Jones v Brooklyn Hop 2 LLC
2022 NY Slip Op 33957(U)
November 14, 2022
Supreme Court, Kings County
Docket Number: Index No. 524385/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MARY JONES,

Plaintiff,

-against-

BROOKLYN HOP 2 LLC, IHOP RESTAURANTS LLC and REVA HOLDING CORP.,

Defendants.

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Index No.: 524385/2018

DECISION AND ORDER

Motion Sequence #2, #3

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	34-36, 38-55, 57-80,
Opposing Affidavits (Affirmations)	82-85, 87-93, 95-99,
Reply and Sur-Reply Affidavits (Affirmations)	109, 111-113, 115,
Memorandum of Law	37, 100-107,

After a review of the papers and oral argument, the Court finds as follows:

The instant action results from an alleged trip and fall incident that occurred on January 17, 2017. On that day the Plaintiff, Mary Jones (hereinafter "the Plaintiff") allegedly injured herself at a restaurant owned and operated by Defendants Brooklyn Hop 2 LLC and IHOP Restaurants, LLC, (hereinafter the "IHOP Defendants") located at 785 Flushing Avenue, Brooklyn, N.Y. (the "Restaurant"). The Plaintiff alleges in her complaint that she fell as a result of a defective condition on the floor of the Restaurant.

The IHOP Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of the Plaintiff and dismissing any cross-claims against it. The IHOP Defendants argue that summary judgment should be granted as the molding on the floor that the Plaintiff allegedly tripped on was trivial and therefore not actionable. What is more, the IHOP Defendants argue that the alleged condition was open and obvious and not inherently dangerous. The IHOP Defendants also argue that they did not create the condition and did not otherwise have notice of the condition.

Both the Plaintiff and Defendant Reva Holdings Corp. (hereinafter "Defendant Reva") oppose the motion by the IHOP Defendants. Reva apparently owns the property where the Restaurant is located. The Plaintiff argues that the IHOP Defendants have failed to meet their *prima facie* burden. The Plaintiffs further argue that even assuming, *arguendo*, that they have, there are issues of fact regarding whether the defect at issue was trivial and whether the IHOP Defendants exercised reasonable care in their construction and maintenance of the property. Specifically, Defendant Reva argues that there are issues of fact regarding whether the IHOP Defendants created the condition at issue and whether the condition is in fact *de minimis* or open and obvious. Defendant Reva also contends that the IHOP Defendants have failed to meet their *prima facie* burden with respect to the dismissal of the cross-claims by Reva against IHOP.

Defendant Reva also moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment, dismissing the complaint of the Plaintiff and dismissing any cross-claims against it. Defendant Reva argues that it cannot be liable for Plaintiff's injuries because pursuant to its subject lease agreement with the IHOP Defendants, Defendant Reva is a landlord out of possession and therefore has no duty to keep the premises in good repair. Defendant Reva also argues that the condition alleged was open and obvious and that it did not cause or create it.

Defendant Reva also seeks summary judgment on its cross-claims against IHOP for indemnification and IHOP's purported failure to obtain insurance covering Reva.

The IHOP Defendants oppose the motion and argue that there are issues of fact regarding whether Defendant Reva is an out of possession landlord. The IHOP Defendants contend that a review of the lease agreement raises issues of fact regarding whether Defendant Reva continued to have a responsibility to maintain the area of the floor at issue and whether the defect in question could be described as a structural defect. The IHOP Defendants argue that testimony from its employee creates a material issue of fact regarding whether agents of Defendant Reva inspected the Restaurant. IHOP argues that in the event that an inspection did occur Defendant Reva would also have to show that it did not have actual or constructive notice of the alleged condition. IHOP argues that Reva has not shown it lacked notice. The IHOP Defendants also argue that Defendant Reva is not entitled to either common law or contractual indemnification, as it was not negligent and the lease between the parties requires such a showing in order to trigger its indemnity obligation.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence

must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Motion Sequence #2 (IHOP Defendants)

