[* 1]

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

PRESENT: DEBRA A. JAMES Justice — PART 59

GREGORY MCNEIL,,

Plaintiff,

- v -

5060 BROADWAY REALTY CORP. and 5060 AUTO SERVICE, INC.,

Defendants.

Index No.: 102713/06

Motion Date: 06/30/09

Motion Seq. No.: 05

Motion Cal. No.: 65

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4 - 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

In this slip and fall action, defendant 5060 Broadway Realty Corp. (Broadway Realty), the owner of the premises at issue, moves for summary judgment dismissing the complaint and cross claims against it. Defendant 5060 Auto Service, Inc. (Auto Service) cross-moves for the same relief.

Auto Service is one of several commercial tenants leasing space at Broadway Realty's property in Manhattan. Auto Service operates a car dealership and parking garage at the premises. Plaintiff Gregory McNeil brought this action for personal

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

injuries suffered in a fall on the driveway that runs into the garage claiming that defendants' negligence caused his injuries. Each defendant cross-claimed against the other for contribution. Broadway Realty cross-claimed for contractual indemnification and Auto Service cross-claimed for common-law indemnification.

Broadway Realty moves for summary judgment on behalf of itself and Auto Service on the basis that neither one created, or had notice of, the alleged dangerous condition of the driveway. Broadway Realty also asks that the court find, as a matter of law, that the lease obligated Auto Service to keep the driveway free of snow and ice and that if it is found liable for plaintiff's injuries it must be indemnified by Auto Service pursuant to the parties' lease.

Plaintiff alleges that on December 12, 2005, he left work at 5:30 p.m. and walked on the sidewalk towards a subway station. There was snow on the streets and piled up on the sidewalks to his left and right. As he was crossing Auto Service's driveway, his right foot slipped, causing him to fall. Plaintiff states that he saw that he had slipped on an ice patch about two inches thick, extending the entire width of the driveway. Plaintiff's evidence includes a meteorological report indicating that almost six inches of snow fell on December 9, 2005, and freezing rain and snow fell on December 4, 2005. There was no other precipitation prior to the time of the accident.

Broadway Realty asserts that it does not own any snow removal equipment, that it never cleared the sidewalk, that it never contracted with anyone to perform that function, that it was the responsibility of the tenant to remove snow and ice from the sidewalk, and that it had no responsibility to notify the tenant when to do so. Broadway Realty asserts that under the lease Auto Service bore the responsibility of clearing snow and ice off the sidewalks.

Auto Service alleges that it had two employees responsible for removing snow and ice and laying down salt, activities in which the owner participated. The owner would use a snowblower if there were two or three inches of snow on the ground. If the president saw ice and it was still cold, the workers would put down salt to melt the ice.

The lease between the co-defendants provides that the tenant must "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." The tenant is obligated "to keep the sidewalk adjacent to the demised premises free of litter, debris, snow and ice at all times." Paragraph 8 of the lease provides that the tenant shall indemnify owner against all liabilities, damages, and expenditures, including attorney's fees, for which the owner shall not be reimbursed by insurance, that the owner incurs as a result of the tenant's

breach of the lease or other conduct by tenant and that the tenant shall maintain general public liability insurance in favor of tenant and owner.

The landowner or lessee is held responsible for injuries caused by a dangerous snowy or icy condition on an abutting public sidewalk if it created the dangerous condition, used the sidewalk for a special purpose, or removed snow or ice in a manner that made the sidewalk more hazardous than it would have otherwise been. Romero v ELJ Realty Corp., 38 AD3d 263, 263 (1st Dept 2007); Puello v City of New York, 35 AD3d 294, 295 (1st Dept 2006).

The Administrative Code of City of NY (Administrative Code) § 7-210 changed the traditional rule for the owners of real property by imposing upon them the affirmative duty to maintain abutting public sidewalks in a reasonably safe condition, including the duty to remove snow and ice. The owner of real property is liable in tort for personal injury proximately caused by its "negligent failure" to maintain the abutting sidewalk. Administrative Code § 7-210 [b]; Ortiz v City of NY, 67 AD3d 21 (1st Dept 2009). Violation of the Code is evidence of negligence (Castillo v Bangladesh Society, Inc., 12 Misc 3d 1170[A], 2006 NY Slip Op 51130[U], *3-4 [Sup Ct, Queens County 2006]); see also Administrative Code 16-123 ("Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot

of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall . . . remove the snow or ice").

