SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JANINE STURKEY,

Index No. 156686/12

Plaintiff,

- against -

1824 PARK AVENUE LLP,

Defendant.

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1824 PARK AVENUE LLP,

Third-Party Plaintiff,

- against -

A&P PARKING CORPORATION,

Third-Party Defendant.

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KELLY O'NEILL LEVY, J.:

Third-party plaintiff 1824 Park Avenue, LLP (Park Avenue) moves, pursuant to CPLR 3212, for summary judgment on its claim for contractual indemnity and breach of contract against third-party defendant A&P Parking Corporation (A&P Parking).

Background

Park Avenue is the owner of a parking lot located at 1824 Park Avenue, New York, New York (Premises) (complaint, ¶ 1). Plaintiff Janine Sturkey alleges that, on August 26, 2012, while walking on or near the sidewalk abutting the Premises, she tripped and fell due to a "hazard on the defective sidewalk or driveway" (*id.*, ¶¶ 8-9). Plaintiff alleges that she sustained injuries to

her back, right leg, and right calf (*id.*, ¶ 10). Her complaint, in which third-party plaintiff Park Avenue is the sole defendant, contains two causes of action. The first alleges that Park Avenue failed in its duty to maintain the Premises in a reasonably safe condition (*id.*, ¶ 12). The second alleges that, by failing to properly maintain the Premises, Park Avenue violated New York City Administrative Code § 7-210 *(id.*, ¶ 12).

Park Avenue commenced a third-party action against A&P Parking, the tenant of the Premises, containing four causes of action. In the first, for indemnification or contribution, Park Avenue alleges that A&P Parking is responsible for any damages sustained by plaintiff, as alleged in the complaint.

The second cause of action is based on the allegation that, pursuant to a lease agreement between it and A&P Parking (Lease), A&P Parking was required to secure liability insurance for Park Avenue's benefit for loss or damage that Park Avenue sustained under the Lease. Allegedly, the underlying allegations of the complaint come within the scope of the Lease, and, pursuant to the obligation to procure insurance, A&P Parking is liable by way of indemnification or contribution.

The third cause of action is for contractual indemnification, based on a provision in the Lease.

The fourth cause of action alleges that A&P Parking was to maintain the Premises, and that A&P Parking will be liable under the Lease by way of indemnification or contribution in the full amount of a recovery by plaintiff up to the amount of the requisite insurance coverage stated in the Lease.

In support of its motion, Park Avenue states that relevant photographs show that plaintiff fell on the paved entryway (driveway) into A&P Parking's parking lot. According to Park Avenue, plaintiff tripped in the driveway that spanned a portion of the sidewalk, and she fell within arm's length of the gate to the parking lot. Park Avenue attributes the fault solely to A&P Parking. Park Avenue contends that: (1) pursuant to the terms of the Lease, it is entitled to summary judgment against A&P Parking on its claims for contractual indemnity, and (2) for breach of contract as against A&P Parking for failing to procure insurance.

A&P Parking argues that: (1) even if it breached the portion of the Lease requiring it to maintain insurance coverage for Park Avenue's benefit, pursuant to such breach, Park Avenue is entitled to only out-of-pocket expenses (premiums and other costs associated with the policy) incurred in the defense of the action; (2) issues of fact exist as to the alleged defective sidewalk; (3) the Lease did not require A&P Parking to maintain the public sidewalk as opposed to the Premises; and (4) pursuant to Administrative Code § 7-210, Park Avenue, as owner, has a nondelegable duty to maintain and repair the sidewalk abutting the parking lot.

Plaintiff also submitted opposition to the motion, contending that both Park Avenue and A&P Parking are responsible for maintaining the sidewalk, as well as the parking lot and the entrance and exits to the parking lot. Plaintiff argues that, as owner, Park Avenue is not entitled to indemnification and breach of contract against A&P Parking. Plaintiff argues further that, because the accident occurred on the sidewalk that A&P Parking made a special use of as a driveway for ingress and egress of cars, A&P Parking is liable for the defective condition that caused plaintiff to trip and fall.

Determination

Park Avenue's motion is granted to the extent that Park Avenue is entitled to judgment on its claim for contractual indemnification.

Discussion

For the reasons discussed below, Park Avenue, "is entitled to conditional summary judgment on its cross-claim for contractual indemnification in advance of any factual determination that [A&P Parking] was negligent and a showing of loss by [Park Avenue]" *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200, 202 [1st Dept 1998]).

Administrative Code § 7–210 "'imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk'" (*Wahl v JCNYC, LLC*, 133 AD3d 552, 552 [1st Dept 2015], quoting *Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]). "City Council enacted section 7-210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them – the property owners" (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008] [internal quotaion marks and citation omitted]).

"Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party" (*Collado v Cruz*, 81 AD3d at 542 [complaint by plaintiff against tenant dismissed, because it was undisputed that the tenant did not create the condition or make special use of the sidewalk]). Thus, Park Avenue, as owner, is potentially liable to plaintiff for her injuries allegedly resulting from her fall while walking on or near the sidewalk abutting the Premises, due to an alleged "hazard on the defective sidewalk or driveway" (complaint, ¶¶ 8-9).

A&P Parking could also be liable as a tenant, however, if it created the hazardous condition or made a special use of the sidewalk (*see Collado v Cruz*, 81 AD3d at 542 ["tenant may be held liable to the owner for damages resulting from a violation of paragraph 30 of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store"]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 447 [1st Dept 2008]). Use of "a driveway running over a sidewalk constitutes a special use" (*Trent-Clark v City of New York*, 114 AD3d 558, 559 [1st Dept 2014]).

The liability of Park Avenue or A&P Parking to plaintiff, however, is not directly at issue on this motion. Moreover, as discussed below, vis-à-vis Park Avenue's claims against A&P Parking for indemnification, neither A&P Parking nor plaintiff has submitted any evidence establishing an issue of fact as to whether Park Avenue was negligent in causing or contributing to the alleged injury.

Thus, A&P Parking, as tenant, may be held liable to the owner, Park Avenue, for damages based on the Lease, which imposed on A&P Parking the obligation to maintain the Premises (*see Collado v Cruz*, 81 AD3d at 542]). Here, the Lease contains several provisions establishing the parties' intent that A&P Parking bear responsibility for maintaining the Premises.

Section 1 of the Lease provides that "Landlord shall give possession of the Rental Space to Tenant for the Term." Section 7 of the Lease provides:

> "7. Condition of Property:
>
> Tenant represents that it has made a thorough inspection of the Property and is fully familiar with the condition of every part thereof. Tenant agrees to accept possession

> of the Premises in the following delivery condition; vacant, in compliance with all applicable laws, and in its "As Is" condition.
>
> Landlord shall not be required to make any alterations, installations, additions, repairs or improvements of any kind whatsoever to prepare the Property for Tenant's occupancy."

Section 8 of the Lease provides:

> "8. Reports and Maintenance.
>
> Tenant shall be responsible, at its expense, to maintain the Property in good condition, free from dirt, trash and debris, promptly remove any snow from the Property, and promptly perform any required repairs to the asphalt, fence, gate and locks. Tenant shall be responsible for (a) securing the Property after any entry or exit therefrom by Tenant, its employees, agents, contractors or representatives, (b) securing the vehicles brought to or parked at or about the Property, and (c) any loss, theft or damage to any such vehicles or their contents."

The above-cited Lease provisions reveal the parties' intent that A&P Parking bear responsibility for the Premises; it was to perform an inspection, accept the premises in an as-is condition, and maintain the Premises. Park Avenue was not required to "make any alterations, installations, additions, repairs or improvements of any kind whatsoever to prepare the Property for Tenant's occupancy."

Another Lease provision required A&P Parking to indemnify and hold Park Avenue "harmless from and against any and all liability for personal injuries (including death) or property damage caused by Tenant's use of the Property" (*see Isnardi v Genovese Drug Stores*, 242 AD2d 672, 674 [2d Dept 1997]). Section 11 of the Lease provides:

> "11. Indemnification.
>
> Tenant shall indemnify and hold Landlord harmless from and against any and all liability for personal injuries (including death) or property damage caused by Tenant's use of the Property. With respect to any damage to the Property itself that may be caused by Tenant's occupancy, Tenant, at no cost or expense to Landlord

> shall repair such damage and leave the Property in the condition that existed prior to any damage thereto caused by Tenant's occupancy. Landlord shall indemnify and hold Tenant harmless from and against any and all liability for personal injuries (including death) or property damage caused by a breach of this Agreement by Landlord and/or the willful misconduct or negligence of Landlord, its employees, agents, representatives, contractors, invitees, and other licensees or parties with rights to enter upon the Property."

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 446 [2d Dept 1999] [internal quotation marks and citation omitted]). The indemnification clause in the parties' contract is enforceable, because it does not impose an obligation to indemnify Park Avenue for its own negligence (*see Narvaez v 4518 Assoc.*, 250 AD2d 436, 436-437 [1st Dept 1998] ["indemnification clause in the parties' contract is enforceable since it does not impose an obligation to indemnify for negligence other than that of the indemnitor and its agents"]).

A&P Parking argues, unpersuasively, that a question of fact exists as to the cause of the alleged defect, and when the alleged defect occurred, i.e., prior to or after the commencement of its tenancy. In so arguing, A&P Parking states that Park Avenue's owner, Joseph Rabizadeh, testified at his deposition that: (1) he was unfamiliar with the appearance of the sidewalk prior to the alleged accident; (2) he was unaware as to whether there was a crack in the sidewalk; and (3) he inspected the Premises prior to the commencement of A&P Parking's tenancy, but could not recall if he inspected it for defects or irregularities. A&P Parking also avers that Pirzada Uddin, one of its co-investors, testified at his deposition that he could not recall the condition of the sidewalk at the time that his company took possession of the parking lot.

These assertions as to Park Avenue's possible fault are based on speculation, and fail to raise an issue of fact as to Park Avenue's responsibility, given that A&P Parking had the contractual obligation to inspect the Premises, which it accepted on an as-is basis, and to maintain the Premises. Speculation that Park Avenue "created the defect [is] without evidentiary support and cannot suffice to defeat summary judgment" (*Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 356 [1st Dept 1999]). There is no showing of "active negligence" on Park Avenue's part, and the evidence submitted on the motion by all parties indicates that any finding of negligence would be based solely on the acts or omissions of A&P Parking, "although attributable by statute to the owner" (*Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d at 201] [defendant who had entered into an agreement with owner to maintain building's elevators, liable to indemnify owner where no showing of negligence by owner, who had nondelegable, statutory duty to maintain elevators]). In such circumstances, A&P Parking, which assumed a contractual duty to maintain the Premises, "is liable for the full amount of any recovery as well as the owner's legal fees in defending this action" (*id.* at 201-202).

As for Park Avenue's other claim on the motion, for breach of the provision requiring A&P Parking to obtain insurance, the Lease provides:

> "6. Insurance
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> Liability. Tenant shall obtain, pay for, and keep in effect for the benefit of Landlord and Tenant, public liability insurance on the Rental Space as set forth on page 1. The insurance company and the broker must be acceptable to Landlord. This coverage must be in at least the minimum amounts stated above and shall include Landlord as a direct insured party.
>
> Tenant shall deliver the original policy to the Landlord with proof of payment of the first year's premiums. This shall be done not less than 15 days before the Beginning

of the Term. Tenant shall deliver a renewal policy to the Landlord with proof of payment not less than 20 days before the expiration date of each policy."

Park Avenue has failed to establish a prima facie entitlement to judgment on its cause of action for breach of the requirement to procure insurance. There is no allegation in an affidavit by a person with knowledge that A&P Parking failed to procure insurance. The statement, made only by counsel in Park Avenue's memorandum of law, is of no probative value (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 411 [1st Dept 2010]). Thus, the burden never shifted to A&P Parking to demonstrate otherwise or to show the existence of an issue of fact. Moreover, in its reply papers, Park Avenue states that A&P Parking acknowledged that it failed to procure insurance for the benefit of Park Avenue. In its opposition papers, however, A&P Parking has not made that acknowledgment.

Accordingly, it is

ORDERED that the motion by 1824 Park Avenue, LLP is granted as to liability to the extent of its claim against A&P Parking Corporation for contractual indemnification in connection with any judgments rendered against it in favor of plaintiff Janine Sturkey in this action.

Dated: April 11, 2016

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.