Romero v Alezeb Deli Grocery, Inc.
2017 NY Slip Op 30818(U)
April 20, 2017
Supreme Court, New York County
Docket Number: 150307/2012
Judge: Joan M. Kenney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

----------x

AIREEN ROMERO,

Plaintiff,

Index No. 150307/2012

-against-

ALEZEB DELI GROCERY, INC., 2024 SECOND AVENUE LLC, JULIAN CORTES, MOUSA ALEZEB, and BPC MANAGEMENT CORP.

Defendants.

----------x

2024 SECOND AVENUE LLC and BPC MANAGEMENT CORP.,

3rd Party Plaintiffs,

Third-Party Index No. 595170/2016

-against-

JULIAN CORTES,

Third-Party Defendant.

----------x

Hon. Joan M. Kenney:

Motion numbers 013 and 014 are hereby consolidated for disposition.

In motion No. 013 defendants/third-party plaintiffs, 2024 Second Avenue, LLC (2024) and BPC Management Corp. (BPC), respectively, the owner of a commercial/residential building (the building) located at 2024 Second Avenue (NYC) (the premises) and the managing agent of the premises, move for an order granting them summary judgment dismissing the complaint against them and granting contractual and common-law indemnification and/or contribution against codefendants Mousa Alezeb (Alezeb) and Julian Cortes (Cortes). 2024, via its counsel's moving affirmation, but not its notice of motion, also seeks a judgment against Alezeb and defendant, Alezeb Deli Grocery, Inc. (Deli) for breach of their contractual obligations to procure liability insurance in 2024's favor.

Plaintiff, Aireen Romero (Romero), seeks and Order, pursuant to CPLR 3212, granting

her judgment on the issue of liability (motion sequence 014).

Background

Briefly, Alezeb leased from the owner/manager a commercial space located at the premises. Alezeb later assigned the lease to Deli and Cortes. Cortes rented from Deli an adjacent sidewalk space to erect and open a flower stand. Plaintiff alleges that she slipped on an icy sidewalk in front of Cortes's stand, fracturing her wrist (the accident).

2024 is a company with four members, including Mel Lev (Lev), one of its two managing members. Lev, at the time in issue, was a part owner of several buildings, including 2024's, which contained approximately eight apartments and a corner commercial space. Lev and BPC had adjacent offices. Lev was a BPC vice-president, but claims that he did nothing for that entity. Lev tr at 35-36. BPC's principal, Douglas Rosenberg (Rosenberg), represented 2024's interests and negotiated its tenants' leases, without Lev's involvement. *Id.* at 26, 28, 31, 34.

Royce Douglas (Douglas), who saw Lev almost daily, worked for BPC, managing about 15-20 buildings and their tenants, including 2024's. Douglas tr at 19, 20, 22, 23, 35-36. Most of those buildings were in Brooklyn, and about 75% of Douglas's day was spent in his office fielding calls from tenants and superintendents regarding those buildings' problems and ensuring that they were resolved by contractors that BPC used. Lev, who never visited the building to collect rent, believed that Douglas collected the rents, and would issue 2024 statements of rents received and owed. Lev at 23, 27-28. At times, Lev would direct Douglas to address needed repairs and tenant complaints. Douglas dealt with 2024, via Lev and his son. The building had a "traveling" superintendent, Hayward Francis (Francis), who allegedly was the superintendent for two or three other buildings in which Lev had an interest on the same block. *Id.* at 75; Alezeb

tr at 29-30. BPC paid Francis by check. Lev tr at 77. Lev, on occasion, would speak with Francis. *Id.* at 76.

On April 1, 2009, Alezeb, who wanted to open a deli, met with Lev and Rosenberg (*see* Alezeb tr at 24-25, 95) to sign a lease for the building's commercial space. No vaults or vault space (the space under the sidewalk that accessed the building's basement, via doors in the sidewalk) was included in the lease. Lease, ¶ 14. Lease paragraph 35 required the tenant to comply with the appended building's rules, including rule two, under which the tenant, at his own expense, had to keep the sidewalks and curbs fronting his premises clean and clear of things such as dirt, snow, and ice. *See also* Lease, ¶¶ 4, 30. Pursuant to lease paragraph 13, entitled "Access to Premises," the owner or its agents had the right, but not the obligation, to enter the leased premises to examine them and make any necessary repairs and improvements.

