Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 703702/2018
WILFRED WONG,

Plaintiff,

Motion
Date: December 18, 2019

-against-

Motion Cal. No.: 59

JAY JALARAM, INC. AND HAMID VERDI
DBA DAVE DISCOUNT,

Motion Sequence No.: 2

Defendants.
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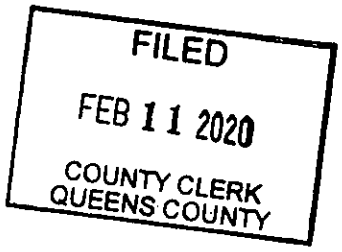
The following efile papers numbered 38-59 submitted and considered on this motion by defendant Jay Jalaram Inc. seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting summary judgment to the moving defendant, dismissing plaintiff Wilfred J. Wong's verified complaint and any and all cross-claims on the issue of liability.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.....	EF 38-53
Affirmation in Support-Affidavits-Exhibits.....	EF 54-58
Reply Affirmation-Affidavits-Exhibits.....	EF 59

Facts and Procedural History

This is a premises liability action. Plaintiff Wilfred J. Wong (hereinafter "Wong") commenced this lawsuit on February 5, 2018 with the filing of a summons and verified complaint against defendants Jay Jalaram, Inc (hereinafter "Jalaram") and Hamid Verdi dba Dave Discount (hereinafter "Verdi and Dave Discount"). The claims against defendants involved their relationship to the premises known as Dave's Discount located at 169-16 Jamaica Avenue, Jamaica, New York. Wong alleged that he sustained serious and protracted injuries on November 9, 2017 when he was



caused to fall down the interior stairs of the premises to the basement due to the negligence of the defendants in their ownership, operation and/or maintenance of the subject premises. All defendants joined issue with the service of verified answers with affirmative defenses and cross-claims, denying the essential allegations contained in plaintiff's verified complaint. Discovery is now complete. Plaintiff filed a Note of Issue and Certificate of Readiness on August 8, 2018. Now, Jalaram moves for summary judgment pursuant to CPLR 3212 on the issue of liability. This motion has been made timely. (*See* CPLR 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004].) In support of the motion, Jalaram's documentary evidence included the pleadings; plaintiff's verified bill of particulars and 2nd supplemental verified bill of particulars; party depositions; a written lease between Jalaram and Hamid Verdi; report and affidavit of Adam C. Cassel, P.E.; and, the report Heimer Engineering, P.C., Harold Krongelb, P.E.

Lease

Jalaram submitted a written lease between it and Hamid Verdi for the subject premises. The lease commenced on September 20, 2007, expiring on September 19, 2012. The annual rent was $26,400.00 and the premises were demised as a store known as Dave Variety Merchandise. Pursuant to Paragraph 2 of the written lease, the Tenant was required to do the following:

> "... take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition... execute and comply with all laws, rules, orders, ordinances and regulations at any time issued or in force (except those requiring structural alterations) applicable to the demised premises... permit at all times during usual business hours, the Landlord and representatives of the Landlord to enter the demised premises for the purpose of inspection... suffer the Landlord to make repairs and improvements to all parts of the building...forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses, and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or the employees... and also for any matter or thing growing out of the occupation of the demised premises... ."

The written Lease also contains a Rider wherein the parties covenanted the following at Paragraph 9:

> "The tenant shall provide and keep in force and effect as its own cost adequate liability coverage for its business at the demised premises, such policies also name landlord as an additional insured and a certificate of such insurance shall be supplied to landlord."

Deposition testimony of Plaintiff Wilfred J. Wong

Wong gave sworn testimony on November 12, 2018. He stated that he sustained serious injuries when he fell down a flight of steps on November 9, 2017 between 9 and 10 P.M. into the basement of the subject premises. He described his accident in detail, stating essentially that on the date of the accident, he was in the premises picking up a bag of fish gravel, and moved slightly to the left and fell. There was a ramp by the shelf that was holding the gravel. He testified that he fell because the step was too close to the fish gravel. He fell straight down the staircase into the basement. He attempted to grab the bag of gravel and turned left and while shifting to the left, he fell. He stated that the store is known as Dave's Discount. He identified photographs, but stated that he had not taken them and could not specifically identify small items in the photographs because he did not have his glasses. He looked at a large photograph which he was shown and stated that he was able to see it and some of the items depicted in the photograph were not present on the day of his accident. The rack which contained the fish gravel was wider than the one depicted in the photograph and it was against another wall. Wong testified that there was no lighting in the area where he fell. He had been to the store about twice prior but he had never been to the back of the store before the accident. After the accident he was taken to the hospital and treated for injuries to his arm, foot and shoulder. There were no warning signs in the area where the accident occurred.

