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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE Carmen R. Velasquez IA Part 38
Justice

GEORGE ROUTSOS, as Administrator of the Estate of AMELIA ROUTSOS, deceased,

Plaintiff,

-against-

SPRINGFIELD ASSOCIATES, LLC., BAYSIDE SUPERMARKET CORP., ET AL.,

Index Number 11005/2009

Motion Date January 16, 2015

Motion Seq. No. 8

The following papers numbered 1 to 22 read on this motion by defendant Springfield Associates, LLC (Springfield) for summary judgment on its cross-claims against defendant Luigi Masonry Work & Home Improvement, Inc. d/b/a Luigi Contumaccio Masonry Contracting (Luigi Masonry) and a cross motion by Luigi Masonry for summary judgment dismissing the complaint of plaintiff George Routsos, as Administrator of the Estate of Amelia Routsos, deceased, and all cross-claims by Springfield.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits....	5-8
Answering Affidavits - Exhibits.....	9-16
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Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff's decedent commenced this action to recover for personal injuries allegedly sustained on March 16, 2009 when she tripped and fell on a mound of concrete in the rear parking lot of the premises located at 6150 Springfield Boulevard in Bayside, New York and operated by defendant Bayside Supermarket Corp. (Bayside)

as a Key Food supermarket.[1] The defect in question was adjacent to the shopping cart corral near the rear entrance of the supermarket. Springfield, the out of possession landlord, leased the subject premises to commercial tenant Bayside pursuant to a lease agreement. On or about October 16, 2006, Bayside retained Luigi Masonry to perform concrete work in the shopping cart corral area which measured approximately 15 feet by 15 feet. The job included repairing the uneven concrete in the shopping cart corral and resetting the poles that prevented customers from leaving the area with their carts.

Luigi Contumaccio (Contumaccio), the principal and owner of Luigi Masonry, and his employee, Manuel Maguana, completed the project in October 2006. Contumaccio testified during a deposition that there was a hole in the asphalt of the parking lot, just beyond the perimeter of the shopping cart corral, that they intentionally filled with concrete "because [they] couldn't just leave it open like that even though it wasn't part of the job." The hole was "between the floor and the concrete [they had just] laid down . . . You let cement run underneath it so that later on you can blacktop over it." They smoothed the top of the concrete mound, but left the "outsides rough so that blacktop would adhere to it." He testified that no one told him to fill the hole, but that it was common building practice and he did not want to leave a tripping hazard behind. According to Contumaccio, the 18" semi-circular concrete patch was approximately 6" at its widest point and approximately 3/8" higher than the existing asphalt surface of the parking lot.

In prior proceedings, by order dated October 4, 2011, the Honorable Justice Augustus C. Agate denied Springfield's motion to dismiss the complaint and for summary judgment on its cross-claims for contractual and common-law indemnification against Bayside; denied the branch of Bayside's cross motion seeking to dismiss the complaint and its cross-claim for common-law indemnification from Springfield, but granted summary judgment on its third-party complaint against Luigi Masonry and dismissal of Springfield's common-law indemnification cross-claim; and denied Luigi Masonry's cross motion for summary judgment dismissing the complaint.

As a preliminary matter, the court notes that Springfield timely moved for summary judgment by serving its papers on Monday,

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[1] After the octogenarian decedent's death in January 2012, her son was appointed administrator of the estate, and by order dated March 26, 2014, was substituted as plaintiff in place of his late mother.

September 29, 2014, the business day immediately following the expiration of 120 days after plaintiff filed the note of issue on May 30, 2014 (CPLR3212[a]; *see Rodriguez v Board of Educ. of City of Yonkers*, 301 AD2d 641 [2003]). Contrary to Luigi Masonry's contentions, no showing of good cause is necessary because the timeliness of the motion is controlled solely by the filing of the new note of issue, rather than from the filing of the original note of issue, which was vacated after decedent's passing (*see Williams v Peralta*, 37 AD3d 712, 713 [2007]; *Farrington v Heidkamp*, 26 AD3d 459 [2006]; *Johnson v Ladin*, 18 AD3d 439 [2005]). Moreover, the instant motion was not duplicative and does not violate the rule against successive summary judgment motions because no cross-claims had been or could have been asserted by Springfield against Luigi Masonry, which was not yet a party to the action at the time Springfield made its first motion.