Generally, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.*, 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*,

70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

The IHOP Defendants argue that the molding upon which the Plaintiff allegedly tripped was a trivial, or *de minimis*, defect and therefore not actionable. The IHOP Defendants also contend that they did not create the condition at issue and did not have actual or constructive notice of the purported defect. The IHOP Defendants rely primarily on the deposition testimony of the Plaintiff and the deposition testimony of Lance Jackson. When asked, during her deposition, where her accident took place Plaintiff stated "[a]t an IHOP on Flushing Avenue." (See IHOP Defendants Motion, Exhibit "I", Page 9) When asked if she had been there before she stated "[n]ope, that's why I was there." (See IHOP Defendants Motion, Exhibit "I", Page 10). When asked if her accident happened before or after she had her meal with her daughter, the Plaintiff stated "[a]fter." (See IHOP Defendants Motion, Exhibit "I", Page 45) When asked how the accident occurred, the Plaintiff stated that "[a]s I stepped out of the booth, I told her bye, turned around to walk towards the railing to walk out, and as I was walking, my foot caught on this molding that they had down there and I fell." When asked how far from the booth this molding was, the Plaintiff stated "[m]aybe eight feet, maybe." (See IHOP Defendants Motion, Exhibit "I", Page 49).

When asked, during his deposition, what his position with the IHOP Defendants was, Lance Jackson stated that, "I am a district manager or area manager." When asked whether the location at issue was one that he supervised, Mr. Jackson stated "[y]es, it was." (See IHOP Defendants Motion, Exhibit "N", Page 10) When asked what his responsibilities are, Mr. Jackson stated "I handle all HR issues, maintenance issues, things of that sort." (See IHOP Defendants Motion, Exhibit "N", Page 11) When asked whether there was any construction or renovation of the Restaurant from 2016, when he became the district manager, to the date of the Plaintiff's

accident, Mr. Jackson stated "I think there was, yes." (See IHOP Defendants Motion, Exhibit "N", Page 13). When asked what needed to be renovated, Mr. Jackson stated "[t]he floor needed to be done." (See IHOP Defendants Motion, Exhibit "N", Page 13) When asked if this was done in late 2016, Mr. Jackson stated "[r]oughly about that time, yes." (See IHOP Defendants Motion, Exhibit "N", Page 14) When asked who performed the work, Mr. Jackson stated "I just hired a contractor and he performed the work." (See IHOP Defendants Motion, Exhibit "N", Page 15) When asked if there were any specifications regarding moldings, Mr. Jackson stated "[n]o, there were no specifications." (See IHOP Defendants Motion, Exhibit "N", Page 16). When asked if anyone had tripped on the molding before the subject accident, Mr. Jackson stated "I am not sure of that." When asked if anyone complained about the alleged defect, Mr. Jackson stated "I do not recall." (See IHOP Defendants Motion, Exhibit "N", Page 23). When asked if he conducted any investigation after the Plaintiff's accident, Mr. Jackson stated "I know that once I did become aware of the accident report I tried to obtain video for the accident but the video was already overridden." (See IHOP Defendants Motion, Exhibit "N", Page 29).

Turning to the merits of the instant motion, the Court finds that the IHOP Defendants have failed to meet their *prima facie* burden. The IHOP Defendants "did not demonstrate either that [it] did not create the alleged dangerous and defective condition, or that [it] lacked actual or constructive notice of the condition and a reasonable time to remedy the same." *Kazimir v. Cornyn*, 30 AD3d 380, 380, 817 N.Y.S.2d 324, 325 [2d Dept 2006].

Even assuming, *arguendo*, that the IHOP Defendants had met their *prima facie* burden, the Plaintiff raises issues of fact regarding whether the defect was *de minimis* or open and obvious and not inherently dangerous. "Further, the law is clear that '[e]vidence that the dangerous condition was open and obvious cannot relieve the landowner' of the burden to exercise reasonable care in

maintaining the property in a safe condition." *Pirreca v. Smithtown Cent. Sch. Dist.*, 208 AD3d 526, 527, 171 N.Y.S.3d 375 [2d Dept 2022], quoting *Cupo v. Karfunkel*, 1 A.D.3d 48, 52, 767 N.Y.S.2d 40 [2d Dept 2003]; see also *Sarab v. BJ's Wholesale Club*, 174 AD3d 933, 103 N.Y.S.3d 307 [2d Dept 2019]; *Pizzolo v. Thyssenkrupp El. Corp.*, 189 AD3d 560, 133 N.Y.S.3d 822 [1st Dept 2020]. The Plaintiff provides an expert affidavit from Stanley H. Fein, P.E. who states that "I am a licensed professional engineer in the State of New York and maintain an office at 6800 Jericho Turnpike, Suite 120 W, Syosset, NY 11791-4401." (See Plaintiff's Affirmation in Opposition, Exhibit "Fein Affidavit", Paragraph 1). Mr. Fein thereafter stated that "[i]n connection with my investigation, I conducted a site inspection on February 23, 2022, at which time I determined that the conditions that existed at the time of plaintiffs trip and fall." (See Plaintiff's Affirmation in Opposition, Exhibit "Fein Affidavit", Paragraph 5) Mr. Fein also stated that "[n]otwithstanding the changes to the restaurant, I reviewed photographs that depicted the actual condition as it existed at the time of plaintiffs trip and fall incident." (See Plaintiff's Affirmation in Opposition, Exhibit "Fein Affidavit", Paragraph 6) Mr. Fein opined that "[i]n my professional opinion, and within a reasonable degree of engineering certainty, the trip and fall incident and injury sustained by plaintiff on January 17, 2017, was caused by the negligence of the owner/management of the restaurant in that they created an extremely dangerous and hazardous condition by the installation of the original molding strip." (See Plaintiff's Affirmation in Opposition, Exhibit "Fein Affidavit", Paragraph 9). Mr. Fein also opined that "at the time of plaintiff's fall, the difference in elevation between the two adjoining floors was filled by the raised floor molding, which was in a jagged and unsafe condition, and created an extreme tripping hazard, which came upon plaintiff as a dangerous and unexpected trap." (See Plaintiff's Affirmation in Opposition, Exhibit "Fein Affidavit", Paragraph 11). Whether a dangerous condition exists on real

property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 [1952]. Accordingly, the motion by the IHOP Defendants is denied.

Motion Sequence #3 (Defendant Reva)

Liability

"An out-of-possession landlord is not liable for injuries that occur on the premises after its transfer of possession and control to a tenant unless the landlord (1) is contractually obligated to repair the premises, or (2) has reserved the right to enter the premises to make repairs, and liability is based on a significant structural or design defect that violates a specific statutory safety provision." *Sangiorgio v. Ace Towing & Recovery*, 13 A.D.3d 433, 433©34, 787 N.Y.S.2d 51, 52 [2nd Dept, 2004]; *see Ingargiola v. Waheguru Mgmt., Inc.*, 5 A.D.3d 732, 774 N.Y.S.2d 557 [2nd Dept, 2004]. From this it reasonably follows that "[a]n out-of-possession landlord may be held liable for a third-party's injury on the premises based on the theory of constructive notice where the landlord reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance, and repair, there is a specific statutory violation, and a significant design or structural defect that proximately caused the injury." *Spencer v. Schwarzman*, LLC, 309 AD2d 852, 766 N.Y.S.2d 74 [2d Dept 2003].

Defendant Reva argues that it cannot be liable for Plaintiff's injuries because pursuant to its lease agreement with the IHOP Defendants, Defendant Reva is a landlord out of possession. "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct.'" *Fox v. Patriot Saloon*, 166 AD3d 950, 951, 88 N.Y.S.3d 483, 484 [2d Dept 2018], *quoting Alnashmi v. Certified Analytical Grp., Inc.*, 89 AD3d 10, 18, 929 N.Y.S.2d 620, 627 [2d Dept 2011]. Defendant Reva primarily relies on the lease agreement between the parties, the deposition testimony of the Plaintiff, the deposition testimony of Lance Jackson, the deposition testimony of Abraham Betesh, the deposition testimony of Robert Cummins, the franchise agreement entered into by the IHOP Defendants, and the remodel specifications for the Restaurant. The relevant provisions of the aforementioned Lease, provide as follows:

> ARTICLE 4 CONDITION OF THE PREMISES; LANDLORD'S WORK
>
> Section 4.1 "AS IS" Condition of the Premises. Tenant has examined the Premises and, subject to Landlord performing Landlord's Work, if any, (a) Tenant accepts possession of the Premises in its "AS IS" condition on the date of this lease, subject to normal wear and tear and the removal of substantially all of the existing occupant's personal property, if any, and (b) Landlord has no obligation to perform any work, supply any materials, incur any expenses or make any installations to prepare the Premises for Tenant's occupancy.
>
> Section 4.2 Landlord's Work (a) If any Landlord's Work is specified in Article 1 and the Exhibit referred to therein, Landlord shall, at its expense, perform Landlord's Work, in accordance with, and subject to, the applicable provisions of this lease. Tenant shall not impede, delay, obstruct or interfere with, Landlord's performance of any and all of Landlord's Work. (b) Tenant acknowledges that Landlord will be performing Landlord's Work in conjunction with Tenant performing "Tenant's Work" (as hereinafter defined). In the event the performance of Landlord's Work delays the performance of Tenant's Work, Tenant shall notify Landlord and Tenant shall be entitled to a day for day extension of the Rent Commencement Date for each day that Tenant is so delayed in performing Tenant's Work after notice to Landlord. Notwithstanding the foregoing, Tenant acknowledges that the lobby entrance to the Building in front of the Permitted

Sublet Area may not be completed prior to Tenant opening for business in the Premises, but it is agreed that the failure to complete said lobby shall not be deemed to delay Tenant's Work for the purposes hereof. If Tenant opens for business in the remainder of the Premises, other than the Permitted Sublet Area, prior to completion of the lobby, the Fixed Rent shall be abated in proportion that the Permitted Sublet Area bears to the total area of the Premises, until said lobby is substantially completed.

ARTICLES REPAIRS AND MAINTENANCE

Section 8.1 Structural Repair. Landlord shall, at Landlord's expense, make all structural repairs needed to the exterior walls, structural columns, structural roof, and structural floors that enclose the Premises (excluding all doors, door frames, storefronts, windows and glass); provided that Tenant gives Landlord notice of the necessity for such repairs. Notwithstanding the foregoing, Tenant shall reimburse Landlord, as Additional Rent, within thirty (30) days of being billed therefore, for all such repair costs to structural elements that are necessitated by the negligence or misconduct of Tenant, its employees, contractors, agents, subtenants, employees, customers and invitees.

Section 8.3 Premises Repair; HVAC. Subject to Articles 12 and 13 and Section 8.1: Tenant shall make, at Tenant's sole expense, all repairs and replacements needed to maintain in good condition and order the Premises and all installations, equipment and facilities therein, and all repairs and replacements needed to any plumbing, water, waste, heating, ventilating and air conditioning units ("HV AC Units"), and electric conduits, lines and equipment located outside the Premises that serve only the Prem1ses. Without limiting the foregoing, but subject to Articles 12 and 13 and Section 8.1, Tenant shall make all repairs and replacements required with respect to the HV AC Units, electrical and plumbing systems within the Premises and any rooftop or exterior air conditioning equipment or HV AC Units serving only the Premises, any plumbing fixtures within the Premises (including sinks and toilets), and the plumbing lines, valves, and pipes connected to or running from such fixtures to the point at which such lines, valves and pipes connect with the Building's common plumbing lines, including such plumbing lines or ducts connecting any roof-top or exterior equipment or HV AC Units or other utility or service to the Premises. Tenant shall_ also make, at Tenant's expense, such repairs and replacements as are needed to keep the sidewalks and walkways abutting the Premises in good condition and order, and shall keep such sidewalks and walkways [and areas behind the Building to which Tenant has access] free of rubbish, snow, ice and other obstructions, and otherwise in a safe and clean condition and shall not put such sidewalks and walkways to any special use (e.g. install any special plates). If Tenant fails to promptly clear snow and ice from the sidewalks and walkways abutting the Premises and keep them clear, Landlord may do so at Tenant's expense. All such repairs and replacements shall be made in compliance with the provisions of this lease (including Article 5).

When asked during his deposition what the business of Defendant Reva was, Abe Betesh stated that "Reva Holding Corp. owns a building in the Bushwick section of Brooklyn." (See Defendant Reva's Motion, Exhibit "G", Page 8). When asked what position he held at Reva, Mr. Betesh stated "[v]ice-president." (See Defendant Reva's Motion, Exhibit "G", Page 11) When asked what other involvement he had with the building at issue, Mr. Betesh stated "I am the sole owner of Abeco Management LLC." (See Defendant Reva's Motion, Exhibit "G", Page 12) When asked if Abeco manages the building at issue, Mr. Betesh stated "[y]es. They do." (See Defendant Reva's Motion, Exhibit "G", Page 15). When asked when he began to manage the property, Mr. Betesh stated "[f]rom 1988 to 1992 is when my company started to be involved in managing that building." When asked if he negotiated the lease agreement with the IHOP Defendants, Mr. Betesh stated "I did." When asked if he's familiar with the lease he states "I'm familiar with the lease in a sense that I negotiated and possibly signed it. I'm not familiar with the terms of the lease without looking at it right now." (See Defendant Reva's Motion, Exhibit "G", Page 16). When asked if there was work to be done by the tenant when it was leased, Mr. Betesh stated "[y]es, there was." When asked to specify, Mr. Betesh stated that "[i]t was a bargain store prior to the lease being signed. They converted it into an IHOP restaurant." (See Defendant Reva's Motion, Exhibit "G", Page 17). When asked if the lease was renewed, Mr. Betesh stated "[t]hey're operating under the same lease from the initial first lease, so if that helps answer the question." When asked if he had overseen any renovations in that space since it was occupied by the IHOP Defendants, Mr. Betesh stated "[n]o, I did not." (See Defendant Reva's Motion, Exhibit "G", Page 18). When asked if he believed the lease required the landlord to repair the floor, Mr. Betesh stated "[t]he landlord will have no responsibility for the floor slab." (See Defendant Reva's Motion, Exhibit "G", Page 23). When asked if he had any discussions regarding repairs in the space with the IHOP Defendants

after the initial build out, Mr. Betesh stated "[n]ever." (See Defendant Reva's Motion, Exhibit "G", Page 24). When asked about the responsibilities of a maintenance worker employed by Abeco, Mr. Betesh stated "[h]is responsibility is to clean the staircases and clean in front of the two entrances to the office building, to monitor the fire alarm that's in the building and to, like a day like today, shovel the common areas." When asked when the last time he was in the Restaurant, Mr. Betesh stated "I don't even remember the last time I was there." (See Defendant Reva's Motion, Exhibit "G", Page 27).

When asked what his connection was with the Restaurant, Robert Cummins stated "I'm the owner." (See Defendant Reva's Motion, Exhibit "H", Page 11). When asked what he means by owner, Mr. Cummins stated "[f]ranchisee of the IHOP." (See Defendant Reva's Motion, Exhibit "H", Page 13). When asked who he owns the business with, Mr. Cummins stated "[m]yself and Arkell Cox." (Page 14). When asked when he entered into the franchise for the Restaurant, Mr. Cummins stated "I'm not sure. I know we opened in 2000 -- (Technical difficulty.) -- 2011." (See Defendant Reva's Motion, Exhibit "H", Page 15). When asked whether the initial construction of the Restaurant included renovating the floors, Mr. Cummins stated "[y]es." (See Defendant Reva's Motion, Exhibit "H", Page 18). When asked if the landlord was required under the lease to make any improvements prior to the Restaurant opening, Mr. Cummins stated "I don't recall." (See Defendant Reva's Motion, Exhibit "H", Page 104). When asked if the building superintendent had any responsibilities as it relates to the Restaurant, Mr. Cummings stated "I wouldn't know, maybe Lance would know, I wouldn't know." (See Defendant Reva's Motion, Exhibit "H", Page 107). When asked whether anyone inspected the floor renovations that took place in 2016, Mr. Cummings stated "I believe Lance was supervising it, but I don't recall." (See Defendant Reva's Motion, Exhibit "H", Page 107). Lance Jackson's testimony is detailed above.

Turning to the merits of the instant motion, the Court finds that Defendant Reva has met their *prima facie* burden. Defendant Reva has established through the Lease and the deposition testimony of both Abe Betesh and Robert Cummins, that it was an out-of-possession landlord with no duty to maintain the subject floor of the Restaurant at issue, that it did not make efforts to maintain the Restaurant, and that IHOP created the condition at issue when they renovated the restaurant. The deposition testimony of Abe Betesh, Lance Jackson and Robert Cummins supports the argument made by Defendant Reva and is consistent with the plain language of the lease between the parties. *See Euvino v. Loconti*, 67 AD3d 629, 631, 888 N.Y.S.2d 571, 573 [2d Dept 2009]. What is more, "[r]eservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when 'a specific statutory violation exists and there is a significant structural or design defect.'" *Lowe-Barrett v. City of New York*, 28 AD3d 721, 723, 815 N.Y.S.2d 630, 631 [2d Dept 2006], quoting *Stark v. Port Auth. of New York & New Jersey*, 224 A.D.2d 681, 682, 639 N.Y.S.2d 57, 58 [2d Dept 1996].

In opposition, the IHOP Defendants failed to raise a material issue of fact. The IHOP Defendants did point to testimony from Lance Jackson that employees of Defendant Reva occasionally came to the Restaurant. However, when asked specifically about this, Lance Jackson admits that he was not present at the time and that he received this information from "the restaurant general manager, her name is Sharel Cummins." (See Page 68). This is not sufficient to raise a material issue of fact as to whether Defendant Reva retained some control or contractual duty to make repairs to or maintain the leased premises. Further, there is no showing that the alleged dangerous condition constituted a statutory violation and a significant structure or design defect. *See McComish v. Luciano's Italian Rest.,* 56 AD3d 534, 535, 868 N.Y.S.2d 79 [2d Dept 2008];

see also *McDonnell v. Blockbuster Video, Inc.*, 203 AD3d 713, 714-15, 160 N.Y.S.3d 648, 649 [2d Dept 2022]; *Nunez v. Alfred Bleyer & Co.*, 304 AD2d 734, 757 N.Y.S.2d 798, 799 [2nd Dept, 2003]; *Thompson v. Port Auth. of New York & New Jersey*, 305 AD2d 581, 582, 761 N.Y.S.2d 75, 76 [2nd Dept, 2003].

Indemnification and Breach of Contract

Defendant Reva also seeks summary judgment as it relates to its cross-claims for common law and contractual indemnification. The Court denies Defendant Reva's application for common law indemnification, as it can only be found after the party [indemnitor] has been found to be negligent. *See McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 376, 953 N.E.2d 794, 799 [2011]. In the instant proceeding, the IHOP Defendants have not been determined to be negligent.

