

Mahon v David Ellis Real Estate, L.P.

2016 NY Slip Op 31750(U)

July 20, 2016

Supreme Court, New York County

Docket Number: 150366/11

Judge: Sherry Klein Heitler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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YVETTE MAHON,

Plaintiff,

-against-

DAVID ELLIS REAL ESTATE, L.P., BLUE WATER
GRILL, B.R. GUEST, INC. d/b/a BLUE WATER
GRILL, SPH RESTAURANT ENTERPRISES, INC.,
d/b/a BLUE WATER GRILL, and HEARTLAND
BREWERY, INC.,

Defendant.

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DAVID ELLIS REAL ESTATE, L.P.,

Third-Party Plaintiff,

-against-

B.R. GUEST, LLC, SPH ENTERPRISES INC.,
31 UNION SQUARE WEST, LLC, d/b/a BLUE WATER
GRILL, and USC OPERATING COMPANY, LLC
d/b/a UNION SQUARE CAFÉ,

Third-Party Defendants.

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USC OPERATING COMPANY, LLC
d/b/a UNION SQUARE CAFÉ,

Second Third-Party Plaintiff,

-against-

HEARTLAND BREWERY, INC,

Second Third-Party Defendant.

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SHERRY KLEIN HEITLER, J.:

Motion sequence nos. 004 ("MS 004") and 005 ("MS 005") are consolidated herein for

Index No. 150366/11
Motion Seq. 004, 005

DECISION & ORDER

disposition.

In MS 004, defendants/third-party defendants BR Guest, LLC, SPH Enterprises, and 31 Union Square West d/b/a Blue Water Grill ("Blue Water Grill") move pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against them. In MS 005, third-party defendant/second third-party plaintiff USC Operating Company, LLC d/b/a Union Square Café ("Union Square Café") moves pursuant to CPLR 3212 for summary judgment dismissing all claims and cross-claims asserted against it. Both motions are opposed by defendant/third-party plaintiff David Ellis Real Estate, L.P. ("David Ellis").

BACKGROUND

This is an action for personal injuries allegedly sustained by plaintiff Yvette Mahon ("Plaintiff") on March 31, 2011 when she tripped and fell on the sidewalk adjacent to an alleyway located on the 16th street side of a building known as 31 Union Square West in Manhattan, a mixed use building owned by David Ellis ("Building"). Union Square Café and Blue Water Grill each occupied a portion of the Building's ground floor as restaurant tenants.

At her deposition on September 16, 2014,¹ Plaintiff described the condition of the sidewalk where she fell to be uneven, broken cobblestones (Plaintiff's Deposition pp. 26-27, 29-30, 172-173):

- Q. The area where you slipped or tripped, was that a level surface or were there any differences in elevation?
- A. Differences. . . .
- Q. Is there any way you could describe the differences?
- A. There was an unevenness in the, almost like there was a little ditch in there. . . .
- Q. At any time before your accident, while you were walking on 16th Street, did you have any difficulty in walking or did you notice any slippery portions of the sidewalk?
- A. No. . . .

¹ A copy of Plaintiff's deposition transcript is submitted as Exhibit B to Blue Water Grill's moving papers ("Plaintiff's Deposition").

Q. Ms. Mahon, the question I just asked you about the sidewalk, I believe that you understood me. But we are talking about that stretch of 16th Street, from Union Square, until you reached the brick-like surface. For the rest of the deposition, we just want to come up with a term, so that brick-like surface, we could use a word like cobblestone, even though I know from your description it isn't true cobblestone.

A. Okay.

Q. But we can use that term to describe that area of the driveway that's different from the concrete sidewalk surface.

A. Okay.

Q. Okay. Now, what was it about the cobblestone that caused you to fall?

A. That imperfection in the cobblestones.

Q. ... Can you describe the imperfection for me? Was it raised, was it lowered, was it broken, was it cracked?

A. It was broken.

David Ellis' managing partner, Mr. Ari Ellis², testified that the subject alleyway and adjacent sidewalk are maintained jointly by the movants and defendant Heartland Brewery, Inc.³ (Ellis Deposition pp. 12-13, 18, 64-66):

Q. With respect to the alleyway itself, you said you don't have an understanding as to who owns it; who maintains that area?

A. It is maintained jointly by Blue Water Grill, Union Square Café, and Heartland Brewery.

Q. When you say it's maintained jointly by them, can you tell me what you mean by that?

A. I mean that all cleaning, maintenance, repair has been done by those three companies in my years of working with the company.

