Tanton v Lefrak SBN Ltd. Partnership
2013 NY Slip Op 30126(U)
January 23, 2013
Supreme Court, New York County
Docket Number: 106601/08
Judge: Debra A. James
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SCANNED ON 1/25/2013

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

HARVEY TANTON and MALENEA COLONNA,

Plaintiff,

- v -

LEFRAK SBN LIMITED PARTNERSHIP, BAY LEAF ENTERPRISES, LTD., BENIHANA N.Y. RESTAURANTS CORP., NOBU 57, LLC, and TEMCO SERVICE INDUSTRIES, INC.,

Defendant.

Index No.: 106601/08

Motion Date: 03/23/12

Motion Seq. No.: 04

FILED
JAN 25 2013
NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 7 were read on this motion for summary judgment

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1
Answering Affidavits - Exhibits	No(s). 2,3,4
Replying Affidavits - Exhibits	No(s). 5,6,7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

Motion sequence numbers 004, 005, and 006 are consolidated for disposition.

In this action for personal injuries, plaintiff Harvey Tanton alleges that, on June 28, 2007, he slipped and fell on grease on the sidewalk in front of 40 West 56th Street, New York, New York (the premises).

Lefrak SBN Limited Partnership (Lefrak) is the owner of the premises.

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

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Bay Leaf Enterprises, Ltd. (Bay Leaf), Nobu 57 LLC (Nobu), and Benihana N.Y. Restaurants Corp. (Benihana) lease space for their restaurants within such premises.

Lefrak retained Temco Service Industries, Inc.(Temco) to clean and maintain the subject premises and sidewalks abutting the premises. Pursuant to a written contract dated January 29, 1991 with Lefrak, Temco was required, among other things, to "[s]weep sidewalks and police during the day, including Plaza areas" and "[h]ose sidewalks as necessary". The written contract contains an indemnification provision and insurance procurement provision. It is undisputed that the written contract between Lefrak and Temco expired by its terms on December 31, 1992, and that Temco continued to provide services at the premises.

On May 13, 2008, plaintiff commenced this action against Lefrak, Bay Leaf, Benihana, and Nobu. He asserts in his bill of particulars that defendants, inter alia, negligently maintained the sidewalk in the area where garbage was placed for collection and thereby caused a dangerous slippery condition upon which he slipped and fell and suffered a fractured left ankle. On November 3, 2009, Lefrak commenced a third-party action against Temco, seeking indemnification and contribution. Thereafter, plaintiff brought a separate action against Temco in this court under Index No. 118196/09. On July 21, 2010, the court consolidated the second action against Temco with this action.

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Defendants assert the following cross claims: (1) Lefrak asserts cross claims for contractual indemnification, common-law indemnification, contribution, and failure to procure insurance against Bay Leaf, and Temco asserts cross claims for common-law indemnification and contribution against Bay Leaf; (2) Lefrak pleads cross claims for contractual indemnification, common-law indemnification, contribution, and failure to procure insurance against Nobu, and Temco also seeks common-law indemnification and contribution from Nobu; and (3) Temco seeks common-law indemnification and contribution from Lefrak.

In motion sequence number 004, Bay Leaf moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. In motion sequence number 005, Nobu moves, pursuant to CPLR 3212, for summary judgment dismissing all claims against it. In motion sequence number 006, Temco moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it. In motion sequence number 006, Lefrak cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims against it and for a conditional order of indemnification against Temco.

In moving for summary judgment, Bay Leaf argues that it did not owe plaintiff a duty to maintain the sidewalk, and that it neither caused nor created the greasy condition of the sidewalk.

Specifically, Bay Leaf maintains that it placed its garbage only in front of its restaurant, and not in the arcade where plaintiff fell. Bay Leaf further argues that though plaintiff contains the stain on the sidewalk is grease, there is no evidence that such so and therefore there is no evidence that Bay Leaf had notice of any greasy condition. Bay Leaf argues that plaintiff never saw anyone place garbage on the sidewalk, and thus does not know whose garbage created the greasy condition. Finally, Bay Leaf contends that it had no notice of the greasy condition.

In opposition, plaintiff argues that there are triable issues of fact as to whether Bay Leaf created the greasy condition of the sidewalk, and in support submits an affidavit from Stanley F. Fein, P.E., who inspected the sidewalk on November 17, 2009. Fein opines, within a reasonable degree of engineering certainty, that:

> the sidewalk area where this accident occurred and the stain on the sidewalk area was due to an accumulation of oil and/or another greasy type substance which was coming from the garbage bags which were placed on the sidewalk by the owners of the building, Lefrak, the cleaning company Temco and the adjacent restaurants, Benihana, Bay Leaf, and Nobu 57 LLC restaurants.