However, the Court finds that Defendant Reva is entitled to contractual indemnification under the terms of the lease. The relevant provisions of the aforementioned Lease provide as follows:

> Section 21.9 Indemnification. Tenant shall not perform or permit to be performed any act which may subject Landlord, its partners, members, managers, shareholders, officers, directors and principals or Landlord's managing agent, if any, to any liability. Tenant shall, to the extent not caused by the negligence or willful misconduct of Landlord or its contractors or agents, indemnify, defend and hold harmless Landlord and Landlord's managing agent, if any, from and against all (a) claims arising from any act or omission of Tenant, its subtenants, contractors, agents, employees, invitees or visitors, (b) claims arising from any accident, injury or damage to any person or property in the Premises or any adjacent walkway during the Term or when Tenant is in possession of the Premises, and (c) Tenant's failure to comply with Tenant's obligations under this lease (whether or not a Default), and all liabilities, damages, losses, fines, costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with any such claim or failure. Landlord and/or Landlord's managing agent shall each be entitled to approve counsel to be retained by Tenant or its insurance carrier to defend Landlord and its managing agent, or, if Landlord and/or its managing agent so choose; to retain its/their own attorneys, whose reasonable fees and disbursements

> shall, at Landlord's option, be paid by Tenant directly to the attorneys retained directly by Landlord and/or its managing agent, or reimbursed to Landlord as Additional Rent.

The Lease provides for broad coverage language and states in subsection (b) that the Tenant shall indemnify the Landlord for claims arising from any accident, injury or damage to any person or property in the Premises. The Lease does not require negligence on the part of the Tenant. As part of this decision this court has granted Reva's summary judgment application. While a such a broad indemnification clause can be challenged if it seeks to indemnify a party for its own negligence, "an indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence." *Giangarra v. Pav-Lak Contracting, Inc.,* 55 AD3d 869, 871, 866 N.Y.S.2d 332 [2d Dept 2008]. The Court does not agree with Defendant IHOPs interpretation of this provision. The Indemnification Provision provides for and constitutes a list of circumstances that would trigger the obligation to indemnify. It does not state that all of the separate conditions need to be established in order to trigger the obligation to indemnify Reva. *See Lesisz v. Salvation Army*, 40 AD3d 1050, 1052, 837 N.Y.S.2d 238, 241 [2d Dept 2007]. Accordingly, Reva's application for summary judgment in relation to its contractual indemnification cross-claim is granted.

The Court grants that aspect of Defendant Reva's motion that seeks summary judgment on its breach of contract cross-claim for failure to procure insurance coverage pursuant to the Lease. Defendant Reva argues that the IHOP Defendants were required by the Lease (See Defendant Reva's Motion, Exhibit "J", Section 11.1) to obtain insurance naming Defendant Reva as an additional insured. In support of this position, Reva relies on the Lease agreement and the insurance coverage that the IHOP Defendants apparently did obtain. The insurance coverage documentation does not name Defendant Reva as an additional insured. The IHOP Defendants do

not raise an issue of fact and a review of the Insurance Policy they annex to their papers (See IHOP Defendants Affirmation in Opposition, Exhibit "B") does not show that Defendant Reva was named as an additional insured.

Based on the foregoing, it is hereby ORDERED as follows:

The motion (motion sequence #2) by the IHOP Defendants is denied.

The motion (motion sequence #3) by Defendant Reva is granted to the extent that the Plaintiff's complaint is dismissed as against Reva. That aspect of Defendant Reva's motion that seeks summary judgment on cross-claims is granted to the extent that any cross-claims against Reva are dismissed and Reva's cross-claims against the IHOP Defendants for contractual indemnification and breach of contract are granted. All other relief requested is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Hon. Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2022 NOV 18 AM 9:32