Deposition testimony of Defendant Jay Jalaram, Inc.

Jalaram, by its witness, Bipin Patel (hereinafter "Patel") gave sworn testimony on behalf of Jalaram on November 16, 2018. Patel testified that he, along with his nephew are the owners of the subject property, which is designated as mixed use. The property has two apartments above it and a discount store named Dave's Discount on the ground floor. The owner of Dave's Discount is Hamid Verdi. The building is incorporated under the name Jay Jalaram Inc. Patel identified and testified regarding the written lease between Jalaram and Hamid Verdi. The lease was executed on September 17, 2017(sic) and was in effect on the date of Wong's accident. Patel stated that the lease was not renewed automatically it was by oral agreement. Patel testified that he does not have a key

to the store and neither does anyone acting on behalf of Jalaram. The last time he visited the premises was four or five years prior. He did advise Mr. Verdi or Dave Discount how items should be arranged at the store earlier in the beginning, probably the last time five years ago. He had never advised Mr. Verdi that he had any issues with how the items in the store were arranged.

According to Patel, the garbage at the location is set out by Hamid Verdi and the tenants of the apartments. Patel's son performs any needed maintenance at the premises, including checking the boiler and making sure there were no mice at the premises, only going to the building if a call is received from the tenant regarding those general issues. The boiler would have been serviced about three times a year in the year 2017. There is a staircase leading to the basement of the premises of the store. It does not have a door closing it off from the store. Neither he or his nephew ever arranged any items in Dave's Discount. Patel stated that he had never received any complaints about the stairwell in the store or the condition of its shelving, and has not received any notices of violation from the New York City Department of Buildings regarding the stairwell leading to the basement. To his knowledge, no one had complained about the stairwell leading from the basement to the first floor or the shelving in the discount store either. Patel testified that Mr. Verdi did not request that he place a door in the location on top of the staircase leading down to the basement.

Deposition Testimony of Anant Patel

Jairam also annexed the deposition transcript of another witness, Patel's son, Anant Patel. He testified that in November 2017 Dave's Discount, owned by Hamid Verdi, was the commercial tenant in the premises pursuant to a written lease. He testified that according to the lease, of which he had never seen prior to the deposition, commenced on September 20, 2007 and expired in September 2012. He was not sure if there was another lease agreement at the time of Wong's accident, but recognized his father's signature on the lease. It was his understanding that the store was a month to month tenant in November 2017. The owners of the premises are his father and cousin Chandresh Patel. Neither he or his father had a key to the store, only the owner of Dave's Discount. He testified that he would go to the premises for the purpose of assisting his father, by maintaining the boiler, utility closet, the gas and sewer lines. According to Anant Patel, Jalaram did not perform any repairs in the commercial space. According to him the commercial tenant was responsible for all repairs and the repair/cleaning of the boiler was for the benefit of the entire building. Access to the premises was necessary in order to access the utility cabinet/closet where the electrical component was contained and to access the gas meters and the main sewer line. Back in November 2017 he would visit the property once a month. The premises had one staircase leading to the basement which was located at the back of the store. He was shown photographs of the store, including the rack placed near the staircase and stated that he did not recall if he had ever seen the subject rack when he went to the premises. No one needed to be present from Jalaram for meter

reading. He had never helped with arranging items in the store. He had never seen customers in the area of the subject rack. He was unsure if there were surveillance cameras located in the premises. He stated that when he became aware of the lawsuit he contacted Mr. Verdi who stated that someone intentionally fell down the basement stairs. He was not on the premises on the date of Wong's accident. In the three month period prior to Wong's accident, he did not recall instructing Mr. Verdi to close off the stairs or place any signs by the staircase to warn customers of the stairs and was not aware of any complaints regarding the stairs. To his knowledge, no one else had ever fallen down the stairs.

Deposition testimony of Hamid Verdi dba Dave's Discount

Verdi gave sworn testimony in this matter on November 16, 2018. He testified that he has owned Dave's Discount since the year 2007. He stated that he has a lease with Jalaram. It is a sole proprietorship and he does not employ and workers. He is the only person that has a key to the store. He cleans the store and takes out the garbage. He was shown the lease and identified his signature on it. At the store he sells 99 cents items, Lotto, furniture and fish products, including gravel. He stated that he would call Patel for boiler maintenance and extermination. Patel's son would perform the work if he could, or someone would be hired to perform it. He was asked if Jalaram ever assisted with arranging shelves or furniture in the store, but a response was not elicited because there was an objection by defense counsel and the question was not repeated. The store is open 7 days a week from 7 A.M. to 7:30 P.M. The shelf he stated was placed in the area at issue three years ago. He testified that customers have access to the area where Wong fell. There has never been a door separating a door separating the area where the rack is in the picture and the staircase. He had never requested that the landlord place a door there.

