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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice
TRIAL/IAS PART 5
NASSAU COUNTY

ALBINO J. SERRADO,

Plaintiff,

-against-

Index No. 20384/06

PARK EAST, LLC,

ORIGINAL RETURN DATE:09/16/08
SUBMISSION DATE: 09/29/08

Defendant.

PARK EAST, LLC,

Third-Party Plaintiff,

-against-

MOTION SEQUENCE #3,4

REGENT MANAGEMENT, INC.,

Third-Party Defendant.

PARK EAST, LLC,

Third-Party Plaintiff,

-against-

PATHMARK STORES, INC.,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3,4,5
Reply.....	6,7,8,9

This motion by the first third-party defendant, Regent Management, Inc. ("Regent Management"), for an order pursuant to CPLR 3212 dismissing the first third-party complaint against it and all cross-claims advanced against it by the second third-party defendant, Pathmark Stores, Inc. ("Pathmark"), is determined as provided herein.

This motion by the defendant/first third-party plaintiff/second third-party plaintiff, Park East, LLC. ("Park East"), for an order pursuant to CPLR 3212 (1) granting it summary judgment dismissing plaintiff's complaint together with any and all cross-claims and counterclaims or, in the alternative; (2) pursuant to CPLR 3212(e) granting Park East partial summary judgment declaring that the first third-party defendant Regent Management and the second third-party defendant Pathmark must indemnify it for any damages incurred by it in this action pursuant to common law and/or contract; and/or (3) granting Park East summary judgment against those parties on its breach of contract claim based upon their failure to name Park East as an additional insured is determined as provided herein.

In this action, plaintiff seeks to recover damages for personal injuries he sustained when he fell on snow and/or ice in a parking lot in Garden City, New York, on January 21, 2004 at about 10:00 AM. Plaintiff commenced this action against the landlord Park East alleging that it was negligent in its maintenance of the property. Park East brought the first third-party action against its management company Regent Management and the second third-party action against the tenant Pathmark seeking to recover, *inter alia*, contribution and common law and contractual indemnification, as well as for breach of contract based upon the third-party defendants' failure to have Park East named as an additional insured under their policies.

Pathmark has cross-claimed against Regent Management for contribution and breach of contract. Pathmark alleges that Regent Management contracted to indemnify and hold it harmless "from all claims, suits and actions of every name and description brought against it and all costs and damages which it may be put to on account or by reason of any injury . . . resulting from the work, the method, or from the negligence, carelessness in the performance of the work, duties and negligence in the completion of their job" and that Regent Management was contractually obligated to obtain comprehensive general liability insurance naming it as an additional insured but failed to do so.

Pathmark has also counterclaimed against Park East seeking contribution and alleging breach of contract. Pathmark alleges that Park East contracted to indemnify and hold it harmless "from all claims, suits and actions of every name and description brought against it and all costs and damages which it may be put to on account or by reason of any injury . . . resulting from the work, the method, or frm the negligence, carelessness in the performance of the work, duties and negligence in the completion of their job" and that Park East was contractually obligated to obtain comprehensive general liability insurance naming it as an additional insured but failed to do so.

Park East seeks summary judgment dismissing the complaint against it on the grounds that it was an out-of-possession landlord. In the alternative, it seeks judgment awarding it common law

and/or contractual indemnification from both Regent Management and Pathmark and to recover for breach of contract based upon their alleged failure to have it named as an additional insured on their insurance policies.

Regent Management seeks summary judgment dismissing the first third-party complaint against it as well as Pathmark's cross-claims.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

The pertinent facts are as follows:

Plaintiff fell in the parking lot on snow and/or ice in a cabana where Pathmark's shopping carts were kept. Regent Management as Park East's management company had contracted with Melville Contractors to plow the parking lot.

Park East as landlord and Pathmark a/k/a Supermarkets General Corporation as tenant were parties to a lease for the subject property originally between Arlen Operating Company, Park East's predecessor-in-interest, and E.J. Korvette, Inc., Pathmark's predecessor-in-interest. The property was a shopping center which included several commercial businesses and a Pathmark grocery store. Park East had a property management agreement with Regent Management. The agreement was primarily oral but an indemnification provision was in writing and executed by Regent Management.