Q. Earlier I asked you about the maintenance and repair, and you told us about that involving the alleyway. Is what you said also applicable to the area in front of the alleyway up through the sidewalk to the street?

A. Yes.

² Mr. Ellis was deposed on November 5, 2014. A copy of his deposition transcript is submitted as Exhibit D to Blue Water Grill's moving papers ("Ellis Deposition").

³ Heartland Brewery, Inc. has not answered or otherwise appeared in this action.

Q. Are there any exterior common areas to the premises located at 31 Union Square West, and by exterior I mean outside?

A. Yes.

Q. What are the exterior outside common areas of the building located at 31 Union Square West?

A. I would say the alleyway. I don't know if that's interior or exterior, but that's a common area.

Q. As depicted in the schematic on Plaintiff's Exhibit 1 where it says common alleyway in the rear of the building, you agree with that marking on that paper, common?

A. I agree, common, yeah.

Q. The herringbone brick in front of that, is that also considered a common area of the building?

A. Yeah.

Q. As landlord, is David Ellis responsible for making structural repairs to common areas of the building? . . .

A. Unless the repair was necessitated by the misuse of the tenant, yes . . . And additionally, unless the tenant was in possession and in use of that area.

Mr. Ellis identified the "cobblestone" area described by the Plaintiff as yellow herringbone brick which dates back to the erection of the Building in the early 1900's (*id.* pp. 21-24). He attributes any damage or unevenness in the herringbone brick area to the large trash dumpster carts that were kept in the alleyway and were used by Union Square Café and Blue Water Grill (*id.* pp. 46-47):

Q. The condition . . . that we talked about earlier, if you know, do you know what caused the condition?

A. I believe I know.

Q. Go ahead.

A. The carts that get muscled in and out are heavy with metal wheels and with a lot of trash in them. I've seen them often taking at least two guys to sort of drag it into the street. With years of that kind of abuse, it certainly would lead to that kind of damage.

Blue Water Grill's witness, Mr. Thomas Brown,⁴ testified that the trash dumpsters were utilized not only by Blue Water Grill and Union Square Cafe, but also by David Ellis' residential tenants of the

⁴ Mr. Brown was deposed on July 15, 2015. A copy of his deposition transcript is annexed to Blue Water Grill's moving papers as Exhibit E ("Brown Deposition")

Building, second third-party defendant Heartland Brewery, and the residents of another building located next to 31 Union Square West (Exhibit E, pp. 12-13, 53-54). Among the dumpsters kept in the alleyway, two were designated for Blue Water Grill and two were designated for Union Square Cafe. Both restaurants contracted with a company called Action Carting to pick up their garbage daily which involved hauling the dumpsters from the alleyway to the street (*id.* pp. 14, 50-53). Mr. Brown did not know of any complaints received by Blue Water Grill regarding damage to the alleyway or the herringbone brick area due to the dumpsters, nor was he aware of any repair work performed by Blue Water Grill to the herringbone brick area (*id.* pp. 55, 46).

Mr. Sam Lipp was deposed on behalf of Union Square Cafe.⁵ He described the condition of the herringbone brick at the time of the accident as worn and in need of repair (Lipp Deposition pp. 13-14, objections omitted):

- Q. Do you recall the general condition of the yellow cobblestones back in 2010, 2011? ... Was it in good shape, bad shape, mediocre shape; how would you describe it?
- A. Worn. . . .
- Q. Would you describe it as being somewhat in disrepair? . . .
- A. Yes. . . .
- Q. Were there cobblestones that had gaps of two or three inches or more? I'm not saying from looking at the picture, just from your memory.
- A. Yes.
- Q. Do you recall if there were cobblestones that were worn, chipped, cracked, that sort of thing? . . .
- A. Yes.

Mr. Lipp acknowledged that Union Square Cafe employees regularly mopped the bricks and swept up garbage from the area, but testified that David Ellis was responsible for repairing the bricks if there was a structural issue (*id.* pp. 16, 23):

⁵ Mr. Lipp was deposed on July 23, 2015. A copy of his deposition transcript is annexed to Union Square Cafe's moving papers as Exhibit H ("Lipp Deposition").