Lease paragraph eight, which pertains to indemnity and the tenant's liability insurance, provides, as is relevant, that the owner would not be liable

> "for any injury or damage to persons . . . resulting from any cause whatsoever, unless caused by or due to the negligence of Owner, its agents, servants or employees. Owner or its agents will not be liable for any such damage caused by other tenants or persons in, upon, or about said building . . . 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 . . . occurring in or upon the demised premises effective from the date Tenant enters into possession and during the term of this lease. Such insurance shall be in an amount and with carriers acceptable to the Owner. Such policy or policies shall be delivered to the Owner. On Tenant's default in obtaining or delivering any such policy or policies . . . Owner may secure . . . any such policy or policies and charge the Tenant as additional rent therefor. Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs , and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys' fees, paid suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees or licensees of any covenant on condition of this lease, or the carelessness,

> negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees. Tenant's liability under this lease extends to the acts and omissions of any subtenant . . . In case any action or proceeding is brought against Owner by reason of any such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by Counsel approved by Owner in writing, such approval not to be unreasonably withheld."

The lease contained a rider, the terms of which governed in the event of conflicting terms in the main lease. *See* Lease rider preamble. Lease rider paragraph 14 provides, in relevant part, that

> "Tenant shall indemnify and hold Landlord harmless from and against any and all liability, claim, loss, damage or expense, including reasonable attorneys' fees, by reason of any injury to any person . . . or damage to property, or otherwise, arising from or in connection with the occupancy or use of the demised premises, or any work, installation or thing whatsoever done in, at or about the demised promises, or resulting from any default by Tenant in the payment or performance of Tenant's obligations under this lease or from any act, omission or negligence of Tenant or any contractors, agents, employees, customers, subtenants, licensees, guests or invitees of Tenant."

Lease rider paragraph 15, an insurance clause, required the tenant to keep in force comprehensive liability and property damage insurance, in specified amounts, including $1,000,000 per person and $2,000,000 per accident, protecting the landlord "against any and all liability occasioned by negligence, occurrence, accident, disaster and other risks . . . occurring in or about the demised premises or any part thereof." That insurance clause also required that the insurance maintained by the tenant name both the landlord and the tenant as insureds, and that any loss be paid to the landlord, irrespective of "any act or failure to act or negligence of the Landlord, Tenant, or any other person . . . ."

Further, if the tenant failed to provide the insurance required by rider paragraph 15, the landlord could obtain it, and, on demand, the tenant was obligated to pay to the landlord the

amount of the premiums paid. In addition to any other right that the landlord had, the landlord, for any breach under paragraph 15, was entitled to recover, as damages,

> "the uninsured amount of any liability, claim, loss, damage or expense, including reasonable attorneys' fees, suffered or incurred by Landlord, and shall not be limited in the proof of damages which Landlord may claim against Tenant to the amount of the insurance premiums not paid or incurred by Tenant which would have been payable for such insurance."

After signing the lease, Alezeb renovated the premises and, with the aid of his accountant, formed Deli to run the business. On June 23, 2009, Joel Levy, 2024's other managing member and an attorney, sent Lev copies of an assignment and assumption of the lease between Alezeb and 2024, which was to be signed by Alezeb and Deli, asking that Lev have them executed and ensure that the insurance required under the lease covering 2024, and other tenant lease requirements, were in the assignee's name. Lev did not take any action with respect to that insurance, and neither Alezeb nor Deli procured any. On June 24, 2009, Alezeb assigned the lease and its duties to Deli, which assumed the performance of the lease's terms and covenants. Pursuant to the lease rider's assignment clause, paragraph 18, an assignment would not release the tenant who previously assumed the lease's obligations, and such individual or entity would remain liable for the rent and the performance of all lease obligations and covenants for the balance of the lease's term, "as if no assignment has been affected."