Fein explains that:

> [t]he sidewalk in the stained area was made of concrete and the stains that were in existence were definitely oil stains and not water stains. Concrete is absorbent and water would not stain the concrete. Only oil could have caused the stains on the sidewalk and therefore the only way the oil could have stained the sidewalk was if the garbage which had been leaking, would be placed along the sidewalk area.

In support of his argument that Bay Leaf created the condition, plaintiff points out that he testified that he was unsure where exactly he fell. In addition, plaintiff argues that Bay Leaf had notice of the recurrent and defective condition of the sidewalk, given plaintiff's own deposition testimony that he previously noticed debris or garbage in the area, and that there is a stain on the sidewalk near where he fell. Plaintiff further contends that Bay Leaf may be liable for negligent maintenance of the sidewalk where Bay Leaf's employees cleaned the sidewalk in front of the restaurant two times per day. Plaintiff contends that Bay Leaf may have created the condition when it washed the sidewalk.

It is undisputed that Bay Leaf is a lessee of space abutting the sidewalk near where plaintiff fell. With respect to the common law rule:

> Liability may only be imposed on the abutting owner or lessee for injuries sustained as a result of a dangerous condition in the sidewalk where the abutting owner or lessee 'either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk which imposes liability upon that party for injuries caused by a violation of that duty'

(Berkowitz v Spring Cr., Inc., 56 AD3d 594, 595-596 [2d Dept 2008], quoting Lowenthal v Theodore H. Heidrich Realty Corp., 304 AD2d 725, 726 [2d Dept 2003]).

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Administrative Code § 7-210, entitled "Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition," 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. . . ."

Here, Bay Leaf has shown that, as a lessee, it did not violate any ordinance or statute or have a duty to maintain the sidewalk in a reasonably safe condition pursuant to Administrative Code § 7-210. Bay Leaf has also shown that it did not create the greasy condition on the sidewalk. Bay Leaf's president, Vijay Gupta, testified that Bay Leaf placed its garbage in front of its restaurant on 56th Street. Gupta also testified that all disposable food garbage was placed in large garbage bags and secured by tying a knot to the bag. Plaintiff marked the location of his accident on a schematic diagram of the area at his deposition, which shows the location to be in front

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of the arcade leading between 56th and 57th Streets and not in front of Bay Leaf's restaurant on 56th Street. Nor is there any evidence that Bay Leaf made a special use of the sidewalk at the location in question, let alone, some such use that caused the condition to occur. (see Lopez v City of New York, 19 AD3d 301 [1st Dept 2005]).

Nor does Fein's expert affidavit rescue plaintiff's cause of action against Bay Leaf. It is well settled that an expert's opinion "'must be based on facts in the record or personally known to the witness'" (Hambsch v New York City Tr. Auth., 63 NY2d 723, 725-726 [1984], quoting Cassano v Hagstrom, 5 NY2d 643, 646, *rearg denied* 6 NY2d 882 [1959]). Furthermore, the court may not accept the conclusion of an expert that assumes material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (Santoni v Bertelsmann Prop., Inc., 21 AD3d 712, 714-715 [1st Dept 2005]; Quinn v Artcraft Constr., 203 AD2d 444, 445 [2d Dept 1994]). Here, Fein cites no factual basis for his conclusion that the grease on the sidewalk was caused by an accumulation of oil and/or another greasy type substance which originated from Bay Leaf's garbage bags. Therefore, Fein's affidavit is insufficient to raise a triable issue of fact as to whether Bay Leaf created the grease on the sidewalk.

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Moreover, while plaintiff maintains that Bay Leaf had notice of the condition, absent creation, special use, or any of the other factors outlined above, a lessee of property abutting a public sidewalk may not be liable even if it had notice of the condition (see Berkowitz, 56 AD3d at 595-596).

Therefore, Bay Leaf is entitled to summary judgment dismissing the complaint as against it.

In moving for summary judgment, Nobu also argues that it did not cause or create the condition that caused plaintiff to fall. Specifically, Nobu maintains that plaintiff did not slip or fall in an area where Nobu placed its garbage - plaintiff testified that he fell between an orange cone and a garbage can in a photograph marked at his deposition- but that it placed its garbage between two trees in that photograph. In addition, Nobu asserts that its garbage was double-bagged and placed on top of clear plastic liners on the sidewalk. Nobu further contends that it did not owe plaintiff a duty to maintain or clean the sidewalk, and that plaintiff assumed the risk of his injury because he previously noticed debris or grease in the area.

