

**Argueta v Shelly Estates Group, L.L.C.**

2016 NY Slip Op 32075(U)

October 6, 2016

Supreme Court, Queens County

Docket Number: 5926/14

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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SILDA ARGUETA and JAVIER ARGUETA,

Plaintiffs,

-against-

SHELLY ESTATES GROUP, L.L.C. and  
TOMAS M. PATTUGALAN, JR., M.D.,

Defendants.  

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Index No: 5926/14

Motion Date: 6/27/16

Motion Seq. No.: 1

The following papers numbered 1 to 11 read on this motion by defendant, SHELLY ESTATES GROUP, L.L.C. (Shelley Estates), for summary judgment dismissing the complaint insofar as it is asserted against it and for summary judgment on its cross claim for contractual indemnification against the defendant, DR. PATTUGALAN, JR. (Pattugalan), awarding legal fees and dismissing the cross-claims of defendant Pattugalan asserted against Shelley Estates.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 11

Upon the foregoing papers it is ordered that this motion is determined as follows.

This is an action to recover for personal injuries plaintiff sustained on December 10, 2013 at approximately 6:00 p.m. when she allegedly slipped and fell on ice on the public sidewalk abutting the premises located at 175-41 Hillside Ave., Jamaica, NY. Plaintiff commenced this action against the owner, defendant, Shelly Estates Group, L.L.C. and the tenant, Pattugalan. In its answer, the Shelley Estates asserted a cross-claims for contractual indemnification and contribution.

The defendant Shelley Estates now moves for summary judgement dismissing the complaint and all cross-claims on the ground that it neither created nor have actual or constructive

notice of the condition on which plaintiff fell.

Administrative Code of the City of New York § 7-210 imposes upon the owners of real property abutting the public sidewalk (with some exceptions not relevant here) a non-delegable duty to maintain the sidewalk, including removal of snow and ice, and makes the owner liable for injuries arising out of its failure to do so (see Gyokchyan v City of New York, 106 AD3d 780,781 [2013]; Serano v New York City Housing Authority, 66 AD3d 867, 868 [2009]; James v Blackmon, 58 AD3d 808 [2009]; Cook v Consolidated Edison Co. of N.Y., 51 AD3d 447, 448 [2008]). While the duty is non-delegable, section 7-210 does not impose strict liability upon the property owner, thus, the owner may be held liable for injury arising out of the failure to remove snow and ice on the sidewalk only if the owner created or had actual or constructive notice of the condition causing the injury (see Khaimova v City of New York, 95 AD3d 1280, 1281 [2012]; Harakidas v City of New York, 86 AD3d 624, 627 [2011]). To meet its initial burden on the issue of lack of constructive notice Shelley Estates must offer some evidence as to when the area in question was last cleaned or inspected or the condition of the sidewalk prior to plaintiff's fall (see Sartori v JP Morgan Chase Bank, N.A., 127 AD2d 1157 [2015]; Rodriguez v Shoprite Supermarkets, Inc., 119 AD3d 923 [2014]; Birnbaum v New York Racing Assn., Inc., 57 AD3d 598, 598-599 [2008]).

To establish its defense, Shelley Estates relied upon the deposition of, its property and office manager Bruce Rubel, the plaintiff and the defendant, Pattugalan and his medical assistant, a copy<sup>1</sup> of the lease and photographs of the storefront and sidewalk taken<sup>2</sup>. Bruce Rubel testified that his office is in the building less than 50 yards from the leased premises and he would generally walk in front of the leased premises twice a week. He also testified that after a snow fall he regularly inspected the sidewalk to make sure it was adequately shoveled and if not, then he would tell the tenant, however, neither Shelley Estates nor anyone on behalf of Shelley Estates performs snow or ice removal on the sidewalk abutting the leased premises since it is Pattugalan's responsibility under the lease to maintain the sidewalk including snow and ice removal. He also

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<sup>1</sup> The copy of the lease submitted and labeled "Standard Form of Store Lease" is illegible as are substantial portions of the Rider, however the court has accepted counsels recitation as to its contents as there are no objections from the parties.

<sup>2</sup> The date when the photographs were taken was not provided.

testified that the awning over the leased premises was installed by Pattugalan. Rubel also testified that there are no records regarding any inspections he may have performed and had no recollection of the condition of the sidewalk or the weather conditions on or before the day of plaintiff's fall.

Pattugalan testified that pursuant to the lease it was his responsibility to maintain the sidewalk, including snow and ice removal. He further testified that it is his general practice, after a snow fall, to shovel the snow and apply salt. He also testified that he leaves the office at 1:00 p.m., that his staff leaves at 3:00 p.m. and if any snow and ice was observed on the sidewalk it would be either shoveled and/or salt applied. Neither Pattugalan nor his assistant had any recollection of the weather conditions or the condition of the sidewalk or what, if any, snow or ice removal was performed on the day of plaintiff's accident.