After finishing the renovations and obtaining, with the help of an accountant, Workers' Compensation Insurance and other required licenses, the deli opened for business, according to Alezeb, in July 2009. The deli was open from 7:00 a.m. to 10:00 p.m., seven days a week. Alezeb worked in the store daily, except for when he was in Yemen, where he was born and his wives and children lived. *See* Alezeb tr at 129-130. Toward the end of 2010, Francis told

Alezeb that he had a friend, Cortes, who wanted to open up a sidewalk flower stand adjacent to the deli's outside wall, and would pay Deli rent for that space. Because business was not good and Deli was unable to fully pay its rent, Alezeb, who repeatedly had complained to Lev about that problem, asked Lev whether he would consent to a stoop line stand adjacent to the deli to help Deli cover its rent. *Id.* at 77-78. Alezeb claimed that he told Lev that someone wanted to "rent in front of there." *Id.* at 78. When asked if Lev knew that Cortes was going to rent the flower space, Alezeb testified that he did not tell him exactly like that, but that Lev knew someone was going to rent the space and never asked for anything in writing, or inquired how the space would be run or of what the stand's structure would consist. *Id.* at 78-79, 90-91.

On November 30, 2010, Lev, as "the owner" of the premises, executed a New York City Department of Consumer Affairs form, giving his written consent to Deli's operation of a stoop line stand. A stoop line stand license, of the type permitting one to sell fruits, vegetables, soft drinks, and flowers, was issued to Deli in late December 2010, and the stand was constructed and opened, evidently in January 2011, by Cortes, who paid $500 monthly to Deli's manager, pursuant to an oral agreement. The stand, at least in cold weather, was attached to the deli's outside wall, and consisted of an awning-like top, with clear plastic wall panels, and a door. The stand's floor was the sidewalk. Francis permitted his friend, Cortes, to use the residential building's adjacent sidewalk-accessible vault space to access the basement's electric outlet to power his stand's lights, which presumably had a heat element to keep the flowers from freezing in winter, and the basement's water outlet to connect a hose to water the plants. The basement's water was paid for by 2024 (Douglas tr at 64), and Cortes's use of that water would have required 2024's consent (*id.* at 65-66), which, evidently, was lacking. The same was true of the

basement's electricity.

Meanwhile, because Alezeb could not make a living by working in the deli, by the end of 2010, and before Cortes opened his flower stand, Alezeb stopped working at, and managing the deli, and was "completely out of the business;" and the only person who had a part in running the deli, as far as he knew, was Shamshun Shahbain (Shamshun), who would collect Cortes's rent and pay Deli's rent. Alezeb tr at 155, 157, 174. Alezeb claims that the business had been sold to Ameen Shahbain (Shahbain)[1] (Alezeb tr at 20), who appointed Shamshun (*id.* at 137) to run the deli and staff it with various relatives and others. Instead, beginning in January 2011, Alezeb drove a taxi for that entire year, except for the four months, beginning in August, when he was in Yemen. Alezeb tr at 134, 136. Because he was no longer involved in the deli, Alezeb was unaware of how the sidewalk fronting it was cleaned (*id.* at 246-247), and of Cortes's responsibilities in connection with cleaning his stand. *Id.* at 172. Alezeb was also unaware of when, during the day, Cortes opened and closed his flower stand, when he watered his flowers, or the arrangement Cortes made for paying his rent. Alezeb tr at 213, 216-217. Alezeb never had a conversation, other than saying hello, with Cortes or his wife in 2011, never saw him water his flowers, never spoke to any store personnel about Cortes's watering his flowers, was unaware of whether Cortes ever received any violations from the City, and never received any complaints about Cortes. *Id.* at 143, 147, 149, 150-152.

On Sunday morning, December 18, 2011, allegedly at about 9:30 or 10:00 a.m. (Romero

---

[1] Because of Deli's financial problems, a lease rider between 2024 and Deli was executed, in March 2011, in which 2024 consented to the transfer of 70% of Deli's stock to Shahbain and to Deli's assignment of the lease to a new corporation, provided that Alezeb owned 30% of the shares and Shahbain owned the remaining 70%. That rider also granted Deli rent and tax concessions, if it paid 2024 a lump sum.

tr at 27; *but see* Romero affidavit in support of default judgment against 2024, dated 6/14/2012, in which Romero avers that her accident occurred at around 10:30; Police Report, narrative section, in which Romero advised that she slipped at 10:40), Romero, who was taking her daughters to a birthday party, left her building on 104th Street, rounded the corner to Second Avenue, and, while talking to her daughters, who were at her side, and allegedly while looking straight ahead, and not down (Romero tr at 37-38), slipped on ice on the sidewalk, allegedly about a foot in front of the enclosed flower stand, fracturing her wrist, which ultimately required surgery. The police arrived, and while their report contains a 10:40 time, it is unclear as to whether that was the incident time, the time of the report, or the time of the police's arrival. Romero's friend, Stacy, was called by Romero's daughters, and arrived at about the same time as the ambulance, which arrived at 11:03, allegedly about 40 minutes after the fall to take Romero to the hospital. Stacy took pictures of the area of the fall, which was covered with water and ice.