Q. Did any staff or your restaurant do anything to maintain that area?

A. Yes.

Q. Would that be things like sweeping and cleaning up garbage?

A. Yes.

Q. Did anyone from your restaurant ever undertake physical maintenance or repairs to those cobblestones?

A. No.

Q. If there was a problem with the yellow cobblestone based on your position, who would you think should fix it, if it was a physical problem say with the pointing, the grouting, that sort of stuff?

A. David Ellis Real Estate.

Annexed to David Ellis' opposition papers is an affidavit by Nicolas Sangprakarn who superintended the Building on the date of the accident and for about seven years prior thereto.⁶ Therein he describes the activities of Blue Water Grill and Union Square Cafe employees in the years prior to Plaintiff's accident, and sets forth his understanding of the parties' respective obligations concerning the alleyway and adjacent sidewalk/driveway (Sangprakarn Affidavit, §§ 3, 5, 6, 8):

The alleyway served as a garbage disposal and storage area for the businesses adjoining the alleyway Garbage was stored in commercial dumpsters or containers of substantial size and weight These dumpsters were metallic and wheeled. Blue Water Grill and Heartland Brewery had doors providing direct access to the alleyway. Union Square Cafe personnel brought their garbage into the alleyway from the front.

It was my understanding that the responsibility to maintain and repair the alleyway and driveway was with the restaurants which utilized them.

In the course of my duties as superintendent, prior to March 31, 2011, I frequently had the occasion to observe employees of the above-named restaurants performing maintenance duties in or around the alleyway and driveway-sidewalk. Employees of all three restaurants (but more frequently those of Blue Water Grill and Union Square Cafe) would sweep or wash the alleyway, driveway and sidewalk frequently. On more than one occasion prior to March 31, 2011, I observed employees of the Blue Water Grill applying wet cement or concrete to spaces or cracks

⁶ Mr. Sangprakarn's affidavit is sworn to April 8, 2016 ("Sangprakarn Affidavit").

in the surface of the herringbone brick surface of the driveway.

* * * *

A large laundry truck would also utilize the driveway to pick up and deliver to the Blue Water Grill on a daily basis. I would generally ask the restaurant employees to have the truck remain in the roadway, but these requests were almost always ignored. I also observed the large metallic garbage dumpsters used by the restaurants being wheeled back and forth from the alleyway to the curb area for garbage pickup. Over periods of time, my observations were that the pressure from the trucks and the dumpsters caused a deterioration in the driveway, and particularly the herringbone brick area, where the cement or concrete placed by restaurant personnel would loosen.

Blue Water Grill argues that it does not own the common alleyway; the wheeling of the trash carts from the alleyway to the curb does not constitute a "special use" of the sidewalk; its lease agreement with David Ellis provides that it is responsible only for non-structural repairs to the sidewalk in front of its demised premises; and the accident did not occur upon its demised premises or any sidewalk adjacent thereto. In opposition, David Ellis argues that the deterioration of the area where Plaintiff fell was caused at least in part by Blue Water Grill's actions; Blue Water Grill's activities constituted a special use of the sidewalk; and Blue Water Grill is required to indemnify it under the terms of its lease.

Union Square Cafe argues that it is responsible only for non-structural repairs to the sidewalk under the terms of its lease with David Ellis; David Ellis' duty to maintain the sidewalk in a reasonably safe condition is non-delegable; and the wheeling of the trash carts from the alleyway to the curb does not constitute a special use. David Ellis contends that the deterioration of the area where Plaintiff fell was caused at least in part by Union Square Cafe's actions; there is an issue of fact whether Union Square Cafe's activities constituted a special use of the sidewalk; and its lease agreement does not explicitly relieve Union Square Cafe of responsibility for structural repairs to the sidewalk.

DISCUSSION

“Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact’ and then only if, upon the moving party’s meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action.’” *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); see also *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). However, “rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact.” *Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 (1st Dept 2010); see also *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190 (1st Dept 2004).

New York City Administrative Code § 7-210⁷ imposes a non-delegable duty on the owner of a premises to maintain and repair the sidewalk abutting its premises. *Collado v Cruz*, 81 AD3d 542, 542 (1st Dept 2011). A lease provision which obligates a tenant to repair the sidewalk does not impose on the tenant a duty to a third party, such as the Plaintiff. *Id.* In order to shift responsibility to a tenant which “has no statutory obligation to maintain the public sidewalk adjacent to its store” (*O’Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]), and impose liability for a defective condition of an abutting sidewalk, there must be evidence that the tenant created the defect,

⁷ NYC Administrative Code 7-210(a) provides that “[i]t 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.”

or made special use of the sidewalk.