In opposing Nobu's motion, plaintiff argues that there are triable issues of fact as to whether Nobu created the greasy condition on the sidewalk. To support this argument, plaintiff maintains that he could not pinpoint the exact location where he fell, and that the area of the grease stain is significant and

covers a large portion of the sidewalk where he fell. Plaintiff again relies on the affidavit from Stanley Fein, P.E., which concludes that the defective condition of the sidewalk was caused by an accumulation of oil and/or another greasy type substance which came from garbage bags which were placed on the sidewalk by Lefrak, Temco, Benihana, Bay Leaf, and Nobu. Plaintiff further contends that Nobu had notice of the recurrent, greasy condition of the sidewalk, and that comparative negligence is an issue of fact for the jury.

As previously stated, a lessee of property abutting a public sidewalk, such as Nobu, may be held liable only if it "either created the [dangerous] condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk which imposes liability upon that party for injuries caused by a violation of that duty" (Berkowitz, 56 AD3d at 595-596 [internal quotation marks and citation omitted]).

In this case, Nobu has demonstrated that, as a lessee, it did not have a duty to maintain the sidewalk where plaintiff fell (*see* Administrative Code § 7-210). Nobu has also made a prima facie showing that it did not create the greasy condition on the sidewalk. Plaintiff testified at his deposition that he fell on the sidewalk between an orange cone and a garbage can depicted in

a photograph marked at his deposition. Nobu's back-of-the-house manager, Wilber Wever, testified that it placed its garbage between two trees, and that it double-bagged its garbage and placed it on top of clear plastic liners on the sidewalk. Though plaintiff again argues that there is an issue of fact as to where he fell, he testified that he fell between an orange cone and a garbage can. Nor has he disputed Nobu's garbage disposal regimen. In addition, there is no evidence that Nobu caused the condition to occur through a special use of the sidewalk (see Lopez, 19 AD3d at 301).

As with Bay Leaf, Fein's opinion that "the sidewalk area where this accident occurred and the stain on the sidewalk area was due to an accumulation of oil and/or another greasy type substance which was coming from the garbage bags which were placed outside on the sidewalk by the owners of the building, Lefrak, the cleaning company Temco and the adjacent restaurants, Benihana, Bay Leaf and Nobu 57 LLC restaurants", is speculative, conclusory, and unsupported by facts in the record, and thus insufficient to raise a triable issue of fact as to whether Nobu created the greasy condition.

In view of the above, Nobu has established entitlement to summary judgment dismissing the complaint.

Temco moves for summary judgment, arguing that it did not owe plaintiff a duty of care, because: (1) there is no evidence

that it created the greasy condition, (2) plaintiff did not detrimentally rely on the continued performance of its contract, and (3) Temco did not entirely displace Lefrak's duty to maintain the premises safely. Temco contends that Lefrak hired many contractors to maintain the premises and that Temco was only hired to perform cleaning, and by affidavit of Peter Chace, Temco's Day Area Manager, states that Lefrak's property manager, Kevin Perdreaux, had exclusive authority and control over the work performed by Temco. Furthermore, Temco maintains that, even assuming that it owed a duty to plaintiff, it did not have actual or constructive notice of the condition. In addition, Temco argues that Fein's expert affidavit should be disregarded as speculative and conclusory. Temco also contends that it did not "launch a force or instrument of harm" because it cleaned the sidewalk every morning, and that the discolored portion of the sidewalk was not slippery, and therefore it did not have actual or constructive notice of the allegedly hazardous condition.

In opposition, plaintiff argues that Temco had a comprehensive and exclusive obligation to maintain the premises. Plaintiff points out that Temco was the only party contracted to clean the premises where plaintiff fell. Plaintiff also argues that Temco failed to exercise reasonable care in the performance of its duties, and launched a force or instrument of harm, given

Temco's day manager's testimony that the sidewalk area was discolored, that he did not know why the area was discolored, but that was where the garbage was put out. Alternatively, plaintiff contends that Temco had actual notice of the recurrent condition of the sidewalk, in view of his testimony that his clothes and hand were dirty after his fall, coupled with the testimony of his co-workers that there was always a residue left on the curb and that he was "covered with grease" after his accident.