Verdi stated that he placed the fish gravel in the location by the staircase because he did not have any other room in the store. He did not feel that the rack was placed too close to the staircase, and did not have any prior complaints about its proximity to the staircase. He did not recall any prior trip and fall accidents in the store or the area where Wong fell from 2007 to 2017. The rack has never moved from its position, even after Wong's accident. No renovations were made following Wong's accident. There are no video cameras in the store. In the area where Wong fell Verdi testified that there is a sign which advises customers to watch their step. He testified that he did not speak to the person that fell after the accident. Although the lease terminated in 2012, he stayed at the premises with the consent of Jalaram but paying increased rent. Thus, currently he is a month to month tenant. He did not have any paperwork to demonstrate that Jalaram is covered under his insurance policy for the building. From the time he opened the store to the time of the accident, the staircase was unchanged. He never had any conversations about the stairwell or complain about it from the time he leased the premises. It was solely in his discretion where to place merchandise in

the store. He testified to the signs contained on the rack which contained the fish gravel. One sign stated "gravel on sale here" and the other stated "please watch your step".

Affidavit of Adam C. Cassel, P.E.

Jalaram submitted the sworn affidavit of Adam C. Cassel, P.E. (hereinafter "Cassel") dated September 23, 2019 who is a Professional Engineer who inspected the subject property and interior stairway to determine the extent to which the condition or arrangement of the interior staircase may have contributed to Wong's accident. Cassel conducted an inspection on April 11, 2019. He attested that based upon his inspection and review, education and experience, he has determined within a reasonable degree of engineering certainty that:

- the placement of a storage unit on the upper landing, adjacent to a staircase, which serves as part of the means and egress between the first floor and cellar is the proximate cause for the reported circumstances of plaintiff's accident;
- the hazard posed by the placement of the storage unit adjacent to a staircase was and remains open and obvious: a condition which should have been recognized by the tenant who maintained and operated the retail store;
- the placement of furnishings or obstructions in the pathway of a means of egress violates the requirements of the 2014 New York City Fire Code. Had the upper landing remained fee and clear of any furnishes or obstructions, as is required by the Fire Code, and the storage unit been placed elsewhere in the store that was not located adjacent to a staircase, the accident would not have occurred; and
- plaintiff's accident would have occurred whether or not the staircase was in compliance with the applicable Building Codes, since the sole factor that resulted in the accident was the placement of the storage unit on the upper landing, adjacent to the staircase, and not the plaintiff attempting to traverse the landing or stair.

The written report noted that the presence of a storage unit in the pathway of a means of egress violates the requirements of 1027 of the 2014 New York City Fire Code (hereinafter "FC") entitled Maintenance of the Means of Egress, which applies to all buildings. The relevant code from the FC section 1027 states the following:

> §1027.2. Prohibition. It shall be unlawful to obstruct or impede access to any required means of egress, including any exit, exit access or exit discharge.
>
> §1027.3. Unobstructed and unimpeded egress required. All required means of egress, including each exit, exit access and exit discharge, shall be continuously maintained free from obstructions and impediments to immediate use in the event of fire or other emergency.
>
> §1027.3.5 Furnishings and decorations. Furnishings, decorations or other objects shall not be placed so as to obstruct exits, access thereto, egress therefrom, or visibility thereof..."

Cassell opined based upon his inspection, experience, education and photographs that the building tenant caused the condition, created a hazard with the placement of the storage unit on the upper landing, and violated the FC and caused Wong's accident.

Report of Heimer Engineering P.C.

On April 11, 2019 Harold Krongelb, P.E. (hereinafter "Krongelb") associate of Heimer Engineering, P.C. conducted a site visit on behalf of Wong at the subject premises. He inspected the subject staircase at the premises, the floor at the top of the steps to the basement. There were limited records available at the City of New York Department of Buildings ("DOB") website and the City of New York Department of Housing, Preservation and Development, however based upon the construction of the building, he opined that it is estimated to have been constructed between 1910 and 1930. The tenant was no longer in the premises. Photographs were taken. According to Krongelb, "the floor at the top of the basement steps is approximately 27-3/4 inches measured east to west in the direction perpendicular to the rear of the building. The floor at the top of the basement steps is approximately 36 inches measured north to south in the direction parallel to the rear wall of the building. The ramp is approximately 5-1/2 inches high where it meets the rear wall of the building." Under the applicable building City of New York Building Code regarding maintenance are contained at 28-101.2 titled "Intent" and 28-301.1 titled "Owner's responsibilities" which set forth that a building owner is expected to maintain the building in a safe condition at all times. "It is the intention of the Building Code that a building owner is not required to have specific notice of a hazard or defect. A building owner must make a reasonable effort to be aware of hazards or defects and correct them." In his expert opinion, based upon generally accepted Engineering, Scientific and Mathematical principles, his inspection of the premises, education and his years of

