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Dism v. 10E Shoes
2-20E Fordham Rd
Indemnification
Granted

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

MARIA RODRIGUEZ,

Plaintiffs,

-against-

10 EAST SHOES, INC. d/b/a 4EVER SHOES, 4 EVER SHOES, INC. and 2-20 EAST FORDHAM ROAD ASSOCIATES, LLC,

Defendants.

Index No **308991/2012**

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to **8** read on this motion, **Summary Judgment**

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1-2**
Answering Affidavit and Exhibits	**4-5 -6**
Replying Affidavit and Exhibits	**7-8**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**3**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, 10 East Shoes Inc. d/b/a 4Ever Shoes, 4 Ever Shoes, Inc., (Shoes), and co-defendant, 2-20 East Fordham Road Associates, LLC, (Associates), move pursuant to CPLR 3212 for summary judgment, dismissing the complaint as against them. Associates also moves pursuant to CPLR 3212 for summary judgment on its contractual indemnification claim for attorney's fees and costs. The motions are hereby consolidated for purposes of decision and disposition.

Plaintiff testified she tripped on a bunched up carpet as she was exiting a store leased and operated by Shoes. Plaintiff testified that she went to the store "just about daily." Plaintiff, "never noticed anything abnormal. I would go in and our no problems." (Transcript, p. 75). Plaintiff specifically testified she had never

seen any raised parts of the carpet on previous visits to the store. (Transcript p. 22). Plaintiff further testified that she did not notice any raised parts of the carpet when she walked into the store. (Transcript p. 21). Plaintiff testified she was in Shoes' store for twelve or thirteen minutes. (Transcript p. 16.).

"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 defendant's employees to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986)" *Strowman v. Great Atlantic and Pacific Tea Co., Inc.*, 252 A.D.2d 384 [1st Dept. 1998]). Given plaintiff's testimony that she did not see any raised portions of the carpet on the way into the store, was in the store for twelve-thirteen minutes and then left the store, tripping on a raised portion of the carpet, is prima facie evidence that the carpet was raised for an insufficient time for Shoes to have constructive notice of the raising of the carpet. There is no argument that Shoes had actual notice or created the condition, and there is no countervailing evidence that Shoes had notice of the raised carpet.

Associates moves for contractual indemnification on its contractual indemnification claims for attorney's fees and costs. Shoes claims that the contractual indemnification provision violates GOL 5-321, in that it purports to indemnify the lessor for its own negligence. However, there is no view of the evidence in which the landlord was negligent.

"The lease's indemnification clause does not violate General Obligations Law § 5-321. Although it purports to indemnify the landlord for its own negligence, the parties permissibly allocated the risk to insurance, regardless of whether indemnification was limited to its proceeds (see *Gary v Flair Beverage Corp.*, 60 AD3d 413, 415 [1st Dept 2009], citing *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]). Moreover, the clause is valid as applied, as there is no view of the evidence that the landlord was negligent (see *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 n 5 [1997]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462 [1st Dept 2014]). The third-party defendant is therefore liable for the costs of defendant's defense." (*Podel v Glimmer Five, LLC,* 117 A.D.3d 579, 580-581 [1st Dept 2014]).

Therefore, while the language of the indemnification clause at bar may violates the letter of GOL 5-321, since the lessor had no negligence in the happening of plaintiff's injuries, GOL 5-321 is inapplicable to the facts of this case. Therefore, Shoes shall indemnify Associates for attorney fees and costs. Shoes is not indemnifying Associates for Associates' negligence, since Associates does not have any negligence for plaintiff's injuries.

Accordingly, the motions of 10 East Shoes Inc. d/b/a 4Ever Shoes, 4 Ever Shoes, Inc. and East Fordham Road Associates, LLC, are granted to the extent that

plaintiff's complaint is dismissed in its entirety. The motion of East Fordham Road Associates, LLC, is further granted to the extent that 10 East Shoes Inc. d/b/a 4Ever Shoes, 4 Ever Shoes, Inc., shall indemnify East Fordham Road Associates, LLC, for attorneys fees and costs incurred in this action.

The foregoing shall constitute the decision and order of this Court.

Dated: SEP 0 4 2014

KENNETH L. THOMPSON JR. J.S.C.