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SCANNED ON 8/1/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN PART 36
Justice

Gail Hoffman

INDEX NO. 111002/04

- v -

NJR Assoc, 48 Ova Nails et al

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5, 6, 7
Replying Affidavits	8
	3, 4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion & cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/31/08

J.S.C.
JUSTICE DORIS LING-COHAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY
PRESENT: Hon. DORIS LING-COHAN, Justice PART 36

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GAIL HOFFMAN,

Plaintiff,

-against-

NJR ASSOCIATES, 48 DIVA NAILS & "PAUL" the person believed to be the owner of DIVA NAILS,

Defendant.

Index: 111002/04

Motion Seq. 001

DECISION/ ORDER

DORIS LING-COHAN, J.:

Defendant 48 Diva Nails (Diva) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint and all cross claims alleged against it. Defendant N.J.R. Associates (NJR) similarly cross-moves for summary judgment dismissing the complaint and all cross claims, and, in addition, for summary judgment on its contractual indemnification claim against Diva.

FACTS

The complaint, as amplified by plaintiff's verified bill of particulars, alleges that, on the afternoon of December 31, 2003, plaintiff Gail W. Hoffman tripped on an uneven and broken portion of the sidewalk adjacent to the building (Building) located at 48 East End Avenue in Manhattan, fell, and sustained injuries including a broken right shoulder. The Building is owned by NJR. Diva occupies a store on the ground floor of the Building, which it leases from NJR.

Plaintiff testified at her deposition that as she was walking on the subject block, her right foot got caught under an approximately

two-inch raised portion of the pavement that extended between approximately 18 and 24 inches in length.[1] NJR's deposition witness, the superintendent of the Building, testified that he had observed the uneven pavement on the sidewalk adjacent to the store, for approximately, more than a year before plaintiff's accident. [Diva's Notice of Motion, Exh. G, Deposition of Anthony Cassar, at 5-6, 10-14]. The superintendent further testified that his responsibilities for the sidewalk were limited to cleaning, sweeping and removing snow, and that he did not repair the sidewalk, nor did he observe others repairing the sidewalk prior to the subject accident. [id. at 15, 18, 22-23, 28-29].

MOTION BY DIVA AND CROSS MOTION BY NJR FOR SUMMARY JUDGMENT

Administrative Code of City of New York (Administrative Code) § 19-152 (a) provides, in relevant part, that:

> [t]he owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property ... .

Administrative Code §7-210 provides, in relevant part:

> (a) [i]t shall be the duty of the owner of real property abutting any sidewalk...to maintain such sidewalk in a reasonably safe condition...(b) [n]otwithstanding any other provisions of law, the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such

[1] The Court notes that neither moving defendant has shown that the defect in the subject pavement that plaintiff described did not exist at the time of her accident, or was not sufficiently substantial to have been the proximate cause of her accident.

> sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags... .

Administrative Code §7-210 is applicable here, as plaintiff's accident occurred after September 14, 2003. Accordingly, NJR, as the property owner, has a statutory duty to maintain the sidewalk in a reasonably safe condition and may be held liable if plaintiff can establish that her fall was proximately caused by NJR's failure to maintain the sidewalk. Accordingly, NJR's cross motion for summary judgment dismissing the complaint is denied.

NJR contends, however, that, pursuant to its lease, Diva was responsible for maintaining and repairing the subject sidewalk.

The lease that defendants entered into, on March 8, 2000, is the Standard Form of Store Lease prepared by the Real Estate Board of New York, Inc. (the "lease"). Paragraph 4 of the standard form lease provides that:

> [o]wner shall maintain and repair the public portions of the building, both exterior and interior...[t]enant shall ... take good care of the demised premises ..., and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition ... ."

Paragraph 30 of the lease provides, in relevant part, that:

> if demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish.

On the same date that defendants entered into the lease, they also entered into a rider, which is not a standard form, that "modified and supplemented" [see Exh. I, Notice of Motion] the lease and which provides that:

> [w]herever there is any conflict between this Rider and the printed part of this contract, the provisions of this rider are paramount and the contract shall be construed accordingly.

Paragraph 63 of the rider entitled "Adjacent Property and Sidewalks" provides, in relevant part, that:

> [t]enant shall not use the sidewalk in front of, or the entrances to or exits from [the demised premises] except for ordinary and usual ingress to and egress from said premises, and shall remove any accumulations of ice, snow and rubbish.

