[* 1]

FA 5/13/15 E

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

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT PART 5

~~HON. KATHRYN FREED Justice~~
~~JUSTICE OF SUPREME COURT~~

Mina, Nicole

- v -

City of New York

INDEX NO. 103823/11

MOTION DATE

MOTION SEQ. NO. 006

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

MAY 13 2015

NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
MAY 13 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 5-8-15
MAY 08 2015

~~HON. KATHRYN FREED~~ J.S.C.
JUSTICE OF SUPREME COURT

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 5

----------X

NICHOLE MINA,

Plaintiff,

-against-

THE CITY OF NEW YORK, CITY OF NEW YORK DEPT. OF PARKS & RECREATION, JINX-PROOF, L.L.C. d/b/a BEAUTY BAR, JAVA 14, LLC., SKY MANAGEMENT CORP., UNION SQUARE PARTNERSHIP DISTRICT MANAGEMENT ASSOCIATION, INC., and ATLANTIC MAINTENANCE CORP.,

Defendants.

----------X

DECISION AND ORDER
Mot. Seq. 006
Index No. 103823/11

UNION SQUARE PARTNERSHIP DISTRICT MANAGEMENT ASSOCIATION, INC.,

Third-Party Plaintiff,

-against-

ATLANTIC MAINTENANCE CORP.,

Third-Party Defendant.

----------X

Index No. 590562/11

KATHRYN E. FREED, J.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

PAPERS	NUMBERED
CITY'S NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2 (Exs. 1-2)
UNION SQUARE'S AFF. IN OPP.	3 (Exs. A-B)
ATLANTIC'S AFF. IN OPP.	4 (Exs. A-E)
PLAINTIFF'S AFF. IN OPP.	5 (Exs. A-E)
CITY'S REPLY AFFS.	6,7

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for personal injuries resulting from a fall in a tree well on a sidewalk, defendants The City of New York and City of New York s/h/a New York City Department of Parks and Recreation ("DOPR") (hereinafter collectively "the City") move for leave to renew their prior cross motion for summary judgment 1) on their claim for contractual indemnification against defendant Union Square Partnership District Management Association, Inc. ("USP") or, in the alternative, 2) on their claim for common-law indemnification against defendant/third party defendant Atlantic Maintenance Corp. ("AMC") and, upon renewal, granting the said motions for summary judgment. After oral argument, and after a review of the parties' motion papers and the relevant case law and statutes, this Court **grants the motion for renewal and grants the motion for summary judgment in part**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Nichole Mina commenced this action to recover damages for injuries that she allegedly sustained on April 18, 2010, at approximately 2:15 a.m., when she left an establishment known as Beauty Bar, located at 231 East 14th Street, New York, New York. Ex. B to Ex. 2.[1] Beauty Bar occupied the premises pursuant to a lease with Java 14, LLC, the owner of the building. Sky Management Corp. managed the premises.

After leaving the bar, plaintiff intended to enter a taxi that was double-parked on the street. She headed toward the street, and after she crossed about half of the sidewalk, she tripped and fell in a tree well. Ex. E to Ex. 2, at 5, 11, 14. Beauty Bar did not maintain, repair, clean, or have any other involvement with the tree well.

[1]Unless otherwise noted, all references are to the exhibits to the City's motion to renew.

On July 1, 2008, USP entered into a 5-year contract with the City ("the contract") to perform capital improvements and supplemental services in the 14th Street - Union Square Business Improvement District. Ex. F to Ex. 2. Section 2B.02(b)(11) of the contract included among such capital improvements "trees and flowers". Ex. F to Ex. 2. Section 4.01 of the contract obligated USP to procure insurance protecting the City "against claims for injuries to persons . . . arising from or in connection with the performance of the [contract]." Id. Section 9.02 of the contract provided that USP:

> hereby assumes liability for, and hereby agrees to indemnify, protect, defend, save and keep harmless the City from and against any and all liabilities, obligations, losses, damages, penalties, claims, actions, suits, costs, expenses, and disbursements, including , without limitation, reasonable legal and investigative fees and expenses * * * which may be incurred by or imposed at any time (whether during the [c]ontract [t]erm or thereafter) on the City (whether or not also indemnified against by another person) and in any way relating to or arising out of, or alleged (by a person other than the City) to in any way relate to or arise out of this [c]ontract, except for the negligent acts of the City.