Administrative Code § 7-210 does not impose absolute tort liability upon the property owner. As with all who own or occupy land, no liability will be found absent proof that a defendant actually created the dangerous condition or alternatively, had actual or constructive notice of the same. Armstrong v Ogden Allied Facility Mgt. Corp., 281 AD2d 317, 318 (1st Dept 2001); Gangemi v City of New York, 13 Misc 3d 1112, 1130 (Sup Ct, Kings County 2006); Fernandez v 1330 3rd Ave. Corp., 10 Misc 3d 1057[A], 2005 NY Slip Op 51995[U], *2 (Sup Ct, NY County 2005). Where the defendant caused the dangerous condition, further notice of the condition need not be shown. Panagakos v Greek Archdiocese of N. and S. Am., 213 AD2d 336, 336 (1st Dept 1995). Constructive notice exists where the dangerous condition is visible and apparent and has existed for a sufficient length of time before the accident to permit discovery and remedy by the landowner. Gordon v American Museum of Natural History, 67 NY2d 836, 837 (1986).

Although Broadway Realty does not explicitly allege that it is an out-of-possession landlord, the court notes that such status does not preclude liability under the Code. See Castillo, 2006 NY Slip Op 51130[U],at *4 (the general rule that an out-of-

possession landlord is not liable is not relevant here since the sidewalk is not part of the demised premises and is owned by the City of New York and the City by statute imposes maintenance and liability on the "owner" of the abutting property).

While there is no evidence that the defendants created the condition or had actual notice of the slippery hazard, defendants fail to make a prima facie showing that they did not have constructive notice of the condition. In Gonzalez v American Oil Co., (42 AD3d 253, 254-255 [1st Dept 2007]) the Court held that summary judgment was inappropriate where plaintiff presented evidence that there was an ice patch in front of the entrance to defendants' premises, no precipitation had fallen within three hours of the accident, approximately three inches of snow had accumulated the prior day and snow was removed on an "as needed" basis by the defendants. The Court stated that "it can be reasonably inferred from the available evidence that this large patch of ice was near the front door to the store for a considerable period of time prior to the accident, and that defendants, had they acted reasonably with regard to their obligation to keep the area free from snow and ice, would have discovered it. . . From these facts-the large size of the ice patch, its consistency as well as its close proximity to the store's front door, and defendants' failure to perform any meaningful maintenance-one could reasonably conclude that

defendants should have discovered this condition well before plaintiff's fall and remedied it." Id. at 255-256.

Defendants submit no evidence showing that the icy condition of the driveway existed for such a short time that they had no chance to discover and remedy it. It cannot be ascertained from the record when the alleged dangerous condition came into existence and how long it existed. In any case, plaintiff provides meteorological evidence showing that the sidewalk could have been in an icy and slippery condition for about three days, enough time for defendants to have had constructive notice. Whether either defendant possessed notice of the dangerous condition is a question of fact.

The First Department has held that the duty created by section 7-210 is nondelegable (Cook v Consolidated Edison Co. of N.Y., 51 AD3d 447, 448 (1st Dept 2008). Therefore, Broadway Realty as the owner of the premises owes a duty to the plaintiff and is answerable to the plaintiff for breach of that duty. However, although Auto Service has a contractual duty to remove snow and ice, its duty is to Broadway Realty and Auto Service has no duty to plaintiff in tort. See Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 -139 (2002) ("a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party"); Taubenfeld v Starbucks Corp., 48 AD3d 310, 310-311 [1st Dept 2008]; Tucciarone v

Windsor Owners Corp., 306 AD2d 162, 163 [1st Dept 2003]). . Therefore, summary judgment as to plaintiff's claims shall be denied as to defendant Broadway Realty. However, summary judgment dismissing plaintiff's claims against Auto Service shall be granted.