experience, Wong was obtaining merchandise in the store when he fell down the basement steps because the shelving had been placed in a hazardous location, constituting a trap. In his opinion, there was no safe way for any pedestrian to leave the area where the display shelves were located. The placement of the display shelving coupled with the presence of a ramp next to the floor at the top of the steps to the basement was the proximate cause of Wong's accident. In his professional opinion with a reasonable degree of Engineering certainty, the maintenance of the floor at the top of the steps to the basement violated the applicable City of New York Building Code; that a gate should have been placed between the ramp and the flooring at the top of set of steps; that it is good and accepted practice not to display merchandise in a location where pedestrians cannot safely obtain the merchandise, and here, Wong could not safely leave the location where the merchandise was on display.

Discussion and Analysis

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc.*, 120 AD3d 462 [2d Dept 2014].) "Premises liability, as with liability for negligence generally, begins with duty. The existence and extent of a duty is a question of law." (*See Alnashmi v Certified Analytical Group, Inc.* 89 AD3d 10 [2d Dept 2011]; *see also Palka v Servicemaster Mgt. Servs.. Corp.*, 83 NY2d 579 [1994].)

"An owner of a property has a duty to maintain the property in a reasonably safe condition...[t]hus, in a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the condition or had actual or constructive notice of its existence" (*see Egan v Emerson Assocs., LLC*, 127 AD3d 806 [2d Dept 2015]). "Reservation of a right to enter the premises for purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect." (*See Nikolaidis v La Terna Restaurant*, 40 AD3d 827 [2d Dept 2007].) An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or by a course of conduct by the landlord giving rise to a duty" (*see Lugo v Austin-Forest Assocs.*, 99 AD3d 865 [2d Dept 2012]). "[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" (*see Elsayed v Al Farha Corp.*, 132 AD3d 942 [2d Dept 2015]; *Alnashmi v Certified*

Analytical Group, Inc. 89 AD3d 10 [2d Dept 2011]).

"Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law there is implied continua[tion] of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument." (*See Miske v Selvaggi*, 175 AD3d 1526 [2d Dept 2019] [internal quotations omitted]; *City of New York v Pennsylvania R. Co.*, 37 NY2d 298 [1975]; *Yu Yan Zheng v Fu Jian Hong Guan American Unity*, 168 AD3d 511 [1st Dept 2019]; *Henderson v Gyrodyne Company of America, Inc.*, 123 AD3d 1091 [2d Dept 2014]).

Jalaram argued that it is an out-of-possession landlord and thus cannot be held liable for any alleged injuries that occurred on the premises as a result of a condition which does not constitute a structural design or defect because under the lease agreement it was not contractually obligated to repair or maintain the premises. Under the facts as presented, Jalaram was not in possession of the premises, did not retain any control over the premises, and was not obligated by the lease to repair or maintain the premises at the time of Wong's accident. Therefore, it cannot be liable for the condition created by Dave's Discount and Hamid Verdi, the placement of a display rack in a hazardous location next to the basement steps. Jalaram stated that the case *Seigal v Congregation Ziehron Shmuel, Inc*, (226 AD2d 913 [3d Dept 1996]) is similar to the instant case. In that case, Plaintiff alleged that he sustained injuries when he slipped and fell on ice on an exterior stairway at premises owned by defendant and leased to the plaintiff's employer. In *Seigal* the record demonstrated that the defendant premises owner did not contract to remove snow and ice from the property or assumed a duty. (*See also Festa v Waskawic*, 181 AD2d 758 [2d Dept 1992].) Here, again, there is no evidence that Jalaram had any obligation to repair and that they negligently constructed or maintained the premises. In the case *Almanzar v Picasso's Clothing, Inc.* et al., (281 AD2d 341 [1st Dept 2001]), the Appellate Division First Department found a lack of merit in plaintiff's argument that the open trap door into which he fell was a significant structural design defect that an out of possession landlord had constructive notice due to their right to reentry for the purposes of inspection and repair in the absence of demonstrating that the trap door was kept open for structural reasons or the evidence that the door was defective. The fact that no individuals from Jalaram helped arrange things in the store is confirmed by the deposition of Anant Patel. Based upon the report of its expert, Adam C. Cassel, P.E. and plaintiff's expert, Harol Krongelb, P.E. the accident was caused by the placement of the display case on the upper landing near the steps, in violation of the City of New York Fire Codes and Building Codes. Moreover, pursuant to the lease agreement, Verdi/ Dave's Discount was required to indemnify Jalaram for any liability arising from its negligent acts as well as to procure liability naming Jalaram as an additional insured.