The police went to the hospital that day and interviewed Romero at 1:00 p.m. According to their report, Romero advised that she had "slipped on a slick, possibly icy sidewalk." Romero further advised that, when she slipped on the unsalted sidewalk, the flower vendor was washing his flower shed, causing water to flow over the pitched sidewalk, toward the street. The police report indicates that an investigation of the scene revealed a slick sidewalk, notwithstanding a salt layer. The report recites that Cortes was interviewed, that he apparently was an independent contractor who rented space from the adjacent store, and that he stated that water had spilled from his vases before the incident. A few months later, Deli closed its store.

The Pleadings and History of this Action

In February 2012, Romero commenced this action against Cortes, Deli, and 2024,

alleging that Deli had a permit for the sidewalk stand; made special use of the sidewalk; leased that space to Cortes; employed Cortes, who made special use of the sidewalk, and supplied Cortes with water and electricity from the basement. The complaint also alleges that 2024 controlled and owned the premises, made special use of the sidewalk; and leased space and supplied water and electricity to Cortes. The foregoing three defendants, and their employees and agents, are alleged to have been negligent by causing water to flow on the sidewalk, and by failing to properly maintain it, such as by not placing salt or sand on the sidewalk before and after using the hose, causing the water to freeze, and resulting in Romero's fall and injuries. Additionally, the defendants are alleged to have violated various regulations, including New York City Administrative Code § 7-210, commonly referred to as the Sidewalk Law, which requires owners to maintain the sidewalks adjacent to their properties in a reasonably safe condition, and holds them liable for personal injuries caused by their negligent failure to remove snow and ice from those sidewalks. The complaint further alleges that these defendants had actual and constructive knowledge of the dangerous condition, because their agents, servants, and employees caused it, and because it allegedly existed long enough before the accident to be discovered.

Deli never answered the complaint, and, in September 2012, Romero's motion for a default judgment was granted against it, and an assessment of damages was ordered. Cortes answered, in April 2012, and, in November 2012, Romero stipulated to discontinue her action against Cortes, with prejudice. The next day, Cortes signed an affidavit, prepared by Romero's counsel, in which Cortes averred that he had no written lease for the sidewalk space, that he had rented that space for $500 per month, and that, at the time of Romero's accident, he had paid the

rent to the deli's manager. Cortes maintained that Francis authorized him to run, from the basement through the sidewalk's vault doors, a hose to his adjacent flower stand and an extension cord to obtain electricity for the stand. According to Cortes, the basement was never used by Deli, but was controlled and used only by 2024. Cortes averred that, on December 18, 2011, he was watering his flowers with the hose, and that the water drained from his stand, spilled onto the sidewalk, flowed toward the street, and, because it was a cold day, froze on the sidewalk. He claimed that he had witnessed Romero slipping on the ice, which had formed from that water, and that it was not raining when Romero slipped, nor had it rained or snowed within 24 hours before her accident. After the accident, Cortes applied salt to the area on the sidewalk where ice had formed. Cortes asserted that, once the deli closed down, he paid his rent to the building's owner.

2024 failed to answer Romero's complaint, and her motion for a default judgment was granted on default. That judgment was, on 2024's motion, vacated, by order filed in April 2013, which order was affirmed on appeal. *Romero v Alezeb Deli Grocery, Inc.*, 115 AD3d 496 (1st Dept 2014). 2024 then served an answer alleging, among other affirmative defenses, that Romero was comparatively negligent. 2024's answer also set forth three cross claims against Cortes, which was no longer a party, and Deli, alleging, in its first cross claim, that if Romero prevails against 2024, 2024 will be entitled to indemnification and contribution from Cortes and Deli. In its second cross claim, 2024 asserts that Cortes and Deli breached their alleged contractual obligations to carry liability insurance in 2024's favor, and that, therefore, 2024 is entitled to contribution and indemnification from these codefendants, if Romero recovers a judgment from 2024. The third cross claim alleges that Cortes and Deli are contractually

obligated to defend and indemnify 2024 against all claims arising from the performance of their duties, and that, accordingly, Cortes and Deli must provide 2024 with a defense, and indemnify it for any amounts recovered by Romero against 2024.

