SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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KATHLEEN SNYDER,

Plaintiff(s),

-against-

GETTY PETROLEUM MARKETING, INC., LEEMILT'S PETROLEUM, INC., SOUTH HYLAN, LLC, HYLAN-NELSON, LLC, DURHAM TALMAGE, LLC, d/b/a DUNKIN DONUTS and QSR MANAGEMENT, LLC,

Defendant(s).

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DCM PART 5
Present:

HON. JUDITH N. McMAHON

DECISION AND ORDER

Index No. 102382/2008
Motion Nos. 005, 006, 007

The following papers numbered 1 to 10 were used on this motion this 15th day of February, 2011:

[005]Notice of Motion [Defendant Durham Talmage, LLC] (Affirmation in Support)	**1**
[006]Noticce of Motion [Defendant Getty/Leemilt](Affirmation in Support)	**2**
[007]Notice of Motion [Defendant QSR](Affirmation in Support)	**3**
Affirmation in Opposition [Plaintiff]	**4**
Affirmation in Opposition [South Hylan]	**5**
Affirmation in Opposition [Getty/Leemilt]	**6**
Reply Affirmation [Durham/Talmage]	**7**
Reply Affirmation [Getty]	**8**
Reply Affirmation [QSR]	**9**
Reply Affirmation [QSR]	**10**

This action was commenced on May 28, 2008, for injuries sustained after the plaintiff, Kathleen Snyder, tripped and fell on an allegedly defective condition on an asphalt ramp located at 4000 Hylan Boulevard, Staten Island, New York [hereinafter "premises"]. It is undisputed that defendant Leemilt's Petroleum, Inc., [hereinafter "Leemilt"] is the owner of the premises. Defendant Leemilt leased the premises to defendant Getty Petroleum Marketing, Inc., [hereinafter "Getty"] who subleased to defendant South Hylan, LLC, and Hylan-Nelson, LLC [hereinafter collectively referred to as "South Hylan"]. Defendant South Hylan operates a Dunkin Donuts and gasoline station at the premises. Defendant QSR Management, LLC, is the management company for defendant South Hylan.

Defendant Durham Talmadge, LLC, d/b/a Dunkin Donuts [hereinafter "Durham"] is an entity that operates Dunkin Donuts in various locations. Presently, discovery is complete and defendants Durham and QSR are both separately moving for summary judgment on all claims and cross claims. In addition, defendant Getty/Leemilt are moving for contractual indemnification and breach of contract as against defendant South Hylan pursuant to the lease agreement between the parties.

I. Defendant Durham's Motion for Summary Judgment [005]

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon 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" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

To sustain a claim for common-law negligence, a plaintiff must prove that the defendant had a legal duty, that the duty was breached, and that that breach was a direct and proximate cause of the plaintiff's injury (Fernandez v. Elemam, 25 AD3d 752, 753 [2d. Dept., 2006]; Vetrone v. Ha Di Corp., 22 AD3d 835, 837 [2d. Dept., 2005]; Dugue v. 1818 Newkirk Mgmt. Corp., 301 AD32d 560 [2d.

Dept., 2003]). Here, the defendant Durham has established its entitlement to summary judgment as a matter of law by submitting evidence that it only operates Dunkin Donuts franchises in New Jersey and had no connection with the instant Dunkin Donuts located at 4000 Hylan Boulevard, Staten Island, New York. Defendant Durham has presented the testimony of Mr. Anton Nader and Mr. Leo Tallo who both indicated, as partners of Durham, that it is a limited liability company which operates a Dunkin Donuts store in Edison, New Jersey. In opposition, the plaintiff has failed to raise any triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). While the plaintiff contends that defendants Durham and QSR had "intertwined responsibilities" and therefore should both be held liable, there is no evidence that defendant Durham had any connection to the Dunkin Donuts or QSR in this case. As a result, summary judgment is appropriate in favor of defendant Durham.

II. Defendant South Hylan's motion for indemnification/breach of contract [006]

It is undisputed that tenant, South Hylan, entered into a lease, dated July 19, 2002, with defendant Getty, to operate a gasoline station on the premises. In connection with the lease, South Hylan was required to secure an insurance policy where Getty/Leemilt were named as additional insureds and with specific insurance amount requirements[1]. The indemnification agreement provides:

[1] The lease provides that South Hylan was to secure: Property Insurance in the amount no less than $125,000, Bodily Injury in the amount of $1 million, Garage Liability in the amount of $1 million, Workers Compensation and Garagekeeper's Legal Liability in the amount of $50,000. To the extent that defendant South Hylan failed to secure the required amount of insurance, pursuant to the lease agreement between the parties, they will be held liable for *at least* the amount of insurance they were required to obtain in the lease and possibly more, which may require a hearing after any verdict that is rendered.

(a) As part of this business relationship, Lessee acknowledges that in furtherance of its obligations to assume full and complete responsibility for the operation of the Station, it has agreed to fully and completely be responsible for any liability to any third parties in any manner relating to the premises or the operation of the Station conducted from the premises. Accordingly, Lessee, by reason of the terms of this Paragraph 34, relieves the Company from liability for any acts or omissions, including any negligence by the Company, and, at the same time, Lessee assumes responsibility for liability to third parties as a result of not only its own negligence but also that of the Company. Lessee understands that it can obtain insurance for the responsibility that it is assuming by this Paragraph 34 in the amounts provided for in Paragraph 10 hereof and, in doing so, it must name the Company as an additional insured as required in Paragraph 10 hereof. However, to the extent that Lessee does not obtain insurance which covers the risk, or the limits of the insurance policy are exceeded, Lessee shall also be responsible as set forth in the following subparagraph (b).

