SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOANNE Z. BRUNO and RICHARD SENTIPAL,

Plaintiffs,

- against -

REDI-CONSTRUCTION INC., MARGARET MOOSBRUGGER, 32 GRAMERCY PARK OWNERS CORP., and CHARLES H. GREENTHAL MANAGEMENT CORP.,

Defendants.

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Index No. 157753/14

Mot. seq. no. 003

DECISION AND ORDER

BARBARA JAFFE, J.:

For movants:
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For Moosbrugger:
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By notice of motion, defendants 32 Gramercy Park Owners Corp. (Gramercy) and Charles H. Greenthal Management Corp. (Greenthal) (collectively, movants) move pursuant to CPLR 3212 for an order granting them summary judgment on their cross claim of contractual indemnification and attorney fees as against plaintiff's neighbor, defendant Margaret Moosbrugger. Moosbrugger opposes.

I. BACKGROUND

Pursuant to a proprietary lease between shareholder Moosbrugger and Gramercy, Moosbrugger agreed:

> to save [Gramercy] harmless from all liability, loss, damage and expense arising from injury to person or property . . . due wholly or in part to any act, default or omission of [Moosbrugger] or of any person dwelling or visiting in the apartment, or by [Gramercy], its agents, servants or contractors when acting as agent for [Moosbrugger] as in this lease provided.

(NYSCEF 49).

On February 10, 2013, in anticipation of renovating her apartment, Moosbrugger and Gramercy entered into an alteration agreement, whereby Moosbrugger agreed to

> [i]ndemnify and hold[ ] harmless [movants] . . . and other shareholders and residents of the Building against any damages suffered to persons or property as a result of the Work, whether or not caused by negligence, and for any and all liabilities arising there from or incurred in connection therewith.

(NYSCEF 48). Moosbrugger agreed that 3/16"-thick masonite would protect the "back halls" during the work. (*Id.*). Gramercy retained the right to designate an engineer or architect to review the alteration plans, observe "from time to time" the work, ensure that the work conforms with the plans, and inspect the work. Moosbrugger also agreed that upon Gramercy's inspection, she would "make all corrections" as specified. (*Id.*).

Sometime thereafter, Moosbrugger hired nonmoving defendant Redi-Construction Inc. to perform the renovation work in her apartment. On the morning of October 29, 2009, in advance of the work and pursuant to the alteration agreement, masonite boards were placed in the hallway outside the apartment leading to the elevator. Movants own and manage the building. (NYSCEF 2, 47).

Later that morning, as she stepped into the elevator, Bruno allegedly tripped on an improperly secured masonite board. (NYSCEF 47).

On or about July 30, 2014, plaintiffs commenced this action, asserting claims of negligence, premises liability, and a derivative claim of a loss of consortium. (NYSCEF 1-2). Movants interposed an answer and asserted cross claims against Moosbrugger and Redi for common-law and contractual indemnification, and for a breach of contract based on their failure to procure insurance. (NYSCEF 43).

At her deposition held on July 30, 2015, Bruno testified, in pertinent part, that the masonite board on which she tripped had been laid in the hallway the morning before her accident but she did not know who placed it. (NYSCEF 47).

II. DISCUSSION

A. Contentions

Movants contend that the accident was caused by Redi's failure to secure the masonite board adequately and thus, pursuant to both the proprietary lease and alteration agreement, Moosbrugger must indemnify them for Bruno's injuries arising from the work that Moosbrugger hired Redi to perform. They deny having supervised or assisted with the work, having provided materials or equipment, or having had any knowledge of working with masonite. By affidavit dated May 6, 2016, Gramercy's superintendent adds that on the day of the accident, he was advised by plaintiff Sentipal, Bruno's husband, that she had tripped on masonite installed by Redi. (NYSCEF 41, 50).

In opposition, Moosbrugger denies that Bruno's accident was caused by Redi, as the alteration agreement references only work to be performed inside the apartment. Moreover, she notes, movants offer no evidence other than their counsel's inadmissible assertion that Redi placed the masonite boards, and that the superintendent's allegation is not based on personal knowledge, but on his conversation with Sentipal, which in any event, is belied by Bruno's contrary testimony. (NYSCEF 55).

Moosbrugger argues that Gramercy has a nondelegable duty to keep the common areas of the premises in a safe condition, and observes that their alteration agreement addresses the placement of masonite as a matter distinct from the scope of the alteration work, which evidences Gramercy's control over masonite placement, and that Gramercy retained the right to

inspect the work and direct changes. She claims that Gramercy breached its duty in light of its admission that it did not know how the masonite boards were installed or who installed them. (*Id.*).

Alternatively, Moosbrugger argues that the indemnification clause of the alteration agreement violates General Obligations Law (GOL) § 5-322.1 absent any limit of indemnification to instances where she alone is negligent, absent the phrase "to the fullest extent permitted by law," and absent a finding that Gramercy is free from negligence. Moreover, as depositions have not yet been held and in light of the factual issues as to who installed the masonite, whether doing so was within the scope of the work, and whether Gramercy breached its duty to maintain the premises safely, she contends, the motion is premature absent completion of discovery. (*Id.*).