By not including the tenant's obligation to repair the sidewalk, as provided for in paragraphs 4 and 30 of the standard form printed lease, in paragraph 63 of the rider, while specifically retaining therein only that part of the provision of paragraph 30 that the tenant is required to remove accumulations of ice, snow, and rubbish, defendants clearly manifested their intent that Diva not be required to repair the sidewalk. Moreover, when a party is under no legal duty to assume a statutory imposed duty of another, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. See generally Weissman v. Sinorm Deli, Inc., 88 NY2d 437 (1996)("[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to

avoid reading into it a duty which the parties did not intend to be assumed" (citations omitted). Here, the obligation to repair the sidewalk is specifically imposed on the owner by statute; thus, to avoid or to delegate such statutory obligation by contract, the provision transferring such statutory duty must be clear and unambiguous, which is absent here. The lease rider, specifically crafted by the parties, as opposed to the standard form lease, is noticeably silent as to the transferring of the obligation to repair to the tenant, but, nevertheless, specifically imposes upon the tenant only the obligation to remove ice, snow and rubbish, in the paragraph entitled "Adjacent Property and Sidewalks". (¶63, of Rider). Accordingly, the obligation that Administrative Code § § 7-210 and 19-152 (a) places on the owner, NJR, was not affected by the lease between defendants; Diva had no sidewalk-related duties to any passerby, and therefore plaintiff has no cognizable claim against Diva.

NJR's CROSS MOTION FOR SUMMARY JUDGMENT ON ITS CROSS CLAIMS AGAINST DIVA FOR CONTRACTUAL INDEMNIFICATION

NJR has cross-moved for summary judgment on its cross claim against Diva for contractual indemnification pursuant to the lease.

Paragraph 8 of the printed lease provides that:

> [t]enant shall indemnify and save harmless Owner against and from all liabilities,... costs and expenses for which Owner shall not be reimbursed by insurance ... suffered or incurred as a result of any breach by Tenant ... of any covenant o[r] condition of this lease, or the carelessness, negligence or improper conduct of the Tenant ... .

NJR has failed to identify any breach by Diva of the lease or rider, or any carelessness, negligence or improper conduct on Diva's part.

Article 60 of the rider expands Diva's liability for indemnification by providing that Diva shall hold NJR harmless for "any costs ... arising out of or in connection with the furnishing of any labor or material for contract by the Tenant ... ." NJR does not contend that it has incurred, or that it may incur any costs thus arising. Paragraph 60 also provides that "Tenant and Landlord shall ... indemnify the other from all injury ... to any person ... while on the demised premises ... ." It is undisputed that the sidewalk where plaintiff was injured was not part of Diva's demised premises. Indeed, section 63 of the rider explicitly states that:

> [n]o space attached or appurtenant to or connected with the demised premises lying in or under any public street or highway or any other public property is included in this demise ... .

In short, NJR has shown no basis for its claim of contractual indemnification against Diva.

Citing Great N. Ins. Co. v Interior Constr. Corp. (7 NY3d 412 [2006]), NJR appears to argue that the mere fact that the lease contains an indemnification provision that is coupled with an insurance procurement provision requires Diva to indemnify NJR. Following Hogeland v Sibley, Lindsay & Curr Co. (42 NY2d 153 [1977]), the Great N. Ins. Co. Court held that when two parties

enter into an indemnification agreement "whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law [GOL] § 5-321 does not prohibit indemnity." Great N. Ins. Co. v Interior Constr. Corp., supra, 7 NY2d at 419. However, contrary to NJR's argument, the question of whether GOL § 5-321 bars indemnification does not even arise if the indemnification agreement has not been triggered. See id. at 417-18. Here, NJR has submitted no evidence that, or even given any indication of how, the indemnification agreement may have been triggered. Therefore, the branch of NJR's cross motion seeking summary judgment against Diva on its cross claims for contractual indemnification is denied and the branch of Diva's motion seeking dismissal of NJR's cross claims for indemnification is granted.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of 48 Diva Nails, is granted and the complaint is hereby severed and dismissed as against defendant 48 Diva Nails, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of 48 Diva Nails to dismiss the cross claim against it is granted and the cross claim of N.J.R. Associates is dismissed; and it is further

ORDERED that the cross motion of defendant NJR Associates is denied; and it is further

ORDERED that the remainder of the action shall continue; it is further

ORDERED that within 30 days of entry of this order, defendant 48 Diva Nails shall serve a copy upon all parties with notice of entry.

Dated: July 30, 2008

Hon. Doris Ling-Cohan, J.S.C.

G:\Supreme Court\Summary Judgment\HOFFMAN.njr associates.wpd