(b) Lessee agrees to defend, indemnify and hold Company and its subsidiaries and affiliates and their respective directors, officers, employees, agents and the owner of the premises harmless from and against any and all claims, demands and actions for, or in any way connected with, any accident, injury or damage whatsoever to any person or property arising out of, incidental to or happening in connection with, in any manner, the operations (including the storage and handling of products) to be carried out pursuant to this lease or any of its related documents, or by reason of any other casualty, or occurring on any of the sidewalks, drives, curbs and streets adjoining the same, or from the equipment and facilities thereon, regardless of any defects therein, or from any act or omission of Lessee or any subtenant or assignee and their respective licensees, servants, agents, customers, employees or contractors, and from and against all attorneys' fees, costs, expenses and liabilities including all costs, disbursements and attorneys' fees connected with and incidental to the establishment of this indemnity obligation (otherwise known as "pursuit costs") incurred in connection with any such claim or proceeding brought thereon whether such claims or actions are rightfully or wrongfully brought or filed. Lessee's obligations under

> this Paragraph34 shall survive expiration or termination of this lease.

It is well settled that "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous' (Bradley v. Earl B. Feiden, Inc., 8 NY3d 265, 274-75 [2007]). Here, the indemnity agreement between Getty/Leemilt and South Hylan is very clear and unambiguous. It provides that South Hylan must indemnify the Lessor (i.e., "Getty") and the owner (i.e., Leemilt) for any and all claims brought by third parties including any alleged defects on "curbs". In opposition to the defendant's prima facie showing of entitlement to contractual indemnification, the plaintiff contends that the motion is premature as Judicial Hearing Officer Ajello had yet to render a decision in the severed third-party declaratory judgment which South Hylan commenced against the CNA Insurance Company and National Fire Insurance Company of Hartford [hereinafter collectively referred to as "CNA"][2]. At this point, JHO Ajello has rendered his decision finding that "defendant [CNA] is required to defend and indemnify the cross-moving plaintiffs [South Hylan] in the underlying personal injury action based upon the rule of equitable reformation". As a result, defendant South Hylan is entitled the indemnification, *inter alia*, from CNA and South Hylan's opposition is thereby rendered moot. Therefore, this court finds that pursuant to the clear and unambiguous indemnification provision in the lease agreement between Getty and South Hylan, defendant South Hylan is required to defend and indemnify defendants Getty and Leemilt.

III. Defendant QSR Management's Summary Judgment Motion [007]

[2]South Hylan commenced that action against CNA Insurance seeking a declaratory judgment that CNA wrongfully refused to cover South Hylan in this tort action.

It is well settled that "an owner of real property has a duty to maintain the property in a reasonably safe condition" (Basso v Miller, 40 NY2d 233, 241 [1976]). In order to establish a prima facie case of negligence the plaintiff must prove that the defendant either created the condition, or had notice of the condition and had a reasonable time to remedy the situation (Gonzalez v. Jenel Management Corp., 11 AD3d 656, 656 [2d Dept. 2004; Finocchiaro v. AVR Realty Corp., 32 AD3d 819, 819 [2d Dept 2006]).

Here, in opposition to defendant QSR's prima facie showing of entitlement to summary judgment, co-defendants Getty and Leemilt raised triable issues of fact as to whether QSR knew or had notice of the alleged defect (id.; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept 2003]). Pursuant to the testimony of Leonard Tallo, as an employee of QSR, his duties included inspecting any properties owed by the company. He would inspect the properties inside and outside for any issues and report them to the director of operations. In addition, QSR would hire or contract with any companies to perform any necessary repairs and/or construction. As a result, there are numerous questions of fact with prohibit summary judgment at this point (id.).

Accordingly, it is

ORDERED that motion 005 by defendants Durham Talmadge d/b/a Dunkin Donuts seeking summary judgment is hereby granted , and it is further

ORDERED that all claims and cross-claims against Durham Talmadge d/b/a Dunkin Donuts are hereby dismissed, and it is further

ORDERED that the portion of motion 006 by defendants Getty Petroleum Marketing, Inc. and Leemilt's Petroleum, Inc. seeking indemnification is hereby granted, and it is hereby

ORDERED that defendant South Hylan, LLC, defend and indemnify co-defendants Getty Petroleum Marketing, Inc., and Leemilt's Petroleum, Inc., and it is hereby

ORDERED that the portion of motion 006 by defendants Getty Petroleum Marketing, Inc. and Leemilt's Petroleum, Inc. seeking breach of contract is hereby granted, and it is further

ORDERED that the motion 007 by defendant QSR Management, Inc., seeking summary judgment is hereby denied, and it is further

ORDERED that any and all other requests for relief by any party are hereby denied, and it is further

ORDERED that this case proceed immediately to trial, and it is further

ORDERED that the Clerk enter judgment accordingly.

Dated: 3/15 2011 E N T E R,

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Hon. Judith N. McMahon

Justice of the Supreme Court