Generally, a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party (Church v Callanan Indus., 99 NY2d 104, 111 [2002]; Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]). However, there are three exceptions to this general rule: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (Church, 99 NY2d at 111); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 112 [internal quotation marks and citation omitted]).

Plaintiff relies on the first and third exceptions to the general rule, arguing that Temco was the only contractor hired to clean the premises and that it may have created the condition.

Under the third exception, a defendant may owe a duty of care where it has a "comprehensive and exclusive" contractual obligation to inspect and maintain the premises safely (Palka v Servicemaster Mgt. Servs. Corp., 83 NY2d 579, 588 [1994]). Stated otherwise, the contractor must have entirely displaced the landowner's duty to maintain the premises safely (Espinal, 98 NY2d at 141).

In Corrales v Reckson Assoc. Realty Corp. (55 AD3d 469 [1st Dept 2008]), the plaintiff slipped and fell on an oily substance on the plaza outside an office building. The building owner and manager hired a maintenance contractor to provide cleaning services for the interior and exterior of the building. The Court held that the maintenance contractor did not owe a duty of care to the plaintiff, noting that the contractor's contract with the owner "was not comprehensive and exclusive as to preventative maintenance, inspection and repair, and that the [owner's] on-site property manager retained responsibility for and control over maintenance and safety of the premises" (id. at 470).

In Jackson v Board of Educ. of City of N.Y. (30 AD3d 57 [1st Dept 2006]), the plaintiff, a utility worker, slipped and fell on a food substance at a college and commenced an action, inter alia, against the college's janitorial services contractor. The First Department held that a janitorial services contractor did not owe a duty of care to plaintiff. Specifically, the Court

held that the contractor's contract was not comprehensive because it did not assume a blanket responsibility for the entire college campus, and since the contractor's contract was not exclusive because plaintiff's employer was required to perform cleaning duties in that area (id. at 65-66).

Here, Temco's limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation which entirely displaced Lefrak's duty to maintain the premises. It is undisputed that Temco's written contract with Lefrak expired, and that Temco continued to work at the premises pursuant to an oral agreement. Kevin Perdreaux, Lefrak's property manager, testified that, in June 2007, Temco was required to maintain the exterior and interior of the building in a clean fashion. Peter Chace, Temco's employee, indicates that Lefrak retained supervision and control over Temco's work.

However, the court concludes that there are triable issues of fact as to whether Temco failed to exercise reasonable care in the performance of its cleaning duties, and launched a force or instrument of harm (see Moch Co. v Rensselaer Water Co., 247 NY 160, 168 [1928]; Espinal, 98 NY2d at 142 [a contractor who "creates or exacerbates" a harmful condition may be said to have "launched" it]). Plaintiff testified that "[o]ther than my clothes being dirty and my hand touching the - something, I didn't know what it was and my hand being dirty. I don't know

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what it was, but there was some substance on the sidewalk". Plaintiff's co-worker, Donald Hoffman, testified that when he saw plaintiff after his fall, plaintiff was "covered with grease". However, Temco's porter testified that Temco cleaned the sidewalk every day by 6:30 A.M. by washing the sidewalk with a hose, brushing it, and applying a degreaser. Therefore, Temco's motion for summary judgment dismissing the complaint must be denied (see Cornell v 360 W. 51st St. Realty Corp., 51 AD3d 469, 470 [1st Dept 2008] [plaintiff's allegation that subcontractor negligently removed demolition debris from building fell within exception to general rule of negligent creation or exacerbation by launching a force or instrument of harm]).

Lefrak cross-moves for summary judgment dismissing plaintiff's complaint and for a conditional order of indemnification against Temco. In so moving, Lefrak points out that, although its cross motion is untimely, it should be considered on the merits because its co-defendants made motions for summary judgment on nearly identical grounds and seek nearly identical relief.

Lefrak further argues that there is no evidence that it created the greasy condition, and that the testimony of its building manager establishes that it had no notice of the condition. Lefrak points out that Temco's cleaning crew would have cleaned the sidewalk area sometime between 6:00 and 6:30

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A.M., or about an hour-and-a-half before plaintiff fell. Lefrak argues that, even if plaintiff could establish notice, the evidence establishes that it cannot bear liability for plaintiff's injury pursuant to Administrative Code §§ 7-210 and 19-101, because his accident occurred in an area over which it had no duty of care. In support of this argument, Lefrak contends that plaintiff testified that he fell as he was "walking onto the curb," and that he did not know whether he had passed the curb.

In opposition, plaintiff argues that Lefrak's cross motion must be denied because it was made 140 days after the note of issue was filed and Lefrak has not offered any good cause. Plaintiff also argues that Lefrak had notice of the recurrent, greasy/oily condition that caused his fall. In addition, plaintiff maintains that Lefrak's employees may have created the condition, since its employees cleaned the sidewalk with a power wash broom. Temco also opposes Lefrak's cross motion, inter alia, on the grounds that it is untimely and Lefrak has not shown good cause.

Initially, the court must consider whether to entertain Lefrak's cross motion for summary judgment. It is well settled that a court may consider an untimely cross motion for summary judgment as long as the court is deciding a timely motion for summary judgment on "nearly identical" grounds (_Lapin v Atlantic_

Realty Apts. Co., *LLC*, 48 AD3d 337 [1st Dept 2008]; Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006]; Altschuler v Gramatan Mgt., Inc., 27 AD3d 304, 304-305 [1st Dept 2006]). Courts have explained that an untimely cross motion for summary judgment may be considered, even in the absence of "good cause," because the court may search the record pursuant to CPLR 3212 (b), and grant summary judgment to any party even if a cross motion has not been made (see Filannino, 34 AD3d at 281). Here, although Lefrak's cross motion is indeed untimely, the cross motion addresses the same issues as the timely motions for summary judgment dismissing plaintiff's claims, i.e., lack of duty, creation, notice of the allegedly hazardous conditions, as well as the cross claims for indemnification asserted by Lefrak of which Temco seeks summary judgment. Accordingly, the court may consider the issues raised in Lefrak's cross motion.

As indicated previously, Lefrak, as an owner, has a nondelegable duty to maintain the sidewalk abutting its premises in a reasonably safe condition (Administrative Code § 7-210; see also Spector v Cushman & Wakefield, Inc., 87 AD3d 422, 423 [1st Dept 2011]; Cook v Consolidated Edison Co. of NY, Inc., 51 AD3d 447, 448 [1st Dept 2008]).

> "A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its

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> existence. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof"

(Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp., 79 AD3d 518, 519 [1st Dept 2010] [citation omitted]; see also Manning v Americold Logistics, *LLC*, 33 AD3d 427 [1st Dept 2006]; Giuffrida v Metro N. Commuter R.R. Co., 279 AD2d 403, 404 [1st Dept 2001]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). "The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (Mitchell v New York Univ., 12 AD3d 200, 201 [1st Dept 2004]). Additionally, a general awareness that a dangerous condition may be present is legally insufficient to constitute constructive notice of the particular condition (Solazzo v New York City Tr. Auth., 6 NY3d 734, 735 [2005]; Piacquadio v Recine Realty Corp., 84 NY2d 967, 969 [1994]).

As a preliminary matter, the court rejects Lefrak's contention that plaintiff slipped and fell in an area over which it had no duty of care. Administrative Code § 19-101 (d) defines a "sidewalk" as a "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent

property lines, but not including the curb, intended for the use of pedestrians." Although Lefrak contends that plaintiff fell on the curb, there is contrary evidence in the form of plaintiff's testimony that "I stepped over the curb onto the sidewalk, my leg gave way and I fell".

However, there is no evidence that Lefrak created the condition. Plaintiff has only offered speculation that Lefrak may have created the condition by cleaning the sidewalk. There is also no evidence that Lefrak had actual notice of the greasy condition. Kevin Perdraeux, Lefrak's building manager, testified that the sidewalks were not slippery when there was no garbage on them, and that Lefrak did not receive any complaints about the sidewalks. Thus, the issue is whether Lefrak can be charged with constructive notice of the condition.

"A defendant may be charged with constructive notice of a hazardous condition if it is proven that there was a recurring condition of which the defendant has actual notice" (Roman v Met-Paca II Assoc., *L.P.*, 85 AD3d 509, 510 [1st Dept 2011]). In Batista v KFC Natl. Mgt. Co. (21 AD3d 917 [2d Dept 2005]), the plaintiff slipped and fell on wood chips on a sidewalk adjacent to a restaurant. The Court held that there were issues of fact as to whether the owner had actual notice of a recurring condition, given that the manager of the restaurant which leased the property testified that her daily inspection of the premises

frequently revealed the presence of wood chips on the sidewalk (id. at 917-918). "Under these circumstances, a trier of fact could reasonably infer that the defendant had actual notice of such a recurring condition" (id. at 918 [internal quotation marks and citation omitted]).

In order to establish a recurring condition, plaintiff refers to his testimony that "there was some substance on the sidewalk", and to his co-worker's testimony that "[t]here was an area at the curb near a tree and a garbage can where the garbage - somebody's garbage is piled up there on a daily basis and there was always a residue left on the curb and the street in that area. Still remains today" and that "[plaintiff's] clothing was covered with grease". Additionally, plaintiff relies on another co-worker's testimony that "I don't know it's grease, but I know it's a black mark there. . It's black, so I would assume it's grease or oil or something", and Temco's supervisor's testimony that there was an area of the sidewalk that was discolored where the garbage was put out, that he did not know the cause of the discoloration, and that it smelled like garbage However, plaintiff has not pointed to any evidence that Lefrak had actual notice of grease or garbage on the sidewalk prior to the accident, and thus has failed to show that Lefrak had constructive notice of a recurring condition (see Early v Hilton Hotels Corp., 73 AD3d 559, 562 [1st Dept 2010] ["to the extent

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that the record is bereft of any evidence that defendants had actual notice of any straps on the sidewalk prior to the accident, plaintiffs have failed to prove constructive notice of a recurring condition"]; see also Segretti v Shorenstein Co, E, 256 AD2d 234 (1st Dept 1998); cf. Uhlich v Canada Dry Bottling Co. of N.Y., 305 AD2d 107 [1st Dept 2003] [issue of fact as to whether tenant had notice of a recurring condition where plaintiff observed garbage, debris, potholes, broken asphalt and obstructive vehicles in parking lot *and* complained to tenant about garbage]).

Accordingly, Lefrak is entitled to summary judgment dismissing the complaint as against it.

Temco moves for summary judgment dismissing Lefrak's contractual indemnification and failure to procure insurance claims, arguing that its written contract with Lefrak expired by its terms. In addition, Temco contends that the conduct of the parties does not indicate that they intended to incorporate any of its terms into any subsequent agreement.

In opposition, and in cross-moving for a conditional order of indemnification against Temco, Lefrak argues that the parties' conduct evidences their intent to embrace the same provisions as the written contact.[1] According to Lefrak, Temco continued to

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[1]Article 13.2 of the contract between Lefrak and Temco provides as follows:

perform the same duties as outlined in its contract up to and including the time of plaintiff's accident. Lefrak submits an affidavit from Kevin Perdreaux, Lefrak's property manager, who states that, at the time of the accident, Temco provided supervisory staff; reported damage and security breaches; performed nightly services Monday through Friday; performed general and detailed cleaning services; supplied extermination services; removed snow from the sidewalk; provided an elevator starter six days per week; and provided a day porter five days per week. Lefrak argues that, although certain duties were added to Temco's responsibilities, its duties remained substantially unchanged, i.e., it was required to clean and maintain the building. Furthermore, Lefrak maintains that Temco has not disputed that it continued to owe Lefrak indemnification and insurance following the expiration of the contract. To support

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"[Temco] hereby agrees to indemnify and save harmless [Lefrak] from and against all liability claims and demands on account of injury to persons including death resulting therefrom, losses, damages, expenses (including attorney's fee), claims demands, payments, recoveries, judgements and damage to property *arising out of or caused in any manner by the performance or the failure to perform any work under this contract by [Temco]*, [Temco's] employees and agents of [Temco] and [Temco's] property, except from and against such claims and demands which may arise out of the negligence of [Lefrak] or any of its subsidiaries. [Temco] shall at his or its own expense, defend any and all actions at law brought against [Lefrak] based thereon and shall pay all attorney fees and all other expenses, and promptly discharge any judgements arising therefrom"

this assertion, Lefrak provides a certificate of insurance, which Temco provided, naming Lefrak as an additional insured in accordance with the terms of the expired contract. Finally, Lefrak argues that the indemnification provision does not require a showing of Temco's negligence, and that plaintiff's accident arises out of Temco's failure to police and clean the sidewalk.

In response to Lefrak's cross motion, Temco relies on the affidavit from Peter Chace, its day manager, who states that there were significant changes in the parties' relationship that differed from the terms of the written contract. Specifically, Chace avers that the following services were eliminated: window washing, maintenance of marble items, and maintenance of metal trims outside the building, and the lobby cleaning duties outlined in Appendix A "Periodic Maintenance," while the "Nightly Maintenance" duties in Appendix A were reduced to sweeping and mopping only. In addition, Chace states that several services were added after the expiration of the written contract, including building security in 2001 and additional security services in 2005, pressure washing, maintenance of the lower parts of pillars in the plaza, regular work requests to perform extra work for tenants or perform other miscellaneous work, and carpet care. Additionally, Temco points out that, pursuant to the expired written contract, Lefrak was required to provide

compensation increases; however, Temco's compensation actually decreased in 1993, 1994, 1995, 1996, 2003, and 2008.

