made by her in the surrender letter have been misconstrued as being an admission when, in fact, she only wrote that letter because she thought she was being cooperative with the landlord. She claims the landlord told her it would only commence a holdover against A&L once she provided a surrender letter. Thus, Ms. Welsh contends the surrender letter was a mere formality and not decisive of whether HGW was, in fact, in occupancy when Ms. Welsh sent it. Defendants argue that landlord has also misconstrued Article 11 and 72 of the lease pertaining to assignments by taking it to mean an assignment is valid only if made in writing. HGW and Ms. Welsh claim an unwritten (oral or *de facto*) lease assignment is enforceable.

HWG and Ms. Welsh (third party plaintiffs) have cross moved for summary

judgment against C1 and C2 on their breach of contract and contractual indemnification claims. The third party plaintiffs also seek recovery of their legal fees in connection with the Civil Court proceedings, as well as their legal fees in this action. Principally, the third party plaintiffs rely upon an April 16, 2008 agreement among the HWG, Ms. Welsh, C1 and C2 which is identified by them as the "Forced Sale Agreement" ("buy-out agreement"). The buy out agreement details C1's buyout of HWG's interests in C2 and also addresses the lease in paragraph 4 [d] thereof. That paragraph provides in relevant part as follows:

> "HGW and HW [Ms. Welsh], as directed by [C1], shall take all necessary steps to surrender the premises that HWG occupies on the 19th Floor of 141 West 36th Street, New York, New York (the "36th Street Premises"), at the earliest practicable date and to terminate the lease agreement applicable to such premises (the "Lease"). [C1] shall have the exclusive power and authority to determine the course of action that it deems desirable to arrange for the surrender of the ...premises...HWG and [Ms. Welsh] hereby...grant [C1] and C2 an irrevocable power of attorney, coupled with an interest, to take all such action...[C1] and C2 shall be responsible for the rent and other obligations associated with the 36th Street Premises. [C1] agrees to indemnify and hold HWG and [Ms. Welsh] harmless from and against any claims... including but not limited to reasonable attorney's fee both in defense against the landlord's claims and in enforcement of this indemnification... "

According to HWG and Ms. Welsh, the buy out agreement arises from an earlier Contribution Agreement dated April 18, 2006 among HWG, HW, C1 and C2. Pursuant to the Contribution Agreement, C2 acquired all assets and liabilities of HWG. Section 2.2 [b] of the Contribution Agreement provides that C2 was to remit the rent payable under the lease to HWG by the 10th of each month starting with the April 2006 which

was prorated. That section of the Contribution Agreement also provides that "the company [C2] is indemnifying HWG and Helen Welsh pursuant to Section 7.1[v] for liabilities that it may incur in relation to the 36th Street Lease Agreement."

C1 and C2 oppose HWG's and Ms. Welsh's cross motion against them, claiming their performance under the buy out agreement was excused due to impossibility of performance. They contend it would have been "impossible" to get the landlord to terminate the lease and HGW had entered into a sublease with A&L, which they contend was also impossible to terminate. C1 and C2 have commenced a fourth party action against A&L for common law indemnity. As of the date of these motions, A&L had not answered or appeared. It has also not taken any position on these motions.

Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing (*See*: Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]).

Discussion

Plaintiff's motion for summary judgment

The landlord has established it had a lease with HWG and although it was amended, allowing HWG to, among other things, share the space with other Users, it was not assigned. HGW and Ms. Welsh acknowledge that efforts to get the landlord to agree to a lease assignment were unproductive. The landlord has also established that Ms. Welsh guaranteed the lease, as amended.

Even assuming that HGW and Ms. Welsh could prove at trial that there was a lease assignment by operation of law, this does not relieve HGW's ultimate responsibility to make sure rent is being paid to the landlord, or Ms. Welsh's personal guaranty of the tenant's obligation under the lease (Mandel v. Fischer, 205 A.D.2d 375 [1st Dept 1994]). Although landlord addressed rent bills to HGW and the Concept defendants, it was at the defendants' request, a point not disputed by any of the defendants. In any event, the amended lease specifically addresses such a situation: "Notwithstanding any such use and/or acceptance of rent or additional rent by Owner from the Users, Tenant shall remain in fully liable for the payment of the fixed rent and additional rent due and to become due hereunder and for the performance of all the covenants, agreements, terms, provisions and conditions contained in this lease..." Thus, rent bills sent to any of the Users did not abridge HGW's obligations under the lease.

Defendants attack upon the sworn affidavit of Ms. Kroker is unavailing and the court has considered her affidavit. Although HGW and Ms. Welsh claim Ms. Kroker's affidavit is not based upon personal knowledge, she states that as Controller of

plaintiff's managing agent, she is familiar with the facts of this case. Leaving aside some of the conclusions of law she makes, she provides facts that support plaintiff's claims. Importantly, Ms. Welsh has not come up with any material factual disputes in Ms. Kroker's affidavit which would require a trial.