Shelley Estates' evidence is sufficient to demonstrate that it did not create or have actual notice of the condition on which plaintiff fell. However, testimony regarding general cleaning practices is insufficient to establish lack of constructive notice and defendant failed to present any evidence as to when Shelley Estates (see Sartori v JP Morgan Chase Bank, N.A., 127 AD3d 1157, 1158 [2015]; Martinez v Khaimov, 74 AD3d 1031, 1033-1034 [2010]; Herman v Lifeplex, LLC, 106 AD3d 1050, 1051 [2013]).

Accordingly, the defendant's motion for summary judgment dismissing the complaint and all cross-claims is denied.

The defendant also moves for summary judgment granting Shelley Estates conditional contractual indemnification against Pattugalan on its cross-claim for contractual indemnification. Shelley Estates asserts that it is entitled to conditional contractual indemnification against Pattugalan inasmuch as Pattugalan had the obligation under the lease to perform snow and ice removal on the sidewalk and the lease contains a valid indemnification clause obligating Pattugalan to indemnify Shelley Estates. Pattugalan opposes on the ground that the indemnification provision of the lease is void and unenforceable pursuant to General Obligations Law (GOL) § 5-321.

Although Shelley Estates, as the abutting landowner, may not delegate its duty to keep the sidewalk in a safe condition with regard to third parties it may, however, secure an indemnification agreement from the party to whom it delegated the responsibility to maintain the sidewalk and allocate the risk of liability to third parties by the procurement of liability insurance for their mutual benefit (see Hogeland v Sibley,

Lindsay & Curr Co., 42 NY2d 153 [1977]; Hughey v RHM-88, LLC, 77 AD3d 520, 522 [2010]; Morel v City of New York, 192 AD2d 428, 429 [1993]). An indemnification clause, which is coupled with an insurance procurement provision obligating the tenant to indemnify the landlord for its share of liability does not violate General Obligations Law § 5-321 (see Hogeland v Sibley, Lindsay & Curr Co.; Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 417 [2006]).

"The right to contractual indemnification depends upon the specific language of the contract" (Roldan v New York Univ., 81 AD3d 625, 628 [2011]; see Hooper Assoc. v AGS Computers, 74 NY2d 487, 491-492 [1989]). 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 circumstances (see Hooper Assoc. v AGS Computers, supra). While a landlord and tenant are free to negotiate at arm's length for allocation of the risk of liability to third parties, the language expressing such intent must be unmistakable (see Great N. Ins. Co. v Interior Constr. Corp., 7 NY3d 412, 417 [2006]; Stern's Dept. Stores, Inc. v Little Neck Dental, 11 AD3d 674, 675 [2004]; Moore v First Indus., 296 AD2d 537, 538 [2002]).

In this case, it is undisputed that pursuant to the express terms of the lease Pattugalan agreed to and was responsible for maintaining the sidewalk including snow and ice removal. In addition, by the specific and unequivocal language of Paragraph 8 of the Form Lease and Paragraphs 55 and 56.1 "Supplementing Article 8" in the Rider, Pattugalan agreed to defend and indemnify Shelley Estates against any and all claims damages, actions including attorney's fees, arising from any default by Pattugalan in the performance of any covenants, terms, provisions, conditions and/or obligations to be performed under the lease. Finally, the agreement to indemnify is not void pursuant to GOL § 5-321 since it is coupled with the agreement to obtain insurance for the benefit of Owner.

Accordingly, Shelley Estates' motion for summary judgment on its cross-claim for contractual indemnification is granted to the extent that it is granted conditional contractual indemnification.

The defendant also moves for summary judgment on its claim for breach of contract for failure to obtain insurance.

A party who breaches an agreement to procure insurance in favor of another is liable for the "resulting damages," (see Kinney v G.W. Lisk Co., 76 NY2d 215, 219 [1990]).

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (DiBuono v Abbey, LLC, 83 AD3d 650, 652 [2d Dept 2011] ).

Although the lease clearly requires that Pattugalan obtain insurance for the benefit of Shelley Estates, Shelley Estates failed to establish, prima facie, that Pattugalan failed to procure insurance in accordance with the lease. Pattugalan testified that he obtained insurance, and Shelley Estates submitted correspondence with State Farm Fire and Casualty Insurance Company(State Farm) indicating the existence of insurance. The fact that State Farm has refused Shelley Estates' tender of the defense is insufficient to demonstrate that Pattugalan breach his contractual obligation (Perez v Morse Diesel Intern. Inc., 10 AD3d 497, 498 [2004]) inasmuch as neither Shelley Estates nor Pattugalan submitted a copy of the insurance policy to demonstrate whether such policy complies with the terms of the lease. In this regard it is pointed out that Pattugalan has failed to comply with Shelley Estates' demand for a copy of the insurance policy.

Accordingly, the branch of Shelley Estates's motion for summary judgment on its cross-claim for breach of contract for failure to obtain insurance is denied as there exist questions of fact as to whether the insurance procured by Pattugalan complies with the terms of the lease.

Dated: October 6, 2016  
D# 54

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J.S.C.