

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

CARMEN SOLERO and ROBERTO SOLERO,

Plaintiffs,

Index No.: 19250/05

- against -

Motion Date: 2/21/07

40-16 NATIONAL ASSOCIATES, INC.,
ROMONA MINA and ALEXANDER'S BEAUTY
SALON,

Motion No.: 33

Defendants.

- - - - - x

The following papers numbered 1 to 12 on this motion:

	<u>Papers Numbered</u>
Defendant 40-16 National Associates, Inc.'s Notice of Motion-Affirmation-Affidavit(s)- Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	5-7
Defendant Romona Mina & Alexander's Beauty Salon's Affirmation in Partial Support/Opposition Affidavit(s)-Exhibit(s)	8-10
Defendant's Reply Affirmation-Exhibit(s)	11-12

By notice of motion, defendant, 40-16 National Associates, LLC (40-16), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of plaintiffs' complaint on the grounds that they failed to state a cause of action, and summary judgment pursuant to CPLR § 3212, on their cross-claim for contractual indemnification as against defendants Roman Mina (Mina) and Alexander's Beauty Salon (Alexander's).

Plaintiff files an affirmation in opposition. Defendants Mina and Alexander's support in part and oppose in part, and defendant 40-16 replies.

The underlying cause of action is a claim by plaintiff, Carmen Solero, for injuries she alleges she sustained on October 11, 2002, when she slipped and fell down stairs located at 95-21 37th Avenue, premises where Alexander's Beauty Salon was located. Defendant Mina is the owner and operator.

Defendant 40-16 owns the building where the business was located; and leases the premises to defendant Alexander's.

Defendant maintains that plaintiff fails to specify the nature of any dangerous condition that existed on the stairs that caused her to fall. In her bill of particulars she states, however, that she "fell into a stairwell hole into the basement of the shop."

Essentially, defendant maintains that plaintiff "stepped aside" to allow other customers to enter the premises as she was beginning to exit, and that in doing so she "stepped off onto the open stair case," resulting in her fall. As a consequence, defendant argues, plaintiff admits to her own carelessness being the cause of the accident and not the fault of the defendant.

Defendant 40-16 cites defendant Mina's deposition testimony in further support of their contention that 40-16, the out of possession owner of the premises, bears no liability for the accident. The open staircase to the right of the vestibule when entering the premises where plaintiff fell, had been covered over when co-defendant Mina initially leased the premises. Mina removed that covering without permission of 40-16 in order to make use of the space in the basement.

Moreover, 40-16 maintains Mina's testimony was that plaintiff was standing on the stairs as the other customers passed, speaking to someone in the basement, when she made a mis-step and fell.

Finally, defendant 40-16 maintains that the lease agreement between defendant, Alexander's and 40-16 supports their entitlement to contractual indemnification, in the event that plaintiffs succeed in proving their liability and damages.

In support of such, defendant 40-16 cites the following portion of said lease agreement:

"Paragraph 3:

'Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and

requirements of the Federal, State and Local Governments and of any and all their Departments and Bureaus applicable to said premises, for the correction, prevention, and abatement of nuisances or other grievances, in, upon, or connected with said premises during said term...'"

"Paragraph 10:

'Tenant shall neither encumber nor obstruct the sidewalks in front of, entrance to, or halls and stairs of said premises, nor allow the same to be obstructed or encumbered in any manner.'

"Paragraph 12:

'Landlord is exempt from any and all liability for any damage or injury to person or property caused by or resulting from steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of said building, **or from any damage or injury resulting or arising from any other cause or happening whatsoever unless said damage or injury be caused by or due to the negligence of the Landlord.'**"

"Paragraph 37:

'Tenant agrees to hold the Landlord harmless for any damage or injury to any property, fixtures and improvements or to any person or persons on the said demised premises, including but not limited to any damage or injury to the Tenant or to any of the Tenant's servants, employees, agents, invitees, or visitors. The Tenant, at his own cost and expense during the entire term of the lease, shall keep in full force a policy of public liability and property damage insurance with respect to the leased premises...in which the limits of public liability shall not be less than \$1,000,000.00 per person and \$2,000,000.00 per accident...'"

"The policy shall name Landlord, any person, firm or corporation designated by Landlord, and Tenant as insured..."

In response, plaintiff maintains that she slipped and fell down the staircase because the floor was very wet and slippery, a

condition plaintiff maintains that defendants Mina and Alexander's were on notice of. Defendant Mina, in her deposition testimony admits that it was raining very hard that day, and that she found it necessary to continually mop the floor, but insists that plaintiff fell as a result of her own misstep.

On the issue of defendant 40-16's liability, plaintiff maintains, without support, that defendant 40-16 was negligent in allowing co-defendant Alexander's to engage in "construction" within the premises without insisting on compliance with various building codes. Plaintiff, however, does not cite any particular building code violations, and fails to address defendant's contention that as landlord, they relinquished control over the interior of the premises.

Finally, it is undisputed that defendant Mina executed the lease agreement upon which 40-16 relies for the claim of contractual indemnification. Mina, however, a successful business woman for approximately twenty years at that location argues that because of a language difference and her "lack of sophistication" she was somehow taken advantage of by defendant 40-16 and forced into a contract of adhesion.

It has long been held that negligence cases do not generally lend themselves to resolution by summary judgment. Peralta v. Moore, 272 AD2d 487, 459 (2^d Dep't 2000).

Where, as here, however, there is a dispute regarding the reason for plaintiff's fall, but no dispute however as to a recurring accumulation of water being tracked into the shop, there remain questions of material issues of fact for the jury to resolve. Voss v. D&C Parking, 299 AD2d 346 (2^d Dep't 2002); Deluna Cole v. Tonali, Inc., 303 AD2d 186 (1st Dep't 2003).

General Obligations Law § 5-321, makes clear that indemnification clauses are void and unenforceable where lessors seek to exempt themselves from liability for their own negligence.

"Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly

unenforceable.”

Where, however, the contract provides for the lessee to indemnify the lessor for injury to third parties due to some act or omission on the part fo the lessee, such a provision has been held to not be violative of public policy. Hogeland v. Sibley, Linsay & Curr & Co., 42 NY2d 153, 397 NYS2d 502 (1977). To be enforceable, such provisions must be accompanied by comparable language holding the lessor (landlord) responsible for their own negligence. Sanford v. Jonathan Woodner Co., 304 AD2d 813, 758 NYS2d 399 (2d Dep't 2003).

In this instance, the provisions of the lease agreement cited by defendant 40-16, satisfy the statute making the claim for contractual indemnification enforceable. Moreover, in consideration of defendant Mina's many years as a successful business woman, it can not be said as a matter of law that such a provision is unenforceable. Morel v. City of New York, 192 AD2d 428, 597 NYS2d 8 (1st Dep't. 1993).

Accordingly, upon all of the foregoing, that branch of defendant's motion for summary judgment and dismissal of plaintiffs' claim is denied; that branch of defendant's motion for summary judgment on their cross-claim for contractual indemnification is granted to the extent that, it is hereby

ORDERED, that defendant, 40-16 National Association, LLC, shall be entitled to conditional indemnification from Roma Mina and Alexander's Beauty Salon to the extent that they are found liable for damages to plaintiff.

Dated: Jamaica, New York
April 9, 2007

JOSEPH P. DORSA
J.S.C.