Ms. Welsh's personal guaranty of the lease continues "Until Tenant and all other occupants vacate the entire demised premises . . ." Such a clause in a guaranty extinguishes the guarantor's liability for a tenant's obligations in the event the tenant vacates before the end of the lease term (Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v. Sheraton Holding Corp, 304 A.D.2d 455 [1st Dept 2003]). Although Ms. Welsh's letter states that HWG surrendered the premises in February 2009, this surrender by HGW--regardless of when it actually took place--would not cut off HWG's obligation to pay rent for the remainder of the lease term or, under the facts of this case, terminate Ms. Welsh's obligation as the guarantor of the lease. Landlord has established that the premises were occupied by one or more of the Users up until the time the Marshall was about to execute the warrant of eviction in April 2009. Thus, not only was HWG responsible for the rent and additional rent until April 2009, the conditions set forth in the "Good Guy" clause which would have terminated Ms. Welsh's personal guaranty of the tenant's lease obligations were not met.

Nor does the April 16, 2008 agreement among C1, C2, HWG and Ms. Welsh terminate any of HWG and/or Ms. Welsh's obligations to the landlord. The landlord is not a party to that agreement and therefore, not bound by it.

Plaintiff has established its claims against HGW and Ms. Welsh. Neither of these defendants have challenged the correctness of the amount of unpaid rent

claimed by the landlord (now $108,331.04). In fact, they admit this amount is due in their answer. Having failed to raise any triable issue as to their liability on the first and second causes of action, plaintiff is entitled to summary against HGW and Ms. Welsh, jointly and severally, in the amount of $108,331.04.

Plaintiff has also established that the lease agreement and the guaranty provides for legal fees to be paid by HGW and Ms. Welsh in the event of a default under the lease. Although HGW and Ms. Welsh seek discovery on the issue of damages, this does not defeat plaintiff's motion on the issue of liability for such fees. Therefore, plaintiff's motion for summary judgment is granted on the third cause of action as to the issue of liability. The issue of damages is set for a hearing before a Special Referee to hear and report his/her findings back to the Court.

The remaining defenses pleaded by defendant are inapplicable; plaintiff's motion for an order striking them is granted and they are stricken for the reasons that follow:

First affirmative defense - release: plaintiff has proved it did not release the defendants from the lease agreement.

Second affirmative defense - waiver: plaintiff has proved it did not waive HGW and/or Ms. Welsh's obligations under the lease and/or guaranty. The landlord has not waived its right to seek the unpaid, due and owing rent.

Sixth affirmative defense - novation: a novation requires that there be a previous valid obligation, agreement of all parties to a new contract, extinguishment of the old obligation and sufficient consideration (Town & Country Linoleum & Carpet Co., Inc. v. Welch, 56 A.D.2d 708 [4th Dept 1977]). These conditions, though alleged by defendants, were disproved by plaintiff.

Seventh affirmative defense - absence of a necessary party: a necessary party is a person who ought to be a party if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action (CPLR § 1001 (*see*, Nestor v. New York State Div. of Hous. & Community Renewal, 257 AD2d 395 [1st Dept 1999]; *also*, In re 37 West Realty Company v. New York City Loft Bd., 72 AD3d 406 [1st Dept 2010]). Plaintiff has named all the parties necessary for it to obtain a judgment in this action. The other parties are only necessary on the indemnification claims among the defendants.

HGW and Ms. Welsh's cross motion for summary judgment

The motion by HGW and Ms. Welsh for summary judgment on their contractual indemnification claims against C1 and C2 is based upon the provisions set forth in the April 16, 2008 agreement among C1, C2, HWG and Ms. Welsh. The only defense raised by C1 and C2 is that of "impossibility of performance." Impossibility of performance is a recognized common law defense, but it is narrowly applied and then only in extreme circumstances. (Kel Kim Corporation v. Central Markets, Inc., 70 NY2d 900 [1987]). Impossibility will excuse a party's performance only when the subject matter of the contract has been destroyed, or when the means of performance makes performance objectively impossible (Kel Kim Corporation v. Central Markets, Inc., supra; Warner v. Kaplan, 71 AD3d 1 [3rd Dept. 2009]). Performance is not excused merely because it has become more difficult (Monroe Piping & Sheet Metal, Inc. v. Edward Joy Company, 138 AD2d 941 [4th Dept. 1988]). Consequently, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even where unforseen circumstances make performance burdensome.

Although Mr. Hafif, C1's Chief Operating Officer and C2's Vice President states it was "impossible" to terminate the lease with plaintiff and the sublease with A&L, this defense has no merit. Assuming the lease could not be terminated, the indemnification provision simply provides that in the event the landlord brought claims against HGW and Ms. Welsh, C1 and C2 would indemnify and hold HWG and Ms. Welsh harmless against the landlord's claims. The defense of impossibility is unavailing and does not defeat HGW and Ms. Welsh's cross motion for summary judgment against the third party defendants. It was not legally impossible to terminate the lease, just very difficult to do so. Presumably C1 and C2 could have negotiated a surrender and termination agreement with the landlord for the right price. HGW's sublease with A&L predated the buy out agreement and no claim is made by C1 or C2 that it was unaware of the sublease.