Romero served a bill of particulars as to 2024, apparently in September 2013 (*see* Despas-Barous's affirmation, exhibit Q), alleging that 2024 had a nondelegable duty to maintain the sidewalk; that it caused and created the condition on the sidewalk, which resulted in her injuries; and that 2024 had actual and constructive notice of the condition, because it had existed for a significant period of time before the accident. The bill of particulars further alleges that, because the dangerous condition was a recurring one of which 2024 knew or should have known, it and its agents, servants, and employees should have addressed that condition. Specifically, the bill of particulars alleges that 2024 was aware that the tenant watered his plants, including in cold weather, which would cause ice to develop on the sidewalk. *Id.*, ¶ 3.

In December 2014, Romero commenced a negligence action against BPC and Alezeb. That complaint's negligence allegations are similar to those in Romero's original complaint, including that these defendants, their agents, servants, and employees failed to maintain the sidewalk, created the dangerous condition, had "actual and/or constructive notice of the dangerous condition" (complaint, ¶ 38), and failed to timely remedy it. That complaint also alleges that Alezeb leased and managed the premises and made special use of the sidewalk, and that BPC owned, leased, operated, controlled, inspected, repaired, maintained, and managed the premises and made a special use of the adjoining sidewalk. BPC answered the complaint, alleging that Romero was comparatively negligent, and asserted a cross claim against Alezeb for contribution and/or indemnification, based on his negligence and/or breach of contract, breach of

warranty, and/or strict or statutory liability. Alezeb's answer also alleged Romero's comparative negligence, and asserted a cross claim against BPC, seeking indemnification or contribution.

Romero's two actions were consolidated in July 2015. In March 2016, 2024 and BPC commenced a third-party action against Cortes, asserting three causes of action. The first cause of action sounds in contribution and indemnification. The second cause of action alleges that Cortes entered into contracts with Alezeb and Deli to indemnify and hold harmless 2024 and BPC for any damages arising out of or relating to Cortes's services, and asserting that, if BPC and 2024 are found liable to Romero, Cortes would be liable to them for all or only that part of any verdict or judgment, attributable to Cortes, including costs, disbursements, attorneys' fees and expenses. The third cause of action alleges that Cortes entered into contracts with 2024 and BPC to defend, indemnify, and to hold them harmless. It is further claimed that, under those alleged contracts, Alezeb and Deli were required to procure liability insurance, on Cortes's behalf , but that Alezeb and Deli failed to meet their alleged obligations to Cortes of buying insurance covering 2024 and BPC; therefore, 2024 and BPC will be entitled to the full amount "of any recovery, including of attorneys' fees, disbursements, costs, expenses, as well as judgments, verdicts, and/or settlements." Third-party complaint, ¶ 36. Cortes failed to answer the unverified third-party complaint, and, in May 2016, the third-party plaintiffs moved for a default judgment against him.

The Instant Motions

2024 and BPC move (motion No. 13) for an order granting them summary judgment dismissing Romero's complaint and awarding them contractual and/or common-law indemnification, and/or contribution, against Alezeb, Deli, and Cortes; and granting them

summary judgment on 2024's alleged breach of contract cross claims against Alezeb and Deli, for failure to procure liability insurance. 2024 asserts that summary judgment must be granted "when the plaintiff cannot establish the necessary elements of her cause of action," and, because Romero cannot meet this burden, 2024 and BPC are entitled to summary judgment. Despas-Barous affirmation, ¶ 75.