> 'Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract'

(Twitchell v Town of Pittsford, 106 AD2d 903, 904-905 [4th Dept 1984], *affd* 66 NY2d 824 [1985], quoting New York Tel. Co. v Jamestown Tel. Corp., 282 NY 365, 371 [1940]). "[W]hen an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provisions as the old" (North Am. Hyperbaric Ctr. v City of New York, 198 AD2d 148, 149 [1st Dept 1993], *lv denied* 83 NY2d 758 [1994] [internal quotation marks and citation omitted]; see also Curreri v Heritage Prop. Inv. Trust, Inc., 48 AD3d 505, 506-507 [2d Dept 2008]; Martin v Campanaro, 156 F2d 127, 129 [2d Cir], *cert denied* 329 US 759 [1946] [in determining whether there is an implied contract, courts must follow an objective test, i.e., "whether a reasonable man would think the parties intended to make such a new binding agreement - whether they acted as if they so intended"]).

However, the parties must continue to operate as if governed by the expired contract. In Curreri, *supra*, the plaintiff

tripped on a pothole in a parking lot. The owner had a contract with a contractor to perform custodial work in the parking lot, which contained a contractual defense and indemnification clause. At the time of the plaintiff's accident, the contract between the owner and the contractor had expired; however, the contractor continued to provide "essentially the same services" to the owner, and the owner continued to pay the same rate. The Court held that "despite the fact the original contract had expired, their conduct evidenced their mutual assent to a new contract embracing the same provisions and terms as their prior contract. Accordingly, the contracting obligating [the contractor] to defend and indemnify [the owner] was in effect at the time of the plaintiff's injury" (Curreri, 48 AD3d at 506-507).

In Watts v Columbia Artists Mgt. (188 AD2d 799, 801 [3d Dept 1992]), the Court stated, after a nonjury trial, that,

> "[w]e are of the view that the parties' conduct after the expiration of the written contract including defendant's continued rendition of services, plaintiff's acceptance of those services and plaintiff's payment of commissions in accordance with the terms of the written contract, clearly establish a contract implied in fact with substantially the same terms and conditions as embodied in the expired written contract between defendant and the Corporation."

By contrast, in Twitchell, *supra*, the parties' conduct was insufficient to create an implied-in-fact contract. There, a school district entered into a contract with a town whereby the town was permitted to operate skating rink on the school

district's property and was required to procure liability insurance to cover damages resulting from claims for personal injury. The plaintiff was injured when he fell on ice in the school district parking lot, which was caused by the town's use of a fire hydrant for resurfacing the rink on the day before the accident. The plaintiff sued the town, which then brought a third-party action against the school district. Although the written contract between the town and the school district expired, the town continued to maintain the skating rink after the expiration of the agreement. The school district sought indemnification from the town. On appeal, the Court held that "the mere conduct of the town herein, in continuing to use the skating rink, is insufficient to create a contract for indemnification" (Twitchell, 106 AD2d at 905).

In Computerized Med. Imaging Equip. v Diasonics Ultrasound (303 AD2d 962 [4th Dept 2003]), ongoing dealings between a manufacturer and a sales representative following the expiration of a written contract did not give rise to an implied-in-fact agreement. Notably, the parties expressly characterized their continuing business relationship as "terminable-at-will" (id. at 964).

Here, the court finds that there are issues of fact as to whether the parties mutually assented to a new contract on the same terms as the expired contract (and thus agreed to be bound

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by the contractual indemnification and failure to procure insurance provisions of the expired contract). While Lefrak maintains that Temco's services remained substantially unchanged, Temco submits evidence that several services were added and removed after the expiration of the contract (including pressure washing, security, window cleaning, and periodic and nightly maintenance) and that Lefrak did not continue to pay Temco the rate increases required by the expired contract but in fact reduced Temco's compensation for six years. Whether performance after the expiration of a contract constitutes an implied-in-fact agreement generally presents a question of fact that involves an assessment of the parties' conduct, and the extent to which such conduct demonstrates a meeting of the minds to continue on the expired contract's terms (Monahan v Lewis, 51 AD3d 1308, 1310 [3d Dept 2008]). "The fact that the parties continue to deal under some sort of informal arrangement does not, without more, mean that all of the terms of the expired formal contract continue to apply" (Twitchell, 106 AD2d at 904). Therefore, the branch of Temco's motion seeking dismissal of Lefrak's contractual indemnification and failure to procure insurance claims, and the branch of Lefrak's cross motion seeking a conditional order of indemnification against Temco, are denied.