At her examination before trial, Patricia Schettino testified on behalf of Park East that Pathmark was assigned the lease in the name of Supermarkets General Corporation in 1980. She testified that Park East's agreement with Regent Management required Regent Management to ensure that the parking lot was maintained, that lights were operating, and that site work was subcontracted out. For those purposes, Regent Management visited the property about twice a week. She testified that Pathmark hired the contractor to put up the cabanas which Pathmark used for its carts. She testified that there was no agreement regarding who maintained the cabanas but she "believed" that the lease required Pathmark to maintain any structures it created, that Pathmark

created the cabanas, and that she therefore believed that Pathmark was entirely responsible for the cabanas.

At his examination before trial, James Dalto, President of Regent Management, acknowledged that pursuant to an agreement with Park East, the subject property including the parking lot was managed by Regent Management at the time of the plaintiff's accident. He testified that as Park East's management company, Regent Management was responsible for handling any maintenance issues on behalf of Park East as well as to have the parking lot plowed. However, he testified that the tenants were responsible for snow removal in front of their own stores and that pursuant to its lease with Park East, Pathmark was responsible for snow removal in front of its stores, in its delivery area and in its shopping cart cabanas. He testified that Regent Management's agreement with Melville Contractors specifically excluded structures owned and erected by Pathmark, including the cabanas. However, Dalto testified that he never discussed either of these things with Melville Snow Contractors or Pathmark and that he does not know how this was decided. He admitted that Regent Management was supposed to procure general liability insurance on behalf of Park East and acknowledged that the Indemnification Agreement for Contractors between Regent Management and Park East operated to have Regent Management hold Park East harmless for any work Regent Management was obligated to perform at the property.

Barbara Williams, the Assistant Manager at Pathmark on the date of plaintiff's accident, testified at her examination before trial that there were between six and nine shopping cart cabanas/corrals in the parking lot. When asked if Pathmark did any maintenance or repair work to the cabanas, she responded that Pathmark did not do maintenance work in or remove the snow from the cabanas. She testified that Pathmark would always contact the landlord if there was a problem with the cabanas at that store. She testified though that even though the landlord had a sweeper sweep the lot and that cleaning the cabanas was not really necessary, as a courtesy to the customer, Pathmark employees occasionally removed debris from the cabanas, especially if the debris presented an obstacle to the customers. Ms. Williams testified that Pathmark did take care of the snow on the sidewalk in front of the store including the cabanas on the sidewalk but again that the landlord was responsible for snow removal in the parking lot, including the cabanas. Ms. Williams admitted though that when it snowed, Pathmark employees would try to move the carts from the parking lot cabanas to the sidewalk cabanas for the customers' convenience, but if there was too much snow, they would just leave the carts in the parking lot cabanas until the snow melted.

The lease between Pathmark and Park East provided "[t]hroughout the term of this lease, Tenant shall be in exclusive control and possession of the leased premises as provided herein, and Landlord, Fee Owner and Underlying Sublessor shall not in any event whatsoever be liable for any injury or damage to any property or to any person happening on or about the leased premises . . ." As concerns buildings and installations, their lease provides: "[e]xcept as specifically otherwise provided herein Tenant, throughout the lease term, shall, at its sole expense, maintain all buildings on the leased premises, and all **installations** on, under or over the leased premises. Maintenance by Tenant of the sidewalks contiguous to and immediately surrounding the buildings

leased to Tenant shall include removal of the snow and rubbish (emphasis added)." Nevertheless, the lease defines the parking lot as a "common area", permits Pathmark's non-exclusive use of same, and requires Pathmark to contribute to its maintenance costs. The lease also provides that the landlord has the right to make rules and regulations regarding the parking lot and obligates the landlord to maintain or cause to be maintained the common areas–including the parking lot–"including cleaning and removal of snow, ice and refuse therefrom . . ."

The lease requires Pathmark to defend, indemnify and hold Park East harmless "against all claims, liability, suits, loss and damages by any party arising out of any accident, injury, damage or other occurrence upon or about the leased premises or appurtenances thereto . . . however caused, or arising out of the condition, occupation, maintenance, repair, use or operation of the premises or appurtenances except to the extent that same have been caused by [Park East's] willful act or negligence." In addition, pursuant to the lease and memorandum, Pathmark was required to provide comprehensive liability insurance naming Park East as an additional insured.

Melville Snow Contractors' contract with Regent Management described the job name as "Pathmark," the job location as 2301-2349 Jericho Turnpike, Garden City Park, and required it to, *inter alia*, "clear snow from vehicular entrances, exits, roadways, **parking** and loading areas (emphasis added)."

"The Indemnity Agreement for Contractors," which was part of the agreement between Park East and Regent Management provided:

> Regent Management ("Contractor") hereby agrees to indemnify and hold harmless owner and its managing agent . . . from and against any and all claims, damages, liabilities, losses, costs and expenses including attorneys' fees and expenses resulting from or arising directly or indirectly in connection with this contract (as the same may be modified) and any work contemplated or performed pursuant hereto.

While Pathmark maintains that Park East has not established that it was a party to the lease, Park East avers that although the lease is in the Supermarkets General Corporation name, "Pathmark Garden City location" is on the lease and Pathmark is the name under which "Supermarkets General Corporation" trades. Pathmark has not denied that.

"To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff." Quick v G.G.'s Pizza & Pasta, Inc., 53 AD3d 535 (2d Dept. 2008), citing Nappi v Incorporated Vil. of Lynbrook, 19 AD3d 565, 566 (2d Dept. 2005). " '[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property.' " Quick v G.G.'s Pizza & Pasta, Inc., supra, quoting Nappi v Incorporated Vil. of Lynbrook, supra, at 566. " 'The existence of one or more

of these elements is sufficient to give rise to a duty to exercise reasonable care.' " Quick v G.G.'s Pizza & Pasta, Inc., supra quoting Turrisi v Ponderosa, Inc., 179 AD2d 956, 957 (3d Dept. 1992). " 'An out-of-possession landlord is not liable for injuries sustained on the premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs.' " Couluris v Harbor Boat Realty, 31 AD3d 686 (2d Dept. 2006), quoting Seney v Kee Assoc., 15 AD3d 383, 384 (2d Dept. 2005); see also, Valenti v 400 Carlls Path Realty Corp., 52 AD3d 696 (2d Dept. 2008). "Control may be evidenced by the lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises." Tayler v Lastres, 45 AD3d 835 (2d Dept. 2007), citing Ever Win, Inc. v 1-10 Indus. Assoc., LLC, 33 AD3d 845 (2d Dept. 2006); Winby v Kustas, 7 AD3d 615 (2d Dept. 2004); see also, Putnam v Stout, 38 NY2d 607 (1976). "An owner of real property, or a party in possession or control thereof, may be liable for a hazardous snow or ice condition existing on the property as a result of the natural accumulation of snow or ice only upon a showing that it had actual or constructive notice of the hazardous condition and that a sufficient period of time elapsed since the cessation of the precipitation to permit the party to remedy the condition." Hutchinson v Medical Data Resources, Inc., 54 AD3d 362 (2d Dept. 2008), citing Lee-Pack v 1 Beach 105 Assoc., LLC, 29 AD3d 644 (2d Dept. 2006).

Park East's position that it was an out-of-possession landlord and that Pathmark was solely responsible for the cabanas, including the ground, fails. While Pathmark is obligated to maintain the buildings and all installations, the "parking lot" is defined as a "Common Area;" Pathmark is given non-exclusive use of it; the lease provides that the lessor can make rules and regulations for the parking lot; and, more importantly, the lease provides:

> Landlord shall be obligated to maintain or cause to maintain the Common Area . . . including cleaning and removal of snow, ice and refuse therefrom at its sole cost and expense except as in Section 4 below provided [the contribution paragraph mentioned earlier].

Whether the ground where the plaintiff fell in the parking lot under the cabana's canopy falls under the "parking lot" or "installation" provision of the lease presents an issue of fact. And, while Park East maintains that the lease's description of the leased property makes clear that Pathmark leased the parking lot, too, the description, without more, does not resolve that issue and the aforementioned lease provisions nevertheless raise an issue of fact as to who was responsible for the parking lot as well as the ground in the cabana. In light of this issue of fact, Park East's status as an out-of-possession landlord does not absolve it of responsibility as a matter of law. Kane v Port Authority of New York and New Jersey, 49 AD3d 503 (2d Dept. 2008); Taylor v Lastres, supra; Zappel v Port Authority of New York, 285 AD2d 389 (1st Dept. 2001); Fucile v Grand Union Co., Inc., 270 AD2d 227 (2d Dept. 2000).

Turning to Regent Management's request for relief, its position that Pathmark alone was entirely responsible for the cabana area fails, too. Indeed, not only is there an issue of fact as to whether Park East or Pathmark was responsible for the place where the plaintiff fell, Regent Management's agreement with Melville Snow Contractors obligates it to "clear snow from vehicular entrances, exits, roadways, **parking** and loading areas (emphasis added)." Thus, whether Park East is entitled to recover from Regent Management based upon breach of contract presents an issue of fact.

Nevertheless, "[i]t is well established that a plaintiff may not maintain a cause of action for breach of contract where it had no contractual relationship with the defendant, and was not in privity with it." Natural Stone Warehouse Inc. v AKG Yahtim Ve Insaat Malzemeiri Sanayi ve Ticaret A.S. 20 Misc3d 1143(A) (Sup. Ct. Kings Co. 2008), citing Grinnell v Ultimate Realty, LLC, 38 AD3d 600 (2d Dept. 2007); Cinderella Holding Corp. v Calvert Ins. Co., 265 AD2d 444 (2d Dept. 1999); M. Paladino, Inc. v J. Lucchese & Son Contr. Corp., 247 AD2d 515 (2d Dept. 1998); Decker v Chuang, 185 AD2d 613 (4th Dept. 1992). Accordingly, Pathmark's cross-claim for contractual indemnification and breach of contract against Regent Management are dismissed. There was no privity between these entities. However, in light of the issues of fact regarding who was responsible for the ground under the cabanas in the parking lot, dismissal of Pathmark's claim for contribution from Regent Management would be premature.

A contractual indemnification provision in a contract concerning the construction, repair or maintenance of property which indemnifies a party for his own negligence runs afoul of General Obligations Law § 5-322.1 and is void as against public policy. Leibel v Flynn Hill Elevator Company, 25 AD3d 768 (2d Dept. 2006), citing Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 (1997). To recover contractual indemnification, a party must be free of fault. Brown v Two Exch. Plaza Partners, 76 NY2d 172, 179 (1990). Thus, in order to prevail on a claim for contractual indemnification, a party must prove its lack of negligence. Reynolds v County of Westchester, 270 AD2d 473 (2d Dept. 2000). A party is not entitled to summary judgment on a claim for contractual indemnification where an issue of fact concerning that party's negligence exists. Coque v Wildflower Estates Developers, Inc., 31 AD3d 484, 489-490 (2d Dept. 2006).

To recover indemnification pursuant to the common law, a party must establish not only that it was free of negligence "but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party. . ." Correia v Professional Data Management, Inc., 259 AD2d 60, 65 (1st Dept. 1999), citing McDermott v City of New York, 50 NY2d 211 (1980), rearg den. 50 NY2d 1059 (1980).

" '[A]n agreement to purchase insurance coverage is clearly distinct from and treated differently from [an] agreement to indemnify.' " Longwood Central School District v American Employers Insurance Company, 35 AD3d 550 (2d Dept. 2006), quoting Kennelty v Darlind Constr., Inc., 260 AD2d 443, 445 (2d Dept. 1999) and citing Kinney v G.W. Lisk Co., Inc., 76 NY2d 215, 218

(1990). "Furthermore, while an indemnification provision in a contract that seeks to indemnify a party for its own negligence is void as against public policy, insurance procurement provisions are valid and enforceable and are not proscribed by General Obligations Law § 5-322.1." Longwood Central School District v American Employers Insurance Company, supra, citing Leibel v Flynn Hill El. Co., supra; Cavanaugh v 4518 Assoc., 9 AD3d 14, 20-21 (1st Dept. 2004).

Park East's request for contractual indemnification from Pathmark fails because Park East's role here, i.e., whether it was negligent, presents an issue of fact. General Business Law § 5-322.1; Napoli v Wright, 21 AD3d 1071 (2d Dept. 2005); see also, Pardo v Bialystoker Center & Bikurcholim, Inc., 10 AD3d 298 (1st Dept. 2004). Park East's request for common law indemnification from Pathmark fails, too, because whether Pathmark was negligent also poses an issue of fact. Markey v C.F.M.M. Owners Corp., 51 AD3d 734, 738 (2d Dept. 2008), citing Benedetto v Carrera Realty Corp., 32 AD3d 874 (2d Dept. 2006); Perri v Gilbert Johnsen Enterprises, Ltd., 14 AD3d 681 (2d Dept. 2005). Park East's request for common law and contractual indemnification from Regent Management fails for the same reasons. That is, because issues of fact exist concerning both Park East's and Regent Management's negligence.

Finally, Park East has established that both Pathmark and Regent Management were contractually obligated to procure liability insurance for it and that they failed to do so. Park East is accordingly granted summary judgment with respect to liability on those claims.

This decision constitutes the order of the court.

Dated: 10-28-08

HON THOMAS P. PHELAN

J.S.C.

ENTERED
OCT 30 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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