The defendant's motion seeking summary judgment on the issue of liability is denied. Defendant failed to demonstrate its entitlement to judgment as a matter of law (*see Gronski v County of Monroe*, 18 NY3d 374 [2011]; *Nieves v Pennsylvania. LLC*, 165 AD3d 1155 [2d Dept 2018]; *O'Toole v City of Yonkers*, 107 AD3d 866 [2d Dept 2013]; *Sutherland v Whylie*, 292 AD2d 518 [2d Dept 2002]). A landowner has a duty to maintain his or her premises in a reasonably safe manner (*see Basso v Miller*, 40 NY2d 233 [1976]; *Robbins v 237 Ave. X. LLC.*, 177 AD3d 799 [2d Dept 2019]). Movants were on actual and/or constructive notice that there was a hazardous condition which existed on the premises. By the facts adduced by the papers submitted herein, the display at issue herein was in existence in that location for at least 3 years. Jalaram admittedly entered onto the premises on various occasions and had to or should have seen the display and were therefore on actual and/or constructive notice that a hazardous condition existed on the premises, the placement of the display case to close in proximity to the staircase as to present a hazard for anyone which entered the property. Anant Patel testified that as an agent of Jalaram, he would go to the premises at least once a month usually going to access the basement to access the boiler, gas and sewer lines. He would have to pass by the subject display, which the tenant Verdi testified had been in place for at least three years. According to the April 11, 2019 engineering report of Harold Krongelb, P.E., the owner is responsible by statute for dangerous conditions on the property under the New York City Building Code, 28-301.1, regardless of whether the owner has specific notice of the hazard or defect. Jalaram failed to demonstrate that under the circumstances herein it did not have actual and/or constructive knowledge of the defect, the hazardous placement of the subject display rack, and that it could not have remedied this hazard in the three years that it was in placement prior to plaintiff's accident (*see Winby v Kustas*, 7 AD3d 615 [2d Dept 2004]; *see also Robbins v 237 Ave. X. LLC.*, 177 AD3d 799 [2d Dept 2019]; *Rosas v 397 Broadway Corp.*, 19 AD3d 574 [19 AD3d 574 [2d Dept 2005]).

Turning next to the branch of the defendant's motion seeking summary judgment pursuant to CPLR 3212 on its affirmative defenses seeking indemnification, generally, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Mohan v Atlantic Court. LLC*, 134 AD3d 1075 [2d Dept 2015] citing *Cava Const. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2d Dept 2009]; *see Lugo v Austin-Forest Assocs.*, 99 AD3d 865 [2d Dept 2012]). However, here, Jalaram is entitled to summary judgment on its indemnification claims because it established prima facie, that plaintiff's accident fell within the scope of the indemnification agreement contained in the lease. To the extent that the agreement required co-defendant to indemnify Jalaram for its own negligence, the provision is not rendered unenforceable by General Obligations Law §5-321 which states that an agreement which purports to exempt the landlord from its own negligence is void and unenforceable, since here, the lease also provided that the co-

defendant was required to obtain insurance. (*See Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]; *Bilska v Truszkowski*, 171 AD3d 685 [2d Dept 2019]; *Campisi v Gabar Food Corp.*, 130 AD3d 854 [2d Dept 2015]; *Karanikolas v Elias Taverna, LLC*, 120 D3d 552 [2d Dept 2014].) This branch of Jalaram's motion was unopposed. Therefore, Jalaram is entitled to contractual indemnification against Hamid Verdi d/b/a Dave Discount, including reimbursement of attorney's fees, expenses, costs and disbursements, in connection with its defense of the underlying action.

Therefore, the motion by defendant Jay Jalaram Inc. is granted to the extent that the branch of its motion seeking summary judgment against Hamid Verdi d/b/a Dave Discount on its claims of contractual indemnification is granted, without opposition.

This constitutes the decision and Order of the Court.

Dated: January 31, 2020

Hon. Chereé A. Buggs, JSC

FILED
FEB 11 2020
COUNTY CLERK
QUEENS COUNTY