Having established the claims set forth in the first cause of action, which is for a declaratory judgment that C1 and C2 must indemnify defendants/third party plaintiffs HGW and Ms. Welsh, the motion by HGW and Ms. Welsh for partial summary judgment is granted. C1 and C2 are liable to HGW and Ms. Welsh for the $108,331.04 that the court has directed be entered as a money judgment against them.

C1 and C2 have not addressed that branch of HGW and Ms. Welsh's cross motion for legal fees in this action and prior actions in the Civil Court. Since the buy out agreement provides for the recovery of such fees, the cross motion by the defendants/third party plaintiffs is granted as to the issue of C1 and C2's liability for such fees. The issues of damages is set for a hearing before a Special Referee to hear and report his/her findings back to the Court.

The cross motion by C1 and C2 for an order amending the caption to include third party defendant Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC is also granted.

Conclusion

Plaintiff's motion for summary judgment on the issue of liability and damages is granted as to the first and second causes of action in the amount of $108,331.04. Plaintiff's motion for summary judgment on its (third) cause of action for legal fees is granted on the issue of liability and the court directs a hearing on damages which will be held before a special referee. Plaintiff's motion dismissing defendants' affirmative defenses is granted and they are stricken. The motion to amend the caption is granted as well.

Defendants'/Third party plaintiffs' (HGW and Ms. Welsh) cross motion for summary judgment on their contractual indemnification claims against C1 and C2 is granted and it is hereby declared that C1 and C2 are liable to HGW and Ms. Welsh for the $108,331.04 that the court has directed be entered as a money judgment against them. The cross motion by the defendants/third party plaintiffs for legal fees recoverable from C1 and C2's is granted as to the issue of liability and damages are set for a hearing to held before a Special Referee to hear and report his/her findings back to the Court.

In accordance with the foregoing,

It is hereby

ORDERED that plaintiff Sportswear Realities Associates' motion for summary

judgment on its first cause of action against Helen Welsh and second cause of action against The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC, is granted; and it is further

ORDERED that the Clerk shall enter a money judgment in favor of plaintiff Sportswear Realities Associates, against defendants Helen Welsh and The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC, jointly and severally, in the principal sum of One Hundred Eight Thousand Three Hundred Thirty One and 04/100 Dollars ($108,331.04), together with the costs and disbursements of this action as taxed by the Clerk and plaintiff shall have execution thereof; and it is further

ORDERED that plaintiff's motion for summary judgment on its (third) cause of action for legal fees that it may recover from The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC is granted on the issue of liability and the court directs a hearing on damages which will be held before a Special Referee to hear and report his/her findings back to the Court; and it is further

ORDERED that Plaintiff's motion dismissing defendants' affirmative defenses is granted and they are stricken; and it is further

ORDERED that the cross motion by defendants/third party plaintiffs Helen Welsh and The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC to include third party defendant Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC , is granted and the clerk shall make the correction upon service of a copy of this decision and order; the new caption shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Sportswear Realities Associates,

Plaintiff (s),

-against-

Helen Welsh and The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC,

Defendant (s).

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Helen Welsh and The Helen Welsh Group, LLC,

Defendants/3rd Party Plaintiff

-against-

USPA Accessories, LLC d/b/a Concept One and Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC,

3rd Party Defendants,

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USPA Accessories LLC d/b/a Concept One and Concept 2 Accessories, LLC,

3rd Party Defendants/ 4th Party Plaintiffs,

-against-

A&L Sales, Inc.,

4th Party Defendants.

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and it is further

ORDERED that the cross motion by defendants/third party plaintiffs Helen Welsh and The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC for partial summary judgment declaring that USPA Accessories, LLC d/b/a Concept One and Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC are liable for all monies that The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC is liable for in the underlying action is granted; and it is further

ORDERED ADJUDGED AND DECLARED that USPA Accessories, LLC d/b/a Concept One and Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC must indemnify defendants/third party plaintiffs The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC is granted and USPA Accessories, LLC d/b/a Concept One and Concept Two Accessories, LLC d/b/a Concept 2 Accessories, LLC are liable to defendants/third party plaintiffs The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC for the $108,331.04, the amount that the court has directed be entered as a money judgment against The Helen Welsh Group, LLC a/k/a The Helen Welsh Group, LLC; and it is further

ORDERED that the cross motion by the defendants/third party plaintiffs for legal fees recoverable from C1 and C2's is granted as to the issue of liability and damages are set for a hearing to before a Special Referee to hear and report his/her findings back to the Court; and it is further

ORDERED that plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119M, so that the reference herein can be scheduled for a hearing; and it is further

ORDERED that any relief requested but not specifically addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 1, 2011

So Ordered:

Hon. Judith J. Gische, JSC