David Ellis' assertion that Union Square Cafe and Blue Water Grill were obligated under their respective lease agreements to repair and maintain the herringbone brick area is without merit. A copy of the lease agreement between Blue Water Grill and David Ellis in effect on the date of the accident is annexed to Blue Water Grill's moving papers as Exhibit G. This "Standard Form of Store Lease" provides in relevant part (Exhibit G, p. 1, § 4):

Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalk adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damages from the elements, fire or other casualty, excepted.

Further concerning repairs and maintenance responsibilities, the Rider to the "Standard Form of Store Lease" provides (Exhibit G, p. 14, § 44):

It is agreed and understood that the Tenant will at its own cost and expense, keep the sidewalk in front of the demised premises free and clear of ice, snow, dirt, and rubbish and in good repair at all times.

A copy of the lease agreement between Union Square Cafe and David Ellis in effect on the date of the accident is annexed to Union Square Cafe's reply papers as Exhibit A. It provides, in relevant part (§§ 6, 7, 36):

It is understood and agreed that the Landlord is responsible for exterior structural repairs only, including structural repairs to the outside walls and roof, and no other repairs, including but not limited to other exterior repairs. Moreover, if said exterior structural repairs are caused by the negligence of the Tenant or its servants, invitees, licensees, agents or employees, then said exterior structural repair shall be tenant's responsibility rather than the Landlord's responsibility.

* * * *

It is agreed and understood that the Tenant will, at its own cost and expense, keep the sidewalk in front of the demised premises free and clear of ice, sleet, snow, dirt, and rubbish, and in repair, at all times.

New York courts have held that repairs to a public sidewalk are considered structural.

Hand v City of New York, 2015 NY Misc. LEXIS 141, *18 (Sup. Ct. NY Co. Jan. 16, 2015, Freed, J.);

Langston v Gonzalez, 39 Misc 3d 371, 383 (Sup Ct. Kings Co. Feb 4, 2013, Silber, J.); *see also Cucinotta v City of New York*, 68 AD3d 682 (1st Dept 2009). Moreover, “[u]nless a lease specifically obligates the tenant to be responsible for structural repairs and identifies what they are, such obligation will not be implied nor imposed.” *Wolfe v Gallery Partners, LLC*, 2012 NY Misc. LEXIS 4299, *12 (Sup Ct NY Co. Sept. 4, 2012, Gische, J.).

Here, neither lease specifically obligates either tenant to repair a cracked, broken, or uneven sidewalk, either in front of or adjacent to their demised premises. Section 6 of Union Square Cafe’s lease sets forth David Ellis’ duty to make all exterior structural repairs. It explicitly denotes walls and the rooftops as examples of such exterior structures, but not sidewalks. Section 4 of Blue Water Grill’s lease only requires Blue Water Grill to make “non-structural repairs” to the sidewalk adjacent to its demised premises. Each lease also contains a provision requiring the tenant to keep the sidewalk free of debris and in good repair, but only that portion which is “in front of” its leased space. The herringbone brick area is adjacent to but not in front of either tenant’s premises.

Still, section 7-210 of the New York City Administrative Code⁸ does not absolve a tenant of its own liability, and David Ellis may seek to be contractually indemnified for damages arising out of Plaintiff’s injuries (*see Mora v Althelm Sunog Realty*, 2016 NY Misc. LEXIS 1693, *12 (Sup. Ct. NY Co. May 5, 2016, Bluth, J.); *Stuzdak v Killowen, Inc.*, 36 Misc. 3d 1237(A), 2012 NY Misc. Lexis 4211, *16-17 [Sup. Ct. Kings Co. 2012, Schmidt, J.]). The indemnification clauses at issue in this case are as follows (Exhibit G, p. 2, § 8, p. 17, § 51; Exhibit J, § 36):

Owner or its agents shall not be liable for . . . any injury or damage to person or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees . . . Tenant agrees, at Tenant’s sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises

⁸ See n. 7, *supra*.

* * * *

Tenant covenants and agrees to indemnify and save landlord harmless from and against any and all claims arising during the term of this Lease for . . . any personal injury or loss of life in, upon or about the Demised Premises, or on the sidewalks adjoining the Demised premises, except such claims as may be the result of negligence of the Landlord, its agents, employees or contractors, or the failure of the Landlord to perform any of its obligations under the Lease. . . . Tenant covenants to provide on or before the commencement date of the term hereof and to keep in force during the term hereof for the benefit of Landlord and Tenant, a comprehensive policy of liability insurance protecting Landlord and Tenant against any liability whatsoever, occasioned by accident on or about the Demised Premises or any appurtenances thereto.

* * * *

Tenant covenants and agrees to indemnify and save Landlord harmless from an against any and all claims arising during the term of this Lease for damages or personal injury or loss of life in, upon or about the demised premises or on the sidewalks adjoining the demised premises, except such claims as may be the result of the negligence of Landlord, its agents, employees, or contractors, or the failure of Landlord to perform any of its obligations under this Lease.

On their face, such indemnification clauses are enforceable. They do not violate General Obligations Law § 5-321 since they do not purport to indemnify David Ellis for its own negligence. *Oduro v Bronxdale Outer, Inc.*, 130 AD3d 432, 433 (1st Dept 2015). The question is whether they are specific enough to cover the matter at bar. *See Roldan v New York Univ.*, 81 AD3d 625, 628 (2d Dept 2011) ("The right to contractual indemnification depends upon the specific language of the contract The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.").

Importantly, these indemnification clauses cover a broader physical area than the repair provisions of the subject leases insofar as they require each tenant to indemnify David Ellis for damages arising from personal injuries sustained not only within their own leased space, but also on the sidewalks "adjoining" their respective premises. Because Plaintiff's injuries fall squarely within this ambit, David Ellis' indemnification claims should not be dismissed.

The special use doctrine authorizes the imposition of liability upon an owner or tenant who has interfered with public property for "private purposes unrelated to the public use." *Bouratoglou v City*

of New York, 51 Misc. 3d 135(A), 2016 Misc. LEXIS 1293, *2 (App Term 2d Dept 2016). A special use is typically characterized by "the installation of some object in the sidewalk or street or some variance in the construction thereof." *Weiskopf v City of New York*, 5 AD3d 202, 203 (1st Dept 2004). For example, in *Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447 (1st Dept 2008), the gap between two Con Ed shunt boards caused plaintiff to trip. The First Department found that an issue of fact existed as to whether the placement of the shunt boards constituted a special use of the sidewalk. Similarly, in *Santorelli v New York*, 77 AD2d 825 (1st Dept 1980), the court found a special use where an oil filler cap jutting above the sidewalk was used in the delivery of heating oil to the abutting owner's building.⁹

Both Union Square Cafe and Blue Water Grill assert that their activities did not constitute a "special use" of the sidewalk because they did not install objects in or around the sidewalk or perform any construction thereon. According to them they merely dragged trash receptacles across a sidewalk, and indeed, case law supports their position that moving trash does not rise to the level of a special use. See *Klein v Sujin Food Corp.*, 30 AD3d 331 (1st Dept 2006); *Sampino v Crescent Assoc., LLC*, 34 AD3d 779 (2d Dept 2006); *Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930 (2d Dept 2005); *Yee v Chang Kin Food Mkt., Inc.*, 302 AD2d 518 (2d Dept 2003); *Peters v City of New York*, 2015 NY Misc. LEXIS 3956, *11 (Sup. Ct. NY Co. Jan. 22, 2015, Freed, J.). The case of *Campos v Midway Cabinets, Inc.*, 51 AD3d 843 (2d Dept 2008), upon which David Ellis relies, is inapposite. There, the plaintiff allegedly sustained injuries when she slipped and fell on a patch of ice on a public sidewalk in front of

⁹ "[W]here the [tenant] derives a special benefit from that [public property] unrelated to the public use, the person obtaining the benefit is required to maintain the used property in a reasonably safe condition to avoid injury to others." *Kaufman v Silver*, 96 NY2d 204, 207 (1997). "Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised, however, upon the existence of the [tenant's] access to and ability to exercise control over the special use structure or installation." *Id.* Even "partial control of the instrumentality by the special user is sufficient to impose liability." *Petty v Dumont*, 77 AD3d 466, 469-470 (1st Dept 2010).

a warehouse in which the defendant was a tenant. Noting that the use of a sidewalk as a driveway constitutes a special use, the court denied the tenant's summary judgment because it failed to establish that the icy condition was not located on the portion of the sidewalk which it used as a driveway. Here, while the Sangprakarn Affidavit indicates that a laundry service truck used the sidewalk as a driveway, there is nothing to show that either Union Square Cafe or Blue Water Grill had any control over the truck or told the laundry service to use the sidewalk as a driveway.

These movants may still be found directly liable for Plaintiff's injuries if it is shown that they created the alleged defect. In this regard David Ellis relies on Mr. Sangprakarn's observations, including his observation that Blue Water Grill employees filled in the deteriorated spaces between the herringbone bricks with cement. The movants contend, however, that the court is precluded from considering his affidavit because he was never designated as a witness. *See Moore v City of New York*, 85 AD3d 623, 624 (1st Dept 2011) (court "properly declined to consider the affidavits of infant plaintiff's siblings, as plaintiffs did not disclose those witnesses in response to [] discovery demands and a prior court order"); *see also Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 (1st Dept 2009); *Robinson v New York City Housing Authority*, 183 AD2d 434 (1st Dept 1992); *see also Henry v Higgins*, 117 AD3d 796, 797 (2d Dept 2014); *Rizos v Galini Seafood Rest.*, 89 AD3d 1004, 1005 (2d Dept 2011); *Muniz v New York City Hous. Auth.*, 38 AD3d 628, 628 (2d Dept 2007); *Williams v ATA Hous. Corp.*, 19 AD3d 406, 407 (2d Dept 2005).

Notwithstanding, the court is not precluded from considering the Sangprakarn Affidavit on this motion. *Moore* and the other cases relied upon by the movants involve notice witnesses, whereas Mr. Sangprakarn is a fact witness. And the movants were made aware that he worked for David Ellis at the time of the accident (*see Brown v Howson*, 129 AD3d 570, 571 [1st Dept 2015]). Mr. Ellis testified that he and Mr. Sangprakarn may have spoken about the condition of the herringbone, and that Mr.

Sangprakarn left his job in order to move to upstate New York with his wife. While it is true that Plaintiff's counsel called for production of Mr. Sangprakarn's address at Mr. Ellis' deposition (Ellis Deposition pp. 42-44), it does not appear that Plaintiff or even the movants followed up on such request in writing. The court agrees, however, that it would be prejudicial to allow David Ellis to rely on Mr. Sangprakarn's statements in opposition to this motion without having first given Plaintiff and the movants an opportunity to cross-examine him regarding his observations of the area and to explore the basis of his claim that the condition of the herringbone area was caused by the movants. Accordingly, the court hereby directs that Mr. Sangprakarn's deposition be noticed within 20 days from the date hereof. See CPLR 3212(f).

In light of the foregoing, it is hereby

ORDERED that, within 20 days from the date of this decision and order, David Ellis is directed to subpoena Mr. Nicolas Sangprakarn to give deposition testimony as a non-party witness in connection with this matter (see CPLR 8001); and it is further

ORDERED that Mr. Sangprakarn's deposition shall be held at a time and place mutually convenient to all parties, but in no event later than September 16, 2016; and it is further

ORDERED that the portions of MS 004 and MS 005 which seek to dismiss Plaintiff's direct claims against BR Guest, LLC, SPH Enterprises, 31 Union Square West d/b/a Blue Water Grill, and USC Operating Company, LLC d/b/a Union Square Café are denied without prejudice to renew upon the completion of discovery as set forth herein; and it is hereby

ORDERED that the portions of MS 004 and MS 005 which seek to dismiss David Ellis Real Estate, L.P.'s third-party claims for contribution against BR Guest, LLC, SPH Enterprises, 31 Union Square West d/b/a Blue Water Grill, and USC Operating Company, LLC d/b/a Union Square Café are denied without prejudice to renew upon the completion of discovery as set forth herein; and it is further

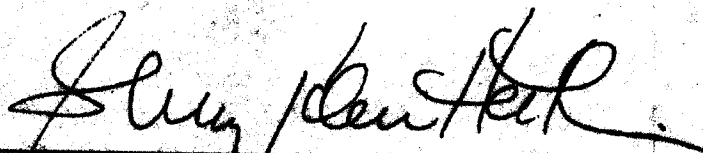
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ORDERED that the portions of MS 004 and MS 005 which seek to dismiss David Ellis Real Estate, L.P.'s third-party indemnification claims are denied in their entirety; and it is further

ORDERED that all parties appear for a compliance conference in Part 30 (60 Centre Street, Room 412) on September 26, 2016 at 10:30AM.

This constitutes the decision and order of the court.

ENTER:

DATED: 7.20.16



SHERRY KLEIN HEITLER, J.S.C.