Id.

On March 30, 2011, plaintiff commenced this action against all defendants except AMC by filing a summons and verified complaint with this Court. Ex. B. To Ex. 2. Plaintiff thereafter filed an amended complaint adding AMC as a defendant. On April 15, 2011, the City joined issue by service of its verified answer, in which it asserted affirmative defenses and asserted cross claims against, inter alia, USP, for contribution and contractual and common-law indemnification. Ex. D to Ex. 2. The City did not assert a claim against USP for breach of contract for failure to procure insurance. Nor did the City assert any cross claim against AMC.

Jennifer Falk, Executive Director of USP, testified that, as part of the contract between the City and USP, USP undertook a tree pit renovation project to remediate the tree pits (or tree wells)

on East 14th Street between Second and Third Avenues in Manhattan. Ex. G to Ex. 2, at 13-19. This project, performed in conjunction with DOPR, sought to beautify the tree pits because tree roots were uplifting some tree grates (large metal plates with holes in a pattern that lay in the tree wells within the metal framing surrounding the perimeter of the tree wells) in an uneven manner, and because graffiti disfigured some tree grates and tree guards (cages around the tree trunks). Id., at 18, 30-31, 65-66.

USP hired AMC to remove tree grates because they posed a tripping hazard. Id., at 32-33. The grates were removed in 2008 and 2009. Id., at 32. Upon receiving AMC's invoice, USP inspected AMC's work to ensure that it had been done properly. Id., at 36, 45-46.

David Goldberg, President of AMC, testified at his deposition that USP entered into an agreement with AMC ("the Sanitation Services Agreement") pursuant to which AMC was to clean the sidewalks and curbs of the 14th Street "Business Improvement District," including East 14th Street between Second and Third Avenues. Ex. D to Ex. 2, at 9-10. In 2008, AMC removed tree grates on 14th Street at the special verbal request of USP. Id., at 15-16, 18-21, 24-25. The invoice for the tree grate removal was dated May 1, 2008. Id., at 27. Goldberg believed that the tree grate in front of the Beauty Bar was included in the Sanitation Services Agreement AMC had with USP. Id., at 30. AMC did not repair any tree grates between 2008 and 2010. Id., at 20-21. AMC was only to perform work relating to the tree grates if asked to do so by USP. Id., at 45.

Goldberg believed that AMC's tree grate removal work was inspected by USP. Id., at 28. USP paid AMC in full for the tree grate removal work. Id., at 27. No one requested that AMC perform any further work or services on the tree wells between April 2008 and April 2010 and AMC did not perform any such work. Id., at 21. After the removal of the tree grates, AMC never received

any complaints regarding the condition of the locations at which it had removed tree wells. Id., at 28.

USP retained other contractors to perform additional work, including removing the metal saddles, aerating and/or fertilizing the soil, and installing cobblestones in the tree pits as part of the tree pit renovation project. The aeration and fertilization of the soil was performed in conjunction with the DOPR.

William Steyer, Director of the Manhattan Forestry Division for the DOPR, testified at a deposition on behalf of the City. Ex. H to Ex. 2, at 6-7. He identified a 311 service request reflecting that, on September 30, 2009, the City's 311 call center received a complaint regarding a missing tree grate in front of 231 East 14th Street. The initial report was referred to DOT which inspected the site and made the following report. "9/30/09, location inspected. Tree pit defective grating is missing. Belongs to New York City Parks. Refer to Parks Department for repair N unit 1 Inspection 362." Pursuant to this report Steyer testified that he assumed that DOT would have referred the matter back to 311 to have it referred to DOPR. Id., at 14-18, 55, 56, 60. Although Steyer stated that the City does not "stock gratings" or replace gratings, he also said that the City could be involved in how to correct the condition, such as by filling in an area with soil. Id., at 32-33, 35.

By order entered October 22, 2014, this Court, inter alia, granted AMC's motion for summary judgment dismissing all claims against it and denied a motion for summary judgment by USP and a cross motion for summary judgment by the City. In denying the City's application, this Court stated that, although papers were submitted in opposition to an apparent cross motion for summary judgment by the City, there was no cross motion in the motion file, none could be found

upon a search of the court file, and none was submitted by the parties at this Court's request. Ex. 1, at p. 3.

