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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

STELLA CORREIA,

Plaintiffs,

- against-

THE TJX COMPANIES, INC.,

Defendants.

INDEX NO. 113860/11

MOTION SEQ. NO. 001

THE TJX COMPANIES, INC.,

Third-Party Plaintiffs,

- against -

UB SOMERS, INC. and URSTADT BIDDLE PROPERTIES, INC.,

Third-Party Defendants.

THIRD - PARTY INDEX NO. 590350/12

The following papers were read on this motion for summary judgment pursuant to CPLR 3212.

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

Cross-Motion: ☐ Yes ■ No

In this personal injury action, defendant/third-party plaintiff, The TJX Companies (TJX), moves, pursuant to CPLR 3212, for an order granting it summary judgment and dismissal of the complaint. TJX also moves, pursuant to CPLR 3212, for an order granting it summary judgment on its third-party claims against third-party defendants, UB Somers, Inc. (UB Somers) and Urstadt Biddle Properties, Inc. (Urstadt). TJX is also seeking costs, disbursements and attorney's fees in this action. Stella Correia (plaintiff) is in opposition to TJX's motion.

Discovery in this matter is complete and the Note of Issue has been filed.

TJX owns and operates Home Goods, a chain of home furnishing stores with locations throughout the United States. UB Somers is the landowner of the Somers Common Shopping Center, which consists of seven buildings located at 86 US Route 6 & Route 118, Baldwin Place, New York. Urstadt is the property management company that manages UB Somers's real property.

BACKGROUND

The following facts are not in dispute. On October 14, 2011, plaintiff visited the Home Goods store located in the Somers Shopping Center (Premises). Plaintiff sustained injuries when she slipped and fell while walking in the rear of the store, in the furniture aisle. After the fall, plaintiff observed a puddle of water on the floor measuring approximately 2 ½ feet in diameter. On December 9, 2011, plaintiff commenced this action based upon a theory of negligence, alleging that TJX was responsible for said defective condition and that it failed to maintain the Premises in a reasonably safe condition. Plaintiff seeks an award of damages, costs and disbursements in this action.

TJX filed its answer on January 30, 2012, and on April 17, 2012 commenced a third-party action against UB Somers and Urstadt for common-law indemnification, contractual indemnification and breach of contract for failure to procure liability insurance. TJX is also seeking an award of attorney's fees, costs and disbursements. On April July 12, 2012, UB Somers and Urstadt filed an answer to the third-party complaint.

In support of its motion, TJX argues that it is entitled to summary judgment because: (1) it owes plaintiff no duty; (2) it was UB Somers' duty alone to maintain the roof; (2) pursuant to the parties' lease agreement, UB Somers and Urstadt are obligated to defend and indemnify TJX in this matter; and (3) TJX is entitled to common-law indemnification against UB Somers and Urstadt.

Plaintiff argues in opposition that TJX is not entitled to summary judgment because: (1) the owner or operator of a retail establishment has a duty to its patrons to maintain the store in a reasonably safe condition; (2) TJX had exclusive control over the interior of the Home Goods store and failed to ensure plaintiff's safety; (3) TJX had a duty to inspect the Premises particularly given its knowledge of prior leaks on the Premises; (4) TJX had constructive notice of the leak that resulted in plaintiff's fall.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

"As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2d Dept 2008]). If the factors of ownership, occupancy or control are not present, "a party cannot be held liable for injuries caused by the allegedly defective condition" (*id.*). Here, potential liability for a dangerous condition is predicated upon TJX's tenancy, occupancy and control of the Premises.

It is well established that a "defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436, 436 [2d Dept 2005]); *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the] defendant's employees to discover and remedy it" (*Chianese v Meier*, 98 NY2d 270, 278 [2002] [internal quotation marks and citation omitted]; *see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]).

Here, there is a question of fact as to whether TJX had actual or constructive notice of the hazardous condition for a sufficient length of time to discover and remedy the problem. In

her examination before trial, plaintiff testifies that after she fell on the date in question, she observed a single puddle of water measuring approximately 2 ½ feet in diameter. She stated that the water was clear and lacked any foot prints or dirt marks (Affirmation of Mary C. Azzaretto [Azzaretto Aff.], dated July 22, 2013, exhibit E pgs. 12-32). Plaintiff indicated that her back, jeans and jacket were wet, and that she had no knowledge of how long the water had been on the floor prior to her fall, nor could she ascertain the origin of the puddle (*id.*). Plaintiff testified that it had been raining the night before and the morning of her accident, but it was not raining when she arrived at the Premises (*id.*). Plaintiff also avers that right after her fall she overheard a male employee scream, "Oh my God, we have a leak" (*id.*).

TJX submitted testimony from Gail Barto (Barto), TJX's assistant store manager who testified that on the day of the incident, it had been raining in the early part of the afternoon (Azzaretto Aff., exhibit F pgs. 19-48). That afternoon, an employee came into her office to alert her to the fact that a customer had fallen in the "power aisle" of the furniture section of the store (*id.*). She testified that she responded to the scene immediately following plaintiff's fall, whereby she observed a small puddle of water measuring approximately five inches on the floor (*id.*). She did not observe any leaks emanating from the roof on that day (*id.*). Consequently, Barto could not identify or determine the source of the puddle (*id.*). She testified that the store uses an outside contractor to sweep, mop and do general cleaning each day. The contractor arrives at 7:00 a.m. every morning to perform his or her duties (*id.*). Barto stated that there was no formal procedure in place for monitoring the aisles of the store as the day went on, to inspect them for any conditions that may need attention (*id.*).

TJX also submitted testimony from John Grillo (Grillo), the assistant vice president of operations for Urstadt. Grillo testified that as landowner, UB Somers is responsible for all external roof repairs at the Premises. UB Somers hired KLM Contracting (KLM) to perform all repairs, maintenance and snow removal on the roof at the Premises (Azzaretto Aff., exhibit G).

Grillo testified that in the spring of 2011, contractors from KLM inspected Home Goods' roof and found several holes (Azzaretto Aff., exhibit G pgs. 14-18). The information was recorded on an invoice dated August 19, 2011 (Lucchese Aff., exhibit F). Consequently, the invoice does not purport the date of the inspection, nor does it purport the document's author (*id.*). When asked how much time elapsed between the date of the inspection and the subsequent invoice, Grillo testified that, generally, an invoice is forwarded thirty days following an inspection (*id.*). *d.*).

Grillo further testified that KLM discovered additional damage to the roof during its fall inspection. According to the fall invoice dated October 17, 2011, "the team ended up repairing 25 holes around all of the a/c units on the 'Home Goods' store" (Azzaretto Aff., exhibit G pgs. 17-22). Whoever completed the inspection and repairs reported that "there had to be a lot of leaks as we also found a 20 foot long section that had water trapped underneath that we cut and removed the water and patched" (*id.*). Consequently, the fall invoice was dated three days after plaintiff's accident (*id.*). When asked again as to the date of the fall inspection, Grillo avers that said information is unknown. He testified that the date of the invoice reflects when the invoice was done, but not when the inspection was actually performed (*id.*).

The record reveals that TJX had notice of a number of leaks on the Premises prior to plaintiff's accident. On March 7, 2011, TJX made a call to UB Somers to report leaks in the furniture and power aisles (Lucchese Aff., exhibit F). On March 9, 2011, TJX made another call to UB Somers after an employee observed a leak in the bedding aisle, running the entire length of the sales floor (*id.*). TJX sent an email and made subsequent calls to inform UB Somers of the numerous leaks on the Premises (*id.*).

The testimony submitted by TJX to support its motion for summary judgment has failed to tender "sufficient evidence to demonstrate the absence of any material issues of fact" (*Smalls v AJI, Indus. Inc.*, 10 NY3d at 735). TJX has not established that it neither created the

hazardous condition in question, or that it did not have actual or constructive notice of the hazardous condition.

On its third-party claims for common-law indemnification, contractual indemnification and breach of contract for failure to procure liability insurance, TJX has failed to demonstrate its entitlement to judgment as a matter of law.

"Indemnity . . . involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer" (*County of Westchester v Welton Becket Assoc.*, 102 AD2d 34,46-47 [2d Dept 1984], *affd* 66 NY2d 642 [1985]). "The right to indemnification may be created by express contract, but it is often one implied by law to prevent an unjust enrichment or unfair result" (*id.* at 47). "In some instances the law imposes liability [upon] a person who in fact committed no actual wrong, but who is held responsible for a loss as a matter of social policy because he is in a position to spread the risk of the loss to society as a whole" (*id.*). "For example, an employer may be held liable for the wrongdoing of his employee, the owner of a vehicle may be held responsible for the tortious operation of the vehicle by another which results in injury, or an owner of property may be held liable for the wrongdoing of his contractor" (*id.*). Here, TJX's right to indemnification is created by express contract.

Section 12.2 of the Lease provides in part:

> "Landlord shall save tenant harmless from, and defend and indemnify tenant against, any and all injury, loss or damage, or claims for injury, loss or damage, of whatever nature to any person or property caused by or resulting from any breach of a covenant of this lease by landlord, any act, omission, or negligence of landlord or its employees or agents" (Azzaretto Aff., exhibit K).

Section 8.2 of the Lease provides in part:

> " . . . the property which landlord is required to

> maintain is the foundation, the roof, the exterior walls, the roof drainage system, the canopy, the structural parts of the demised premises, and, to the extent located within the walls, ceiling or floor of the demised premises and not readily accessible by means of removable panels, access doors or the like, all wiring, plumbing, pipes, conduits and other facilities and sprinkler fixtures, plus all common areas of the shopping center . . ." (*id.*).

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Zaidi v New York Bldg. Contrs., Ltd.*, 99 AD3d 705, 706 [2d Dept 2012] [internal quotation marks and citation omitted]).

> "A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion. Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal quotation marks and citations omitted]).

"A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" (*Farrell Lines v City of New York*, 30 NY2d 76, 82 [1972]). Pursuant to the Lease, it is UB Somers' duty to maintain the roof. However, it has yet to be determined whether a leak from the roof created the puddle that caused plaintiff's fall. Moreover, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks and citation omitted]). Here, an award of summary judgment must await a finding of liability by the factfinder.

On the issue of UB Somers and Urstadt's failure to obtain general liability coverage,

courts have held that a party may recover damages for a party's breach of a lease provision in circumstances that require a landlord or tenant to procure liability insurance covering the other party (*see Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091, 1093 [2d Dept 2008]). However, any damages would be limited to a party's costs of purchasing substitute insurance and other out-of-pocket expenses arising from the liability claim not covered by the substitute insurance, such as any deductibles or any increase in premiums resulting from the liability claim (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]). Here, TJX has failed to demonstrate its entitlement to said damages.

The Court has considered all other arguments and finds them unavailing.

Accordingly, it is

ORDERED that defendant TJX Companies Inc.'s motion for summary judgment dismissing the complaint is denied; it is further,

ORDERED that third-party plaintiff TJX Companies Inc.'s motion for summary judgment on its third-party claims is denied.

Dated: 4-11-19

PAUL WOOTEN *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**