Luigi Masonry's cross motion seeking summary judgment is untimely insofar as it was made on November 3, 2011, well past the deadline, and no good cause has been demonstrated for the delay (CPLR 3212[1]; *Brill v City of New York*, 2 NY3d 648, 652 [2011]). The court also notes that the branch of the motion seeking dismissal of plaintiff's complaint is improperly made against a non-movant (*see Terio v Spodek*, 25 AD3d 781 [2006]). Nevertheless, the court will consider the branch of the motion which seeks summary judgment dismissing Springfield's cross-claims, as they involve indemnification issues nearly identical to those presented in the main motion (*see Alexander v Gordon*, 95 AD3d 1245, 1246/1267 [2012]; *Grande v Peteroy*, 39 AD3d 590, 592[2007]).

On a motion for summary judgment, the movant has the burden of demonstrating "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). To succeed on a cause of action for common-law indemnification, a party seeking common-law indemnification must prove its own lack of negligence, as well as actual negligence on the part of the proposed indemnitor, or in the absence of such negligence, that the proposed indemnitor actually directed, supervised, and controlled the work giving rise to the injury (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]; *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2006]). A defendant in a premises liability action may demonstrate, prima facie, that it was not negligent because it neither created the alleged hazardous or defective condition nor

had actual or constructive notice of its existence (*see Jackson v Jamaica First Parking, LLC*, 91 AD3d 602 [2012]; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909, 910 [2011]). To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; see *Spindell v Town of Hempstead*, 92 AD3d 669, 670-671 [2012]).

Here, Springfield argues that it was only "passively liable" for the injuries sustained, and that, according to Justice Agate's order dated October 4, 2011, Luigi Masonry affirmatively created or exacerbated the alleged dangerous condition that caused decedent's accident. In opposition, Luigi Masonry contends that its performance of the contracted cement work in October 2006 did not launch a force or instrument of harm because Bayside ratified and paid for the completed work and the accident occurred nearly two and a half years later.

The court finds that Springfield fails to satisfy its prima facie burden of establishing that it was not negligent and that decedent's accident was attributable solely to Luigi Masonry (*see Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742 [2009]; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). Although Justice Agate, in granting summary judgment for Bayside on its third-party complaint, found that Luigi Masonry "created or exacerbated a dangerous condition in the parking lot," such determination does not obviate an out of possession landlord's obligation to maintain the premises in reasonably safe condition when it exercises control by retaining a right to enter the premises for purposes of inspection and repair, as provided for in Springfield's lease to Bayside (*see Chapman v Silber*, 97NY2d 9, 19 [2001]; *Denermark v 2857 W. 8th St. Assoc.*, 111 AD3d 660 [2013]). Indeed, as noted in the order, Springfield conducted weekly inspections of the property, including the parking lot. Moreover, Contumaccio testified that when the cement work was complete, he informed David Mandell, Bayside's owner, as well as another Key Food manager, that Luigi Masonry had temporarily filled the hole adjacent to the cart corral with cement and that the holes needed to be covered with asphalt. Thus, a triable issue exists regarding whether defendant "failed to remedy a dangerous condition . . . and discharge its 'duty of providing the public with a reasonably safe premises, including a safe means in ingress and egress'" (*Routsos v Springfield Assocs.*, Sup Ct, Queens County, Agate, J., index no. 11005/2009, *citing Peralta v Henriquez*, 100 NY2d 139, 143 [2003]), as it cannot be said as a matter of law that Springfield did not have notice of the alleged dangerous condition (*cf. Walsh v Super Value, Inc.*, 76 AD3d 371, 376-377 [2010] [where owner of gas

station had no reason to know that the application of certain paint to the curb would result in a dangerous condition]).

To the extent Springfield also seeks summary judgment for contractual indemnification against Luigi Masonry, such request is denied, as it is undisputed that there was no contract containing a clause requiring Springfield to defend or indemnify Luigi Masonry (*see Holub*, 66 AD3d at 742).

Similarly, Luigi Masonry fails to demonstrate that it was not negligent in the performance of its contractual obligations (*id.*). As in Justice Agate's prior order, the record reflects that Luigi Masonry launched an instrument of harm by creating or exacerbating the alleged dangerous condition in the parking lot (*see Pol v Gjonbalaj*, 125 AD3d 955 [2015]; *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007 [2011]). Thus, summary judgment dismissing Springfield's cross-claim for common law indemnification against Luigi Masonry is not appropriate.

Accordingly, Springfield's motion and Luigi Masonry's cross motion for summary judgment on Springfield's common-law indemnification cross-claim are both denied.

Dated: May 26, 2015

CARMEN R. VELASQUEZ, J.S.C.