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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JOHN HARTOFIL,

Plaintiff(s),

-against-

MOTION DATE: 12/17/07
INDEX No.:12554/06
MOTION SEQUENCE NO:1,2,3

CAL. NO.:2007H2845

McCOURT & TRUDDEN FUNERAL HOME, INC., INCORPORATED VILLAGE OF FARMINGDALE, and F.D. CONTRACTING CORP.

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Second Notice of Motion.....	4-7
Notice of Cross Motion.....	8-10
Answering Affidavits.....	11-13
Replying Affidavits.....	14-20
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendant McCourt & Trudden Funeral Home, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the plaintiff's complaint is granted and the complaint is dismissed as against McCourt & Trudden Funeral Home, Inc. Motion by defendant Incorporated Village of Farmingdale for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and co-defendants' cross-claims is denied as moot with respect to the complaint which has been withdrawn as against the Village, and is denied with respect to the cross-claims. Cross-motion by defendant F.D. Contracting Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the plaintiff's complaint is denied.

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiff in a trip and fall which took place on January 27, 2006 in front of premises owned by defendant McCourt & Trudden Funeral Home (hereinafter "McCourt") at

385 Main Street in the Village of Farmingdale. Plaintiff avers that he was walking along the sidewalk in front of McCourt. To his left between the sidewalk and the curb was an area described as red brickwork. He stepped "off the sidewalk" onto the brickwork and tripped on an indentation in the brickwork where the brick had sunk or settled and was approximately two inches lower than the sidewalk.

The subject brickwork was installed along Main Street for the Village in 1997 by defendant J.D. Contracting Corp. Regarding the project, Fred DeGore the secretary/treasurer of J.D. Contracting testified at deposition that the scope of the work included installation of bricks in between the sidewalk and the curb, an area referred to as a right-of-way. The curbs were also newly installed, but not the sidewalks. The procedure involved removing and installing the new curb, removing the "section of concrete between the curb and the existing sidewalk" and installing brick pavers. He also testified that in order to install the brick pavers the municipal contract required his company to "install what they call recycled concrete, and then put sand and install the brick on sand."

Joseph Trudden Jr., the funeral director of McCourt testified at deposition that he noticed the damaged brick work in the spring or summer of 2006 and gave notice to the Village. He testified that he observed the depression and "[w]hen it became deep enough where we noticed someone could fall, we made a written inquiry to the village to have it repaired." The Village repaired the brickwork. McCourt did no repairs or other work in the area where plaintiff fell.

Fred Zamparelle, Superintendent of the Farmingdale Department of Public Works, testified regarding the 1997 renovation on Main Street. He stated that the renovation was not to the sidewalk but consisted of "brickwork between the curb and the sidewalk". During his three year employment he has ordered employees of the Village to make repairs and alterations to the brickwork "a couple of different times."

With respect to the plaintiff's fall in January of 2006 Zamparelle did not receive prior written notice of the dangerous condition. However the Village did receive notice from McCourt later in 2006, and Zamparelle went to the location and "saw that there was some bricks which were settled." He directed village personnel to remove the areas of depressed brick and "raise them back up to sidewalk height." When asked whether the Village would also fix an area of the sidewalk Zamparelle stated, "We maintain the brick area. I believe we do not fix the sidewalk areas."

The affidavit of Deputy Village Clerk Elizabeth Kaye states that she directed a search for records kept by the Village pertaining to the "utility strip" and sidewalk in front of 385 Main Street and the Village did not receive any written complaints for the area prior to January 27, 2006.

The defendants now move for summary judgment seeking dismissal of the complaint.

In general "liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v. Giunta*, 88 NY2d 449, 452-453). However, liability to abutting landowners will be imposed and the general rule is inapplicable where "a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" (*Hausser v. Giunta, supra*). Although maintenance of the public sidewalks is a "non-delegable duty" (*Rothstein v. State*, 284 AD2d 130, Municipal Home Rule Law permits municipalities to transfer the duty of maintenance of the public sidewalks to abutting property owners as well as liability for injuries sustained for breach of the duty, so long as there is no conflict with a state statute (*Hausser v. Giunta, supra* at 454).

Section 81-3.1 of the Code of the Village of Farmingdale places responsibility for maintenance of the public sidewalk upon adjoining landowners, and provides in relevant part that "[n]o person shall suffer any sidewalk . . . adjacent to premises owned or occupied by said person to become out of repair or in an unsafe or dangerous condition." It also provides that the adjoining landowner or occupant "shall be responsible for the maintenance and repair of such sidewalks and, upon the breach of such responsibility and duty, shall be responsible to those who are injured thereby". Accordingly, McCourt is liable for any injury caused by its failure to "maintain and repair" the public sidewalk adjacent to its premises.