In granting AMC's motion, this Court held that there is no evidence that AMC "was obligated to do anything other than remove the tree grates" and that there is no evidence that it did so negligently. Ex. 1 at 7. This Court further held that, since AMC committed no wrongdoing herein, it is not liable to the City for common law indemnification. Id.

Contrary to USP's contention, this Court did not summarily deny its motion for summary judgment. Rather, this Court held, inter alia, that:

> [USP] was responsible for the remediation project, and it hired [AMC] to remove the grates covering the tree wells. It inspected and approved the work, and paid for it, without making any complaint to [AMC]. Thus, it had notice of the condition of the tree wells after the grates were removed. There is evidence that Beauty Bar complained to the City about the dangerous condition of the tree well after the grates were removed. While that complaint does not serve as notice to [USP], it does demonstrate that, at the time that [USP] regularly inspected the area, there was a potentially dangerous condition at the tree well, and therefore [USP] should have known about it. The fact that the precise date of the removal of the grates is uncertain is irrelevant. The grates were removed nearly two years before plaintiff's accident. Thus, there was clearly more than sufficient time for [USP] to have proceeded with its remediation project . . . By doing so, [USP] could have ensured that the tree wells were safe for pedestrians. Therefore, [USP] failed to demonstrate that it did not know about the dangerous condition, or that it had insufficient time to correct it.

Ex. 1, at 12.

The City now moves, pursuant to CPLR 2221, for leave to renew its prior cross motion for summary judgment and, upon renewal, for summary judgment pursuant to CPLR 3211 and/or 3212 on its claims "for indemnity" against USP and on its claim for common-law indemnification against

AMC. Exs. 1, 2.[2]

THE PARTIES' CONTENTIONS:

The City argues that its motion for renewal should be granted in the interests of justice since its initial cross motion for summary judgment was, for some reason, not received by this Court. Upon renewal, the City argues that, based on paragraph 9.02 of its contract with USP, it is entitled to summary judgment on its claim against USP for contractual indemnification. The City further asserts that, since it has no liability, it is entitled to summary judgment on its claim against USP for common-law indemnification. Additionally, the City maintains that it is entitled to common-law indemnification from AMC because even though it was not a signatory to the Sanitation Services Agreement between AMC and USP, that agreement contemplated indemnification of the City.

In opposition to the motion, USP asserts that the City's motion must be denied. First, USP asserts that the City failed to meet the criteria for a motion to renew, as set forth in CPLR 2221(e), by submitting newly discovered evidence and explaining why it could not have been submitted with the City's initial cross motion. USP further asserts that the motion must be denied because the City failed to annex to it USP's opposition to the City's initial cross motion. Next, USP maintains that, even if the City's motion to renew is granted, that branch of the City's motion seeking contractual indemnification must be denied because the City failed to show that it was not negligent. Indeed, urges USP, as a result of the 311 call to DOT, the City had prior written notice of the alleged defect.

---

[2]Although the instant motion initially sought additional relief, such as dismissal of the complaint, the relief sought was limited, by the City's reply affirmation of March 25, 2015, to the relief sought in its initial cross motion. It is unclear why the City is moving for summary judgment pursuant to CPLR 3211, a statute pursuant to which a pleading may be dismissed, but not one pursuant to which affirmative relief may be granted on a pleading.

Last, USP argues that, the fact that the City fails to offer any proof that it inspected the tree well after it received the 311 call on September 30, 2009 "should be considered an omission which also negates the contractual indemnification that [USP] would owe to the City, independent of any alleged negligence of [USP]." USP's Aff. In Opp., at par. 21.

In opposition to the City's motion, AMC argues that the City's motion to renew must be denied since it has failed to establish new evidence, as required by CPLR 2221(e)(2), and has failed to establish "reasonable justification" for failing to present new facts not offered in the initial motion, as required by CPLR 2221(e)(3). AMC further asserts that, since this court has already determined that it has committed no wrongdoing, it is not liable to the City on its claim for common law indemnification.

In opposition to the motion, plaintiff argues that the City had prior written notice of the allegedly defective condition.

In an affirmation submitted in reply to USP's affirmation in opposition, the City argues that it "has no duty to remedy an allegedly defective tree grate that it did not install, and does not own or maintain." City's Reply to USP' Aff. In Opp., at par. 5. Therefore, argues, the City, it is entitled to complete contractual indemnification from USP.

In an affirmation submitted in reply to AMC's affirmation in opposition, the City substantially reiterates the arguments regarding contractual indemnification which it made in its reply to USP's affirmation. It also argues that it is entitled to common law indemnification from AMC.

LEGAL CONSIDERATIONS:

The City's Motion for Renewal

CPLR 2221 (e) (2) provides that a motion for leave to renew:

> shall be based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

CPLR 2221 (e) (3) provides that a motion for leave to renew "shall contain reasonable justification" for the failure to present such facts in a party's initial motion.

Despite the requirement of demonstrating reasonable justification for failing to present any new facts on the prior motion (*see* CPLR 2221[e][3]), 'courts have discretion to relax this requirement and to grant such a motion in the interest of justice' (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003])." *Matter of Pasanella v Quinn*, ___AD3d___ (1st Dept, March 12, 2015). Additionally, "the requirement that new facts be presented to support a motion to renew need not be applied to defeat substantive fairness." *Lambert v Williams*, 218 AD2d 618, 620-21 (1st Dept 1995) (internal citations omitted). Here, the City asserts that its renewal motion should be heard because its initial cross motion was missing from the court file due to a clerical error. Although this Court notes that the City's motion is not founded upon "new facts" as required by CPLR 2221(e)(2), it recognizes that, since opposition was submitted to the City's initial cross motion, such an application was evidently made and somehow misplaced. To punish the City for what appears to be an administrative error would be unduly harsh. Therefore, in its discretion, this Court grants the City's renewal motion pursuant to CPLR 2221(e).

Contractual Indemnification

In general, as USP asserts, relying on *Amato v Rock-McGraw, Inc.*, 297 AD2d 217, (1st Dept 2002), a party may not recover on a claim for contractual indemnification unless it establishes, as a matter of law, that the proposed indemnitee, herein the City, is free of negligence. *See Remekie v 740 Corp.*, 52 AD3d 393 (1st Dept 2008). However, as noted above, the indemnification provision of the contract between the City and USP requires USP to indemnify the City for damages "in any way relating to or arising out of" the contract and prohibits the City from being indemnified for its own negligence. *See* Ex. F to Ex. 2 at par. 9.02. Therefore, the City's motion for contractual indemnification as against USP is granted on a conditional basis to the extent of directing USP to indemnify the City for damages that did not arise from the City's own negligence. *See Wood v Lefrak SBN Limited Partnership*, 111 AD3d 532, 533 (1st Dept 2013); *Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 (1st Dept 2012); *Hughey v RHM-88, LLC*, 77 AD3d 520, 523 (1st Dept 2010); *Lennard v Mendik Realty Corp.*, 43 AD3d 279 (1st Dept 2007).

As detailed by this Court in its order of October 14, 2014, USP's acts pursuant to the contract caused, or at the very least contributed to, the alleged incident. This Court found, inter alia, that USP was responsible for the remediation project, hired AMC to remove the tree grates, inspected and approved AMC's work, and thus knew of the potentially dangerous condition of the grate for approximately two years prior to the incident without taking any action. Ex. 1, at 11. Since USP failed to reargue or appeal this order, it is now law of the case.

Although USP asserts that the City's failure to repair the tree well after it received the 311 call somehow absolves it of its duty to indemnify the City, it fails to support this argument with any legal support and this Court deems the argument to be without merit.

Although the City insinuates that it is entitled to summary judgment against USP on a claim for breach of contract for failure to procure insurance, it did not move on this ground. Further, this Court notes that, although the City maintains that USP was obligated to procure insurance for its benefit, which appears to be the case pursuant to the contract between those entities (see Ex. F to Ex. 2, at par. 4.01), there is no indication, other than a certificate of insurance (Ex. F), which document is not conclusive proof of the existence or absence of coverage (*see, Tribeca Assocs., LLC v Mt. Vernon Fire Ins. Co.*, 5 AD3d 198 [1st Dept 2004]), reflecting that such coverage was procured. Thus, even if the City had pleaded a claim for breach of contract for failure to procure insurance against USP, which it did not (Ex. D to Ex. 2), it would not be entitled to summary judgment on that claim. Although "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Rubenstein v Rosenthal*, 140 AD2d 156 [1st Dept 1988] [*citations omitted*]), the proof does not support such a claim here since the certificate of insurance annexed to the City's own motion raises a question of fact as to whether the City was named as an additional insured on USP's policy.

Common Law Indemnification

"Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (*citation omitted*)." *Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 (1st Dept 2010). Here, since the City has failed to establish that it was not negligent, it has failed to establish its entitlement to summary judgment as a matter of law on its claim for common-law indemnification against USP.

Although the City asserts that it bears no liability herein since Steyer testified that the City did not "stock gratings" or replace gratings, it overlooks that Steyer also testified that the City could have been involved in how to correct a tree grate condition, such as by filling in an area with soil. Ex. H to Ex. 2, at 32-33, 35.

Additionally, Steyer testified regarding a 311 service request reflecting that, on September 30, 2009, the City's 311 call center received a complaint regarding a missing tree grate in front of 231 East 14th Street, where the Beauty Bar was located. The record also indicated that DOT did indeed inspect on 9/30/09 and noted "Tree pit defective grating is missing." Subsequently, DOT determined that this was a DOPR problem, it referred the issue back to 311 to have it referred to DOPR. Id., at 14-18, 55, 60. Steyer admitted that, based on his knowledge of the 311 service request and what it contained, "there should be records maintained by the [DOPR], at the very least a notification from 311 that they are referring this complaint to the [DOPR] in [or] around 9/30/09." Id., at 60. Since the prior written notice requirement in the City's Pothole Law (Admin. Code of City of NY § 7-210[c][2])[3] contains a "written acknowledgment" provision which allows a lawsuit "where there is documentary evidence showing, as clearly as written notice to [the City] would show, that the City knew of the hazard and had an opportunity to remedy it" (*Bruni v City of New York*, 2 NY3d 319, 326 [2004]), there is, at the very least, an issue of fact as to whether, since the City was already aware of a hazard, as it was both inspected and recorded by DOT and should have been referred to DOPR, the City knew of the alleged hazard and had a reasonable opportunity to address it.

---

[3]Although the Pothole Law shifts liability for maintenance of sidewalks to abutting landowners, it does not absolve the City of its liability for maintaining tree wells. *See Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 (2008).

This Court notes that, given the questions of fact regarding the City's negligence, as well as the fact that it did not assert a claim for common-law negligence against AMC, that branch of the City's motion seeking summary judgment against AMC for common-law indemnification is denied. *See Rubenstein v Rosenthal, supra.* Even if the City had asserted a claim for common-law indemnification against AMC, the claim would fail, since this Court found in its order of October 14, 2014 (Ex. 1) that AMC was without fault (*see Martins v Little 40 Worth Assoc., Inc.,* 72 AD3d *supra* at 484) and, since no party has challenged that ruling, it is now law of the case.

Finally, this Court rejects USP's argument that the City's motion must be denied in all respects because the City did not submit with the instant motion USP's opposition to the City's initial cross motion. Since USP submitted that opposition as Ex. B to its affirmation in opposition to the instant motion, any failure by the City to submit these papers was remedied. *See Sass v Varisco*, 2011 NY Misc LEXIS 6187, 2011 NY Slip Op 33386(U) (Sup Ct New York County 2011), *affd Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 (1st Dept 443).

In light of the foregoing, it is hereby:

ORDERED that the City's motion to renew is granted; and it is further;

ORDERED that upon renewal, that branch of the City's motion seeking contractual indemnification against USP is granted to the extent of granting the City a conditional order of contractual indemnification requiring USP to indemnify the City for all damages arising from the alleged claim except for those determined by the jury to have been caused by the City's own

negligence; and it is further,

ORDERED that upon renewal, that branch of the City's motion seeking common-law indemnification from USP is denied; and it is further,

ORDERED that upon renewal, that branch of the City's motion seeking common-law indemnification from AMC is denied; and it is further,

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

Dated: May 8, 2015

ENTER:

KATHRYN E. FREED, J. S. C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT