[* 1]

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

PRESENT:

PART 10

Index Number : 104632/2009

GAMMIE, BETTY A.

vs

1568-1572 THIRD AVENUE

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

MAR 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: MAR 11 2011

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------X

BETTY A. GAMMIE,

Plaintiff,

Index No. 104632/09

-against-

1568-1572 THIRD AVENUE, LLC,
169 EAST 88TH STREET CORP. AND
SOLIL MANAGEMENT CORP.,

Defendants,

----------X

1568-1572 THIRD AVENUE, LLC,

Third-Party Plaintiff,

Index No. 590631/09

-against-

VICKI LEE, LTD.,

Third-Party Defendant.

----------X

169 EAST 88TH STREET CORP.,

Second Third-Party Plaintiff,

-against-

VICKI LEE, LTD.,

Second Third-Party Defendant.

----------X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
169 E.88th n/m (3212) w/HJC affirm, exhs	1
1568-1572 3rd x/m (3212) w/AJS affirm, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

In this personal injury action, defendant/second third-party plaintiff 169 East 88th Street Corp. (169 East) moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissal of the complaint, and all cross claims and counterclaims against it.

Defendant/Third-party plaintiff 1568-1572 Third Avenue, LLC and defendant Solil Management Corp. (together, Third Avenue, LLC) cross-move for an order, pursuant to CPLR 3212, dismissing the complaint and all other claims and cross claims now pending, or in the alternative, summary judgment on Third Avenue LLC's third-party complaint for contractual indemnification against third-party defendant Vicki Lee, Ltd. (Lee, Ltd.).

Third-party defendant/second third-party defendant Lee, Ltd. also cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint and all cross claims against it.

Third Avenue, LLC is the owner of a building located at 1568-1572 Third Avenue a/k/a 171 East 88th Street (the Premises). The building has both residential and commercial tenants. 169 East is the owner of a residential and commercial property located adjacent to the Premises. Solil Management Corp., a/k/a Solil Goldman, is the management company at the Premises. Lee, Ltd., presently known as Y.W. Custom Tailor, is a commercial tenant pursuant to a lease

agreement (Lease) with Third Avenue, LLC. It operates a dry cleaners/tailor shop at the Premises.

The underlying action involves a claim by plaintiff Betty A. Gammie for personal injuries she allegedly sustained on August 28, 2008, when she fell on a sidewalk along the north side of 88th Street, between Third Avenue and Lexington Avenue in Manhattan. Plaintiff testified that she was walking on the sidewalk with her grandson between 169 East 88th Street and the front of the Premises, and as they were walking, her foot became lodged in a cracked portion of the sidewalk thereby, causing her to fall and sustain injuries.

As a result, plaintiff commenced this action based upon a theory of negligence, alleging that defendants failed to maintain the Premises is a reasonably safe condition. Consequently, plaintiff seeks an award of damages, attorney's fees, and costs and disbursements.

On July 13, 2009, Third Avenue, LLC commenced a third-party action against Lee, Ltd. for common-law indemnity, contractual indemnity, contribution and breach of contract for failure to procure liability insurance. 169 East then commenced a second third-party action against Lee, Ltd., asserting claims for common-law indemnity and contribution, together with attorney's fees, interest, costs and disbursements.

DISCUSSION

A. 169 East's Motion for Summary Judgment

169 East argues that it is entitled to summary judgment because: (1) it does not own, occupy, or control the location where plaintiff allegedly sustained her injuries, (2) plaintiff's fall and resultant injuries took place in front of the Premises, and not on its property located at 169 East 88th Street, (3) no question of fact remains as to the location of plaintiff's accident, and (4)

the factors of ownership, occupancy or control are not present, and thus 169 East cannot be held liable for plaintiff's injuries caused by an allegedly defective condition.

Plaintiff argues that 169 East is not entitled to summary judgment because it has not submitted sufficient proof to establish that there are no triable issues of fact as to the property demarcations of the site of plaintiff's accident.

Defendant 169 East seeks dismissal of the complaint pursuant to CPLR 3212.

To obtain summary judgment, it is necessary that the movant establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor, and it "must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]).

169 East has established its entitlement to summary judgment and dismissal of the complaint.

"As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2d Dept 2008]). If the factors of ownership, occupancy or control are not present, a party cannot be held liable for injuries caused by an allegedly defective condition (*id.*). Here, there are no such factors demonstrating 169 East's ownership, occupancy, control, or special use of that property (*id.*).

Plaintiff's bill of particulars and her subsequent testimony reveal that the location of the accident was approximately 113 feet and 2 inches west of the northwest corner of Third Avenue and East 88th Street, and approximately 7 feet north of the curb line of East 88th Street in front of the Premises. It is undisputed that Third Avenue, LLC is the owner of the Premises. 169 East

owns the adjoining Premises, 169 East 88th Street.

In her deposition testimony, plaintiff identified the location of her fall as 171 East 88th Street. Lee, Ltd., averred that plaintiff identified its storefront as the location of her accident and injury (Exhibit E to Affirmation of Henry J. Cernitz, Esq., dated June 18, 2010) (Cernitz Aff.). There is further evidence in the record from Third Avenue, LLC confirming that fact (Exhibit F to Cernitz Aff.). Moreover, the record does not raise any triable issues of fact with respect to whether the condition of the sidewalk was due to any acts of negligence on 169 East's part. Hence, 169 East's motion for summary judgment is granted.

B. Defendant Third Avenue, LLC's Cross Motion

Third Avenue, LLC argues that it is entitled to summary judgment because: (1) the alleged defect in the sidewalk at the Premises was not a trap, snare, nuisance or tripping hazard, and any alleged defect was too trivial to be actionable, (2) pursuant to the Lease, Lee, Ltd. was required to repair the sidewalk abutting its location, and (3) Lee, Ltd. was required under the Lease to procure insurance coverage naming Third Avenue, LLC as an additional insured, and failed to do so and, as a result, Third Avenue, LLC is entitled to contractual indemnification against Lee, Ltd.

Plaintiff argues that Third Avenue, LLC is not entitled to summary judgment because: (1) Third Avenue, LLC has failed to make a prima facie showing of its entitlement to judgment as a matter of law and (2) there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth to be actionable.

Third Avenue, LLC seeks dismissal of the complaint pursuant to CPLR 3212.

To obtain summary judgment, it is necessary that the movant establish its cause of action

or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor, and "it must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]). Third Avenue, LLC has not established its entitlement to summary judgment and dismissal of the complaint.

1. Plaintiff's Cause of Action - Negligence

Again, "[a]s a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d at 730). If the factors of ownership, occupancy or control are not present, a party cannot be held liable for injuries caused by an allegedly defective condition (*id.*). Here, potential liability for a dangerous condition is predicated upon Third Avenue LLC's ownership of the property where plaintiff fell. That fact is undisputed.

Additionally, a landowner has the duty to maintain its premises in a reasonably safe condition (*Garrido v City of New York*, 9 AD3d 267, 268 [1st Dept 2004]). Here, Third Avenue, LLC has failed to establish that it fulfilled its broader duty to maintain the Premises in a reasonably safe condition. It neglected to submit any testimony or evidence to support that finding. "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition *(Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *Mizell v Bright Servs., Inc.*, 38 AD3d 267 [1st Dept 2007]).

Furthermore, "a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436, 436 [2d Dept 2005]).

The record establishes that Third Avenue, LLC had actual and constructive notice of the defect in the sidewalk. Victor Lavarello, the Premises' superintendent, testified in his examination before trial that he has been employed by Third Avenue, LLC for approximately 10 years, and as the superintendent, he was required to make electrical and plumbing repairs to the Premises in addition to keeping both the interior and exterior of the building clean (Exhibit L to Affirmation of A. Jeffrey Spiro, dated July 19, 2010) (Spiro Aff.). Lavello further testified that prior to August of 2008, he was aware of a cracked area in the sidewalk in front of Lee, Ltd.'s storefront (*id.* at 17-30). Lavarello revealed that prior to plaintiff's fall, Third Avenue, LLC hired a company (whose name he could not recall) to construct a new sidewalk from the Premises to the end of the corner. Lavallo declared that the construction company used jack-hammers to break up the sidewalk on the Premises, but the contractors were forced to halt construction after they ran into a hollowed space under the portion of the sidewalk in front of Lee, Ltd. It appears that the construction company abandoned any further construction of the sidewalk upon the discovery of the cellar, and immediately terminated any further work on the project. The hollowed space was subsequently filled with concrete, but the remainder of the sidewalk was left undone (*id.*). Soon thereafter, Lavello noticed cracks in the pavement and reported the defect to Travis Perkins, the building manager, at some point prior to plaintiff's fall in 2008. Perkins assured Lavello that he would rectify the situation, but Lavello testified that no further repairs were made to the Premises (*id.*). The deposition testimony of Lavello, together with the photographs where plaintiff fell, not only sufficiently identify the alleged defect that caused plaintiff's injury, but conclusively establish that Third Avenue, LLC had notice of the defect (*Gregg v Key Food Supermarket*, 50 AD3d 1093 [2d Dept 2008]).

Notwithstanding the fact that Third Avenue, LLC had actual knowledge of the defect in the sidewalk, Third Avenue, LLC argues that the defect was trivial in nature, it did not constitute a "trap" or "snare," under the law, and thus plaintiff's claim is untenable.

"[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). However, courts have held that "a property owner may not be held liable for 'trivial defects, not constituting a trap or a nuisance, over which a person might merely stumble, stub his or her toes or trip'" (*Ambroise v New York City Tr. Auth.*, 33 AD3d 573, 574 [2d Dept 2006]). Ultimately, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d at 977 [internal quotation marks and citation omitted]).

Plaintiff, an 80-year-old woman, testified that on the day in question, she was walking with her grandson on 88th Street, on the north side closest to Third Avenue, when her right foot got caught in a crack in the sidewalk and she immediately fell forward and plummeted to the ground (Exhibit K to Spiro Aff.). Plaintiff identified the area in photographs presented to her on the day of her examination before trial. In support of its claim that the defect that caused plaintiff to fall was trivial, Third Avenue, LLC offered the testimony of plaintiff, Lavello and Sook Ja Lee, one of the proprietors of Lee, Ltd. The parties testified to the condition of the sidewalk prior to and following plaintiff's accident. Each testified to a defect in the sidewalk at the time of plaintiff's injuries. Third Avenue, LLC also submitted various photographs of the Premises taken after the plaintiff's accident, demonstrating that the height differential of the sidewalk's

defect was approximately ½ inch (see Exhibit M to Spiro Aff.). Accordingly, its submissions are sufficient to make a prima facie showing that the alleged defect was too trivial to be actionable.

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d at 562).

Plaintiff has come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. In opposition, plaintiff argues that the discrepancy as to the size of the crack is evident in light of the conflicting testimony in the record taken from plaintiff's grandson, Wyatt Leigh, Hubert Bruegger, the President of the corporation 169 East; and plaintiff's engineer, Stanley Fein.

Leigh avers that he witnessed his grandmother's injury on the day of the accident and the crack in the sidewalk was greater than ½ inch (Exhibit B to Affirmation of William Gentille, Esq., dated September 28, 2010) (Gentille Aff.). Fein inspected the Premises on September 7, 2010. He reviewed the case files, photographs, deposition testimony, witness statements, and took a host of his own photographs of the site (Exhibit D to Gentille Aff.). He avers that following his inspection of the sidewalk, it was apparent that a subsequent repair to the sidewalk had been made following plaintiff's accident. The crack was filled with cement but the crack still has a height differential of ½ inch, and thus he computed that the depression where plaintiff fell had to have been more than ½ inch at the time of the incident (*id.*). He further avers that the original photographs of the sidewalk reveal that a repair was done to the sidewalk, but was

improperly installed (the patch was superficial and could not properly bond, thereby creating a greater defect in the sidewalk) (*id.*). Fein estimates that the crack in the sidewalk on the Premises on the day of the incident, was substantial, covering at least 10 feet. The large triangle hole where plaintiff indicated her foot was lodged was approximately 10 inches long and 10 inches wide at its greatest dimension (*id.*).

The above testimony and submissions raise an issue of fact as to whether the defect was in fact trivial. Hence, review of the photographs of the crack, coupled with the consideration of all relevant factors and surrounding circumstances concerning the incident, demonstrates that the issues of whether the crack constituted a dangerous condition, and whether the injured plaintiff's own conduct in failing to avoid an open and obvious defect, are matters for jury resolution (*Portanova v Kantlis*, 39 AD3d 731 [2d Dept 2007]).

2. *Third Avenue, LLC's Third Cause of Action - contractual indemnification*

Concerning Third Avenue, LLC's third-party claim for contractual indemnification against Lee, Ltd., Third Avenue, LLC has established its entitlement to summary judgment against Lee, Ltd.

"Indemnity . . . involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer" (*County of Westchester v Welton Becket Assoc.*, 102 AD2d 34-46-47 [2d Dept 1984], *affd* 66 NY2d 642 [1985]). The right to indemnification may be created by express contract, but it is often one implied by law to prevent an unjust enrichment or unfair result (*id.*).

"In some instances the law imposes liability [upon] a person who in fact committed no actual wrong, but who is held responsible for a loss as a matter of social policy because he is in a position to spread the risk of the loss to society as a whole" (*id.* at 47). Consequently, "an employer may be held liable for the wrongdoing of his employee, the owner of a vehicle may be held responsible for the tortious operation of the vehicle by another which results in injury, or an owner of property may be held liable for the wrongdoing of his contractor" (*id.*).

Paragraph 40 of rider to the Lease provides:

> "The Tenant and the Landlord herein agree that in the event of a conflict between the printed form and the attached riders, then and in that event, the language of the rider shall prevail as to the intent of the parties. It is further understood and agreed that the Tenant has examined the leased premises and herein agrees to accept possession of same in its 'as is' condition and to make all of the required repairs to the demised premises including repairing the sidewalk"

(Spiro Aff.) (Exhibit F to Spiro Aff.).[1] Paragraph 47 of the rider to the Lease obligates Lee, Ltd. "to procure a comprehensive policy of general liability insurance naming Third Avenue, LLC as additional insured for any and all claims arising during the term of the Lease for damages or injuries arising in or upon or about the demised premises" (Spiro Aff.).

Despite plaintiff's arguments to the contrary, General Obligations Law § 5-321 does not

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[1] Plaintiff's submission of the Lease under Exhibit F is illegible due to the minuscule size of the print comprising the terms of the Lease and the rider to the Lease. The content of this provision of the Lease is taken from paragraph 17 of the Spiro Aff.

preclude parties involved in commercial transactions from securing insurance to shift the risk of liability to third parties (*see East Midwood Jewish Ctr. V CNA Ins. Co.,* 72 AD3d 877, 878 [2d Dept 2010]). General Obligations Law § 5-321 provides:

> "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."

Here, the indemnification provision of the Lease is valid and applicable to the personal injury cause of action brought by plaintiff, and thus to the possible damage award for any negligence on the part of Lee, Ltd. (*id.*; *see also Gross v Sweet*, 49 NY2d 102, 108 [1979] [exoneration clauses negotiated by sophisticated business entities can be viewed as merely allocating the risk of liability to third parties through the employment of insurance]).

It is also well established law that the owner and manager of premises leased to a tenant are entitled to conditional contractual indemnification for any liability "arising out of" an accident at the premises if the lease agreement contains such a provision, provided the accident was not as a result of the defendants' own negligence (Lennard v. Mendik Realty Corp., 43 AD3d 279 [1st Dept 2007]). Paragraph 47 of the lease rider contains that language. Such clauses are enforceable despite the General Obligation Law's prohibition against exempting or exculpating a

lessor from its own liability for damages or injuries caused by lessor's own negligence (Great Northern Ins. Co. v. Interior Const. Corp., 7 NY3d 412 [2006]). This is because the lease was negotiated between two sophisticated parties and the indemnification provision was coupled with an insurance procurement requirement for tenant and, therefore, tantamount to an agreement for the use of insurance to allocate risk of liability to third parties (Great Northern Ins. Co. v. Interior Const. Corp., *supra*; Otero ex rel. Vasquez v. L & M Hub Associates, LLC, 68 A.D.3d 444 [1st Dept 2009]).

Arguments by Lee, Ltd., that it cannot be negligent, under the sidewalk law because it is only tenant at the Premises misconstrue what the sidewalk law says. Administrative Code of the City of New York § 7-210 provides that:

> "a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such 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 and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

Thus while the owner has a duty to plaintiff, the parties, by agreement, allocated the risk of liability to third parties to the tenant. Thus, Third Avenue, LLC is entitled to summary judgment and a conditional order of indemnification, the extent of which will depend on the percentage each party's negligence (if any), contributed to the accident (Hughey v. RHM-88, LLC, 77 AD3d 520 [1st Dept 2010]).

3. Third Avenue, LLC's Fourth Cause of Action - Breach of Contract

To the extent that Third Avenue, LLC's cross claims are premised on Lee, Ltd.'s failure to obtain insurance naming Third Avenue, LLC as an additional insured under the insurance provision of the rider, Third Avenue, LLC has demonstrated its entitlement to summary judgment on its fourth cause of action for breach of contract (*id.*).

"To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). In cases involving a tenant's failure to obtain general liability coverage pursuant to an agreement, the First Department has held that said tenant is liable to the landlord for certain damages. A landlord may recover damages for a tenant's breach of a sublease provision following a breach of a lease requiring the subtenant to procure liability insurance covering the landlord (*Simel v City of New York*, 274 AD2d 466 [2d Dept 2000]). Said damages would be limited to the landlord's costs of purchasing substitute insurance and other out-of-pocket expenses arising from the liability claim not covered by the substitute insurance, such as any deductibles or any increase in

premiums resulting from the liability claim (*Inchaustegui v 666 5th Ave.. Ltd. Partnership*, 268 AD2d 121, 127 [1st Dept 2000], *affd* 96 NY2d 111 [2001]).

Pursuant to a provision within the lease, Lee, Ltd. was required to procure liability insurance covering the landlord. Paragraph 40 to the rider of the Lease provides:

> "The tenant covenants and agrees to provide the Landlord within ten (10) days from the commencement date hereof and for the duration of the term of this lease with a comprehensive policy of general liability insurance in which the Tenant and the Landlord are the named insured, for any and all claims arising during the term of this lease for damages or injuries to goods, wares, merchandise and property and/or for any personal injury or loss of life, in, upon or about the demised premises or any appurtenances thereto"

(Exhibit F to Spiro Aff.). Lee, Ltd. fails to identify any provision within the Lease that would excuse Lee, Ltd. of its separate obligation to name Third Avenue, LLC as an additional insured. Paragraph 47 specifically requires Lee, Ltd. to obtain general liability insurance "for any and all claims arising during the terms of this lease . . . and for any personal injury" upon the Premises (*id.*.). Since it is uncontroverted that Lee, Ltd. failed to obtain the insurance required by the Lease, Third Avenue, LLC is entitled to summary judgment on its cross claim for breach of contract (*Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091,1093 [2d Dept 2008]; *Simel v City of New York*, 274 AD2d 466, *supra*).

C. Third-Party Defendant Lee, Ltd.'s Cross Motion

Lee, Ltd. has not established its entitlement to summary judgment and dismissal of the complaint.

"Liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d at 720). If the factors of ownership, occupancy or control are not present, a party cannot be held liable for injuries caused by an allegedly defective condition (*id.*). In the case at bar, it is undisputed that Lee, Ltd. occupies the storefront in front of which plaintiff allegedly sustained her injury, and thus liability may be predicted on that fact.

Moreover, "a defendant who moves for summary judgment in a slip-and- fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d at 436). There is testimony in the record establishing that Lee, Ltd. had actual notice of the defect in the sidewalk, and as such it has failed to meet its burden of making a prima facie showing that it did not have actual notice of the defective sidewalk (Exhibits C and D to Affirmation of Jerome D. Patterson, dated July 13, 2010) (Patterson Aff.).

Here, potential liability for a dangerous condition is predicated upon Lee, Ltd.'s occupancy of the property where plaintiff fell (*Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d at 436). Sook Ja Lee, the owner and President of Lee, Ltd., testified that she occupied the Premises pursuant to a lease agreement with Third Avenue, LLC (Exhibit N to Spiro Aff.). That fact is undisputed.

The record also establishes that Lee, Ltd. had actual and constructive notice of the defect in the sidewalk (*id.*). Ms. Lee testified that, although she did not witness plaintiff's accident, she identified the accident as taking place in front of the store from a series of photos displayed to her during her examination before trial (*id.*). Ms. Lee testified that she was aware of the fault in the sidewalk prior to plaintiff's injury (*id.*). She also testified that she had witnessed the deterioration of the sidewalk over a number of years, but she made no attempts to repair the sidewalk or alert anyone else to do so (*id.*). Given the deposition testimony of Ms. Lee, it appears that Lee, Ltd. sufficiently identified the alleged defect that caused plaintiff's injury, thereby conclusively establishing that Lee, Ltd. had actual and constructive notice of the defect (*Gregg v Key Food Supermarket*, 50 AD3d 1093, *supra*).

Accordingly, it is

ORDERED that defendant 69 East 88th Street Corp.'s motion for summary judgment is granted and the complaint and all cross claims against it are severed and as against it, dismissed with costs and disbursements to said defendant as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly, upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant 1568-1572 Third Avenue, LLC's cross motion for summary judgment is denied; and it is further

ORDERED that third-party plaintiff 1568-1572 Third Avenue, LLC's cross motion for summary judgment against third-party defendant Vicki Lee, Ltd. is granted to the extent of granting partial summary judgment on its breach of contract claim for Vicki Lee, Ltd.'s failure to procure general liability coverage naming 1568-172 Third Avenue, LLC as an additional insured;

and Third Avenue, LLC is entitled to summary judgment on its indemnification claims against Lee, Ltd., to the extent of granting Third Avenue, LLC a conditional order of indemnification, the extent of which will depend on the percentage each party's negligence (if any), contributed to the accident; and it is further and it is further

ORDERED that third-party defendant/second-third party defendant Vicki Lee, Ltd.'s cross motion for summary judgment is denied; and it is further

ORDERED that this case is ready for trial since the note of issue was filed; plaintiff shall serve a copy of this decision/order on the trial support office so it can be scheduled; and it is further

ORDERED that any relief requested but not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 11, 2011

So ordered:

Hon. Judith J. Gische, J.S.C.