The major issue with respect to McCourt's liability is whether defective brickwork at the accident site is a sidewalk. McCourt would be liable if it had actual or constructive notice of a dangerous condition on the sidewalk adjacent to the premises (*Hausser v. Giunta, supra; Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [defining constructive notice]).

On the other hand, if the defect at the accident site is not a public sidewalk, then the liability shifting ordinance is not applicable, and there are no other grounds to hold McCourt liable

to plaintiff for his injuries.

The record before the court raises no factual issue in this regard. While the Village attempts to provide authority to show that an area between a curb and sidewalk is generally part of the sidewalk, the Village has not defined or treated the area of brickwork as part of the sidewalk, referring to it as a right of way or utility strip and performing maintenance and repair itself since its construction.

The Village Code shifts liability for maintenance of the sidewalks to the adjoining landowner and also places responsibility for injury caused by defective sidewalks on that landowner. As noted, there is no evidence that the Village treats the brickwork as a sidewalk under the Code, as it gave no notice to McCourt (or apparently to any other landowner) to repair damaged brickwork as required by § 81-3.1 of the Village Code. Nor has it provided evidence that it required any landowner to pay for those repairs performed by the Village as testified to by Fred Zamparelle of the Public Works Department. Rather the Village dispatches it own employees to make repairs.

Throughout this record the Village refers to the brickwork as a right of way or a utility strip, not a sidewalk. Nor is it treated as a sidewalk under the Village Code with respect to adjoining landowners. Accordingly, as the defective condition was the depression in the brickwork, so that it was no longer even with the sidewalk, and the sidewalk is not alleged to be defective, the sidewalk maintenance responsibility of the defendant McCourt is not implicated and the complaint is dismissed as against it.

With respect to the allegation of negligence against defendant F.D. Contracting (hereinafter "F.D."), there is no factual dispute regarding its adherence to the specifications provided by the Village and its Engineering Firm H²M. It is plaintiff's contention that the specifications were defective, and therefore the construction was defective, and that F.D. should have known that the materials used would lead to a tripping hazard due to premature settling of the brickwork which was supposed to remain level with the sidewalk.

Plaintiff offers the affidavit of Thomas Cabrera, an experienced mason and owner of Cabrera Construction. Cabrera has done various masonry jobs including sand joint bricks (pavers) and has worked "regularly for the Village of Rockville Centre". He opines that masonry work is made to last for "generations" and sand joint bricks should not begin to sink after "only years."

Cabrera states that F.D. failed to use a proper foundation of

"actual concrete" and instead used a cheaper material called "recycled concrete (also called recycled cement)" which "ultimately sinks after the first few years." Cabrera states that recycled concrete is meant to be used only where "good seepage" is required, or where a "little give" is required, such as a foundation for "blacktop" . He opines that it is an insufficient foundation for sand joint bricks which should not shift or sink. He states that recycled concrete cannot be adhered to, and that its use, together with the use of sand as a second base, causes shifting and premature settling.

Cabrera states that the "industry standard" is to use "three to four inches of transit mix cement" which is laid smooth and level. When it dries "the bricks are adhered to the cement with a specially formulated mortar." He concludes that anything less will lead to "eventual sinking and a hazard." It is his opinion that a mason would know that " such work eventually leads to the creation of a hazard" and that a good mason does not take "short cuts."

Generally, an independent contractor such as F.D. "owes no duty and is not liable to third parties after acceptance of its work by the owner, unless the contractor retained some control after acceptance" (*Morales by Aponte v. City of New York*, 1994 WL 509927 [S.D.N.Y. 1994]). However, the following constitute exceptions:

> After acceptance of its work by an owner . . . the independent contractor may nonetheless be held liable if it . . . "knew the work was being performed in such a manner and according to . . . specifications and directions, so as to create a hazard and knew that an injury to a third person could result when it was used for the purposes intended" or if "the plan was so obviously defective that a contractor of average skill and ordinary prudence would not have attempted the construction according to the plan"

(*Morales by Aponte v. City of New York*, *supra* [citations omitted]; *Ryan v. Feeney & Sheehan Bldg. Co.*, 239 NY 43, *see also, Brown v Welsbach Corp.*, 301 NY 202 [affirmative act in creation of a dangerous condition in a public highway is exception to general rule that independent contractor cannot be held liable after acceptance of the work by owner]).

As the proponent of a summary judgment motion F.D. "must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853). Then the burden shifts to plaintiff "to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 326-327).

Assuming *arguendo* for purposes of this motion that F.D. has made out a prima facie case for summary judgement by statement of the general rule, the testimony of plaintiff's expert is sufficient to raise a factual issue regarding an exception, i.e., that the sinking of the bricks at the accident site was due to knowing use of inferior construction materials. The issue of contractor liability is implicated and a factual issue raised as to whether the work performed according to the Village's specifications would create a hazard, and/or the plans were so obviously defective that a contractor of ordinary skill and prudence would not perform the work (*Morales by Aponte v. City of New York, supra*).