Temco moves for summary judgment dismissing the common-law indemnification and contribution claims asserted against it,

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because plaintiff alleges that its co-defendants were actively negligent rather than vicariously liable. Further, Temco argues that there is no evidence that it performed its work negligently or that its failure to act was a proximate cause of the accident.

Lefrak opposes this portion of Temco's motion and cross-moves for conditional common-law indemnification over and against Temco. Lefrak argues that, to the extent that it bears any liability, it would be based upon principles of vicarious liability, and not based upon any active negligence, and that Temco would bear at least some percentage of fault.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 [2d Dept 2005], quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]; see also Martins v Little 40 Worth Assoc., Inc., 72 AD3d 483, 484 [1st Dept 2010]). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability" of the parties (Godoy v Abamaster of Miami, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]; see also Mas v Two Bridges Assoc., 75 NY2d

680, 689-690 [1990]). As discussed above, there are questions of fact as to whether Temco created the condition which caused plaintiff's accident. Thus, summary judgment on the common-law indemnification and contribution claims against Temco is inappropriate (see Perri, 14 AD3d at 685 [conditional summary judgment for common-law indemnification is premature absent proof that the proposed indemnitor was either negligent or exclusively supervised or controlled the plaintiff's work]).

Lefrak seeks summary judgment dismissing the cross claims for common-law indemnification and contribution against it. Temco argues, in opposition to this portion of Lefrak's motion, that there is a question of fact as to whether Lefrak breached its nondelegable duty to plaintiff to maintain the premises in a reasonably safe condition. The court has determined that Lefrak did not create or have notice of the grease on the sidewalk. Therefore, the cross claims for common-law indemnification and contribution asserted against Lefrak are dismissed.

Bay Leaf and Nobu have also moved for summary judgment dismissing the cross claims for common-law indemnification and contribution against them. Lefrak and Temco oppose these portions of the motions, arguing that there are questions of fact as to whether Bay Leaf and Nobu created or had notice of the greasy condition. As indicated previously, Bay Leaf and Nobu have established that they were not negligent. Accordingly, the

cross claims for common-law indemnification and contribution against Bay Leaf and Nobu are dismissed.

Lefrak opposes the dismissal of its contractual indemnification and failure to procure insurance claims against Bay Leaf and Nobu, arguing that there are questions of fact as to their negligence.[2] As noted above, Bay Leaf and Nobu have shown that they were not negligent. Moreover, Lefrak has not disputed that Bay Leaf and Nobu purchased all appropriate insurance. Accordingly, these claims are dismissed.

Accordingly, it is hereby

ORDERED that the motion (sequence number 004) of defendant Bay Leaf Enterprises, Ltd. for summary judgment dismissing the complaint and all cross claims against it is granted and the complaint and all cross claims are severed and dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence number 005) of defendant Nobu 57 LLC for summary judgment dismissing all claims against it is granted and the complaint and all cross claims are severed and

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[2]Article 46 of the lease between Lefrak and Bay Leaf requires Bay Leaf to indemnify and save harmless Lefrak from all claims arising from, inter alia, any act, omission or negligence of Bay Leaf. Article 9 of the lease between Lefrak and Nobu requires Nobu to indemnify and hold the owner and managing agent harmless from any and all claims resulting from (i) any breach of the lease or (ii) Nobu's negligence.

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dismissed as against said defendant with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (sequence number 006) of defendant Temco Service Industries, Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the cross motion of defendant Lefrak SBN Limited Partnership for summary judgment dismissing the complaint and all cross claims against it and for a conditional order of indemnification is granted to the extent of dismissing the complaint and the cross claims for common-law indemnification and contribution as against it, and is otherwise denied; and it is further

ORDERED that the remaining parties are directed to appear for a status conference before this court on March 5, 2012, at 11:00 a.m. in Part 59, Room 103, 71 Thomas Street, New York, New York 10013.

This is the decision and order of the court.

FILED
JAN 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 23, 2013

ENTER:

[signature]

DEBRA A. JAMES ***J.S.C.***