In reply, movants reiterate their contentions, adding that it is irrelevant whether Redi placed the masonite board. Rather, they assert that Moosbrugger's contractor, whomever that may be, placed it, and that Gramercy neither supervised nor assisted with the work, and was unaware of how such work was done. Additionally, as plaintiffs offer no evidence of Gramercy's negligence, they argue, the indemnification clause is enforceable. (NYSCEF 57).

B. Analysis

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are

insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A party's right to contractual indemnification "depends upon the specific language of the contract." (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2016]). However, pursuant to General Obligations Law (GOL) § 5-322.1(1), a contract for the

> construction, alteration, repair or maintenance of a building, . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons . . . contributed to, caused by or resulting from the negligence of the promisee, . . . whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

Notwithstanding this prohibition, an indemnification contract purporting to indemnify the indemnitee for its own negligence may be enforced upon a finding that the indemnitee was free from negligence. (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 180-181 [1990]; *Cavanaugh v 4518 Assoc.*, 9 AD3d 14, 18-19 [1st Dept 2004]).

Even if an indemnity agreement is unenforceable under GOL§ 5-322.1 due to the indemnitee's partial fault, an indemnitee may seek indemnification to the extent of the indemnitor's negligence, or "to the fullest extent permitted by law." (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 627 [1st Dept 2015]; *Guzman v 170 W. End Ave. Assoc.*, 115 AD3d 462, 463-464 [1st Dept 2014]).

Here, the indemnification clause in issue obligates Moosbrugger to indemnify Gramercy for any injuries resulting from the work for which Moosbrugger hired Redi without regard to Gramercy's negligence or her or her contractor's own negligence. Absent any limiting language, the clause runs afoul of GOL § 5-322.1.

I thus address whether movants sufficiently demonstrate that they were free from

negligence.

It is well-settled that "a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." (*Gronski v County of Monroe*, 18 NY3d 374, 380 [2011]; *Burke v Yankee Stadium, LLC*, AD3d , 2017 NY Slip Op 00597, *1 [1st Dept 2017]). Where the plaintiff's injuries are the result of a dangerous condition on the premises, an owner may be held liable if it created the condition (*Haseley v Abels*, 84 AD3d 480, 482 [1st Dept 2011]), or failed to remedy it "after actual or constructive notice of the condition." (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 968 [1994]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011]). A defendant has constructive notice of a dangerous condition where it is "visible and apparent and . . . exist[s] for a sufficient length of time before the accident to permit the defendant to discover and remedy it." (*Arcabascio v We're Assoc., Inc.*, 125 AD3d 904, 904 [2d Dept 2015]).

Here, the superintendent's sparse, self-serving denial that movants supervised, assisted with, or had any knowledge of how to install masonite was performed does not address whether movants had actual or constructive notice of the dangerous condition in issue. (*See Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 49 [2d Dept 2011] [to extent plaintiff's claim predicated on dangerous condition on premises, owner failed to provide evidence that it did not create condition or that specific location had been inspected at some time prior to plaintiff's accident to demonstrate absence of notice]; *cf. Tarpey v Kolanu Partners, LLC*, 68 AD3d 1097, 1098-1099 [2d Dept 2009] [no evidence in record that owner had control over work site or notice of dangerous condition, and thus free from negligence and entitled to contractual indemnification notwithstanding GOL § 5-322.1 prohibition]). Thus, it is insufficient to establish, *prima facie*, that movants were free from negligence. Moreover, to the extent that the superintendent's

affidavit is offered as proof that the masonite was placed by Redi, his observation relies on hearsay, and his professed lack of knowledge of working with masonite is not dispositive.

In any event, even if movants' proof is sufficient, further discovery may lead to evidence sufficient to raise a triable issue, as representatives for neither movants nor Redi have been deposed, each who may possess information relevant as to who laid the masonite and the scope of movants' duties. (*See Syracuse Univ. v Games 2002, LLC*, 71 AD3d 1531, 1531 [4th Dept 2010] [even if plaintiff satisfied initial burden, motion for summary judgment on contractual indemnification claim premature absent "depositions concerning the respective roles, if any, of the parties involved in the accident"]; *see also* CPLR 3212[f]).

While not briefed by the parties, as defendant Greenthal was not a party to the alteration agreement, it has no ground upon which to seek contractual indemnification from Moosbrugger.

III. CONCLUSION

Consequently, absent any basis at this juncture of the action for finding that movants are free from negligence, their claim for contractual indemnification is premature. I thus need not address whether Bruno's injuries come within the scope of the indemnification provision. Accordingly, it is hereby

ORDERED, that defendants 32 Gramercy Park Owners Corp. and Charles H. Greenthal Management Corp.'s motion pursuant to CPLR 3212 for an order granting them summary judgment on their cross claim of contractual indemnification and attorney fees as against defendant Margaret Moosbrugger is denied.

ENTER:

Barbara Jaffe, JSC

DATED: February 10, 2017
New York, New York