In the lease, tenant Auto Service agreed to keep the sidewalk clear of debris and snow and ice. As Broadway Realty asserts, the provision gives rise to a duty on Auto Service's part to Broadway Realty. The relationship between the landlord and the lessee in this case is analogous to that between other landlords with a nondelegable duty to maintain their premises, and third parties who enter into contracts to maintain the premises. While a landowner cannot divest itself of a nondelegable duty that is owed to the public, it may arrange that another party maintain the premises. Thomassen v J & K Diner, Inc., 152 AD2d 421, 424-425 (2d Dept 1989). The landowner "may bargain with the contractor for performance and stipulate for indemnification if the duty is not performed." Id.; see also Tamhane v Citibank, N.A., 61 AD3d 571, 573-574 (1st Dept 2009); Baratta v Home Depot USA, Inc., 303 AD2d 434, 435 (2d Dept 2003). If the contractor violates the contact by failing to maintain the premises, the contractor may be required to indemnify the landowner (id.) and in such a case, the landowner's liability would be vicarious. See Salisbury v Wal-Mart Stores Inc., 255

AD2d 95, 98 (3d Dept 1999) (owner could easily have shifted its liability by requiring the inclusion of an express indemnity provision in the snow removal contract).

A landowner attempting to blame a third party's failure to perform under a maintenance contract must show that "the delegation of authority to the third party ... is comprehensive enough to relieve the owner of any meaningful responsibility or control" (Salisbury v Wal-Mart Stores, 255 AD2d 95, 97 [3d Dept 1999]). If it is shown that Auto Service was entirely responsible for the sidewalk and that Auto Service did not properly maintain it, thus causing plaintiff's accident, Broadway Realty's liability for plaintiff's injuries would be vicarious. Broadway Realty would be entitled to contractual indemnification.

That Broadway Realty's liability is vicarious has not been shown because there are triable issues of fact regarding Broadway Realty's responsibility for the condition of the sidewalk, a conditional order of indemnification is premature. See Cuevas v City of New York, 32 AD3d 372, 374 (1st Dept 2006) (party "cannot enforce the contractual indemnification provision against [contracting party] unless it demonstrates its own freedom from negligence").

Each defendant moves to dismiss the other's cross-claims for contribution and indemnification. In the event of a determination that both defendants are liable, there may be

questions of contribution. Therefore the court shall also deny Auto Service's motion to dismiss Broadway Realty's cross-claims for contribution and indemnification.

Broadway Realty's motion to dismiss Auto Service's cross-claims for contribution and indemnification is based on the contention that Broadway Realty cannot be responsible under any theory of liability for the condition of the sidewalk and that Auto Service must bear all of the responsibility. However, a finding that both defendants are responsible is possible. Such a finding would raise the issue of contribution. Therefore, the court shall deny dismissal of Auto Service's claim for contribution.

For Broadway Realty to have an obligation to indemnify Auto Service, there would have to be a finding that Auto Service's liability was vicarious. Such a finding is not possible. Auto Service was in possession of its leased premises and it agreed in a contract to maintain the sidewalk (see Winograd v Neiman Marcus Group, 11 AD3d 455, 457 [2d Dept 2004]). Any liability on its part would be direct and therefore under no set of facts could Auto Service maintain its cross claim for indemnification.

Accordingly, it is

ORDERED that defendant 5060 Broadway Realty Corp.'s motion for summary judgment dismissing the complaint and the cross claims is GRANTED only to the extent that the cross-claim by

defendant 5060 Auto Service, Inc. for indemnification is DISMISSED, and the motion is otherwise DENIED; and it is further

ORDERED that defendant 5060 Auto Service, Inc.'s cross-motion for summary judgment dismissing the complaint as against it is GRANTED and its motion to dismiss the cross-claims against it is denied; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference in Part Mediation-1 on February 4, 2010 at 10:00 A.M. and if the case is not settled thereat, the parties are to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on March 2, 2010 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: JAN 19 2010 ENTER:

DEBRA A. JAMES J.S.C.