Finally with respect to the Village, as the accident site is not a sidewalk, neither the liability shifting ordinance or the prior written notice requirement is applicable, as the prior written notice requirement of Village Law § 6-628 applies only to a "street, highway, bridge, culvert, sidewalk or crosswalk." The Village has not shown that the brickwork fits any category requiring prior written notice. Moreover, even were the accident site considered a sidewalk for notice purposes, "an exception to the prior written notice requirement applies where a municipality has created the defect through an affirmative act of negligence", even where the actions are those of its contractor (*Tumminia v. Cruz Const. Corp.*, 41 AD3d 585, 586).

Since plaintiff has discontinued this action against the Village, the Village's motion for summary judgment is moot. The Village now seeks dismissal of the cross-claim asserted by McCourt and F.D. As the complaint is dismissed as against McCourt only the cross-claim of F.D. is at issue.

The Village asserts that it cannot be held liable for the work of an independent contractor on the public roadway or sidewalk unless its affirmative negligence in the construction "immediately" results in a dangerous condition. The Village claims that it "took years" for the brick work to settle, and therefore it cannot be held liable.

There is at least a factual issue as to whether the sunken

brickwork was the result of years of wear and tear or the result of inferior materials used in construction (*see, Galante v Village of Sea Cliff* , 13 AD3d 577). *Galante* is instructive with respect to the allegations of the Village. There the plaintiff's expert alleged that the cracking and uplifting of the concrete thoroughfare which caused the plaintiff's injury was "consistent with" improper installation and or design error. The construction occurred 50 years prior to the suit and it was held that the plaintiff failed to show that the uplifted concrete was caused by the municipality's actions and "given the long passage of time between the accident and the construction of the roadway, the plaintiffs failed to demonstrate that the alleged defect was the result of the County's affirmative act of negligence, rather than the *mere passage of time*" (*Galante v Village of Sea Cliff,* 13 AD3d 577, 578, *supra* [emphasis supplied]).

The authority relied upon by the Village is distinguishable, as it relates solely to the repair of potholes. As the Third Department has held "an ineffectual pothole repair job which does not make the condition any worse is not an affirmative act of negligence" (*Kushner v. City of Albany*, 27 AD3d 851, *affd* 7 NY3d 726; *see also, Bielecki v. City of New York*, 14 AD3d 301; *Hyland v. City of New York*, 32 AD3d 822 [mere *eventual* emergence of a dangerous condition as a result of wear and tear and environmental factors does not constitute an affirmative act of negligence]; *Yarborough v. City of New York*, 28 AD3d 650).

Here the court is not concerned with a pothole or with emergency repair. The issues involve a capital construction project and decorative brickwork adjacent to the sidewalks the length of Main Street in the Village, where it is foreseeable that pedestrians would tread. Unlike the pothole cases, it cannot be said that the Village did not exacerbate an existing dangerous condition. In other words this is not a case of "what was once a pothole gradually became a pothole again" (*Kushner v. City of Albany, supra*).

This action is more analogous to *Oppenheim v. Village of Great Neck Plaza* (10 Misc3d 1070(A), * * * 4 [Supreme Court Nassau County 2006]). There the court found that a question of fact existed regarding an affirmative act of negligence and creation of a dangerous condition which resulted after the passage of some time. The court stated:

> . . . plaintiff's' expert definitively attested that the condition was caused by negligent

> construction rather than the mere passage of time. While he might not be an expert on bridge construction and design, he is an expert in sidewalk safety conditions and is qualified at the very least to distinguish between negligent construction and the settling time-related process.

(*Oppenheim v. Village of Great Neck Plaza, supra*). Here too, the plaintiff's expert attested that the condition was caused by negligent construction, rather than the "mere" passage of time. It was his expert opinion that use of the proper materials for the brickwork foundation would not have resulted in settling of the brickwork within "a period of years". As he stated, mason work is intended to last for generations. At the very least, a question of fact is presented whether the condition was created by the Village's affirmative negligence or the mere passage of time. Accordingly, the authority relied upon by the Village is inapposite, and the cross-claim of J.D. is not dismissed.

Insofar as the Village seeks dismissal of J.D.'s cross-claim based upon its contractual duty to indemnify the Village, it is well established that "an indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence" (*Lesisz v. Salvation Army*, 40 AD3d 1050, 1051). As the question of the Village's negligence remains a factual one, summary judgment may not be awarded pursuant to the indemnity clause of the construction agreement.

Dated: FEB 07 2008

J.S.C.