2024 also contends that the complaint must be dismissed because the record shows that the "defendant" did not create the icy condition, and that "conclusive" evidence that "it" had notice of such condition is lacking. Despas-Barous affirmation, ¶ 31. Defense counsel asserts that, under the Sidewalk Law, Romero must prove that the defendants created the condition or had notice of it. Defense counsel further asserts that because Cortes created the condition, the condition did not last long enough to impart constructive notice to the movants, and because Cortes was still hosing the area of his stand when Romero fell, "it is hard to fathom how one can argue that the facts . . . amount to actual or constructive notice on the part of the movants." Despas-Barous affirmation, ¶ 39. To buttress this position, defense counsel also relies on Alezeb's testimony that he had no knowledge of any complaints regarding Cortes. Defense counsel further relies on Lev's testimony that he was unaware of any complaints regarding the premises, and never received any complaints regarding the sidewalk before the date of Romero's accident, authorized the sale of flowers, or saw anyone access water from the basement. Defense counsel further contends that Douglas's testimony supports the conclusion that the moving defendants lacked notice. In particular, Douglas testified that he lacked knowledge as to how the flower stand operated, and that he was unaware of prior incidents involving the sidewalk. Douglas tr at 70.

Movants' counsel urges that the icy condition was not a recurring one, and that general awareness of a recurring condition is inadequate to demonstrate constructive knowledge of the dangerous condition. Defense counsel also contends that the police report, based on Romero's interview, recites that Cortes was washing down his shed and spraying the sidewalk, and maintains that such act, which was performed on a cold day, was an unforeseeable superceding one, which broke the chain of causation. In addition, because it was Cortes, and not 2024 and BPC, who was allegedly in exclusive control and possession of the flower stand, the moving defendants maintain that Romero cannot establish that 2024 and BPC made a special use of the sidewalk, which caused the icy condition. Despas-Barous affirmation, ¶ 50. Movants also rely on certified climate charts to demonstrate that the temperature, on the day of the accident, was always below freezing and averaged 27 degrees; Cortes's assertion, that it had neither rained nor snowed for 24 hours before the accident; and on defense counsel's claim, that the data show that the temperature on the entire day before the accident was above freezing, ranging between 33 and 38 degrees Fahrenheit.

As for 2024 and BPC's cross claims against Cortes, Alezeb, and Deli for contractual indemnification, movants rely solely on lease paragraph eight. 2024 and BPC note that General Obligations Law § 5-321 deems void any agreement exempting a landlord, its employees, agents, and servants from liability for damages arising from injury to persons and property, where such liability is due to such individuals' negligence in the maintenance or operation of the demised premises, or the real property containing the demised premises. Nonetheless, 2024 and BPC maintain that lease paragraph eight entitles them to indemnification for their own negligence, because that provision contains an insurance procurement clause, in which the tenant and the

owner allocated the risk of liability between themselves. Despas-Barous affirmation, ¶¶ 66, 71-72. 2024 further contends that it is entitled to summary judgment on its alleged breach of contract claims against Alezeb and Deli, because they failed to procure liability insurance in 2024's favor.

The only party opposing 2024 and BPC's motion is Romero, whose counsel addresses the motion as having been made only by 2024, and asserts that the motion must be denied for the reasons set forth in Romero's counsel's affirmations in opposition to defendants' motion, in support of Romero's motion, and in reply to 2024's opposition to her motion. Romero's counsel, in paragraph six of his opposing affirmation, urges that Lev approved the flower stand's operation; that Francis authorized Cortes's use of the building's water and electricity; that 2024 was aware that Cortes was using its hose to water his flowers; and that, on an occasion prior to Romero's accident, the building's owner observed Cortes exiting the basement with the hose and electrical extension cord, and that Lev's claims to the contrary are incredible. Romero asserts that Cortes caused the defective sidewalk condition, but that the moving defendants incorrectly assert that the icy condition arose from Cortes's watering of the sidewalk, when it actually was a consequence of Cortes's flower watering. Romero's counsel urges that, although defense counsel raises issues such as notice, constructive notice, special use, and uneven sidewalks, under the Sidewalk Law, 2024 had a nondelegable duty to maintain the sidewalk, which renders it vicariously liable for Cortes's negligence. Romero's counsel also observes that 2024 and BPC are moving on issues not alleged by her, including that there was a structural defect in the sidewalk, that Romero must prove that these defendants made a special use of the premises in order to find them liable, and that Romero is urging the applicability of constructive notice, the

latter of which Romero's counsel maintains that plaintiff has never asserted. Romero's counsel is silent on the issue of a recurring condition, raised in Romero's bill of particulars and addressed by the moving defendants. Romero adds that 2024 should not be permitted to obtain indemnity from Cortes, because 2024's motion for indemnification constitutes "an attempt to do indirectly what is proscribed by statute to do." O'Connor opposing affirmation, ¶ 67.

In reply, defense counsel posits that, irrespective of how Cortes caused the icy condition, it is undisputed that Cortes was spraying water at the time of Romero's fall and was the sole cause of the icy sidewalk, and, thus, that Cortes's actions amounted to an intervening event, which broke the chain of causation. Defense counsel also refers to Romero's pleadings to show that, contrary to her counsel's assertion, Romero has alleged constructive notice, as well as actual notice, and further points to Romero's counsel's opposing affirmation, at paragraph six, to demonstrate that her counsel has, in fact, argued the applicability of notice, and urged that Lev's claims of a lack of notice were incredible and implausible. Finally, in their reply papers defense counsel "emphasize[s]" in bold and underlined text that Alezeb and Deli failed to oppose the branch of the motion seeking to hold them and Cortes liable for common-law and contractual indemnification, and/or contribution, and for breach of the lease's insurance procurement provision. *Id.*, ¶¶ 45, 51.

Romero moves (motion No. 14) for an order granting her summary judgment on liability against only 2024. Romero asserts that it is undisputed that Cortes created a dangerous condition on the sidewalk adjacent to the building by allowing water to spread on that sidewalk on a cold day, thereby causing the water to freeze. Romero maintains that, because the Sidewalk Law imposes a nondelegable duty on the owner to maintain the sidewalk, and, because Cortes caused

and created the dangerous icy condition, 2024 is vicariously liable for Cortes's negligence, and, therefore, 2024's knowledge of that condition, both actual and constructive, is irrelevant. Romero's counsel also urges that the record is devoid of any evidence of negligence on her part, because she was walking at a normal pace when she slipped. Further, to the extent that liability among the various defendants is disputed, Romero asserts that her entitlement to partial summary judgment against 2024 on liability is not contingent on the apportionment of liability among the defendants.

In opposition, 2024 contends that Romero's argument, that it is vicariously liable for Cortes's negligence, is unsupported by the law, and that Romero's motion must be denied because she has failed to demonstrate that 2024 created the condition or that it had actual or constructive notice of it. 2024 further claims that Romero will be unable to prove that 2024 made a special use of the sidewalk and caused her injuries. Specifically, 2024 seemingly argues that because Cortes, rather than 2024, exclusively constructed, possessed, and controlled the flower stand, Romero cannot recover from 2024 on the special use theory. 2024 also appears to repeat its assertion that Cortes's act of watering his flowers, to the point that the water in his vases overflowed on a cold day, or his washing his stand on a cold day, was an unforeseeable intervening act which broke the chain of causation. Additionally, 2024 advises that it is not, at this time, opining on whether Romero contributed to her injuries. 2024 also maintains that it is not now urging that apportionment among the defendants is an issue, but is instead claiming that Cortes caused Romero's injuries "by his unforeseeable act." Despas-Barous opposing affirmation, ¶ 74.

In reply, Romero's counsel asserts that the sole issue on Romero's motion is whether

2024 is vicariously liable under the Sidewalk Law for Cortes's creating the defective condition, which caused Romero's injuries. Romero further claims that 2024's opposition "mudd[ies]" the waters by addressing issues not raised by her on her motion. O'Connor affirmation in further support, ¶ 18, For example, Romero's counsel contends that plaintiff "does not and has never argued" the applicability of constructive notice, and that it is irrelevant to Romero's motion. O'Connor affirmation in further support, ¶¶ 18, 19. Yet, Romero's counsel asserts that 2024's claimed lack of notice, as to Cortes, is "incredible and implausibl[e]" given the presence of the superintendent; Lev's approval of the stoop stand license; and the fact that Cortes used the building's water and electricity. *Id.*, ¶ 5. Also, Romero's counsel observes that he did not raise the special use issue on this motion, and that to establish 2024's liability under the Sidewalk Law, Romero need not show that "2024 made a special use of the sidewalk." *Id.*, ¶ 22. Romero lastly claims that, because 2024 is not urging, in opposition to her motion, that she was comparatively negligent, there would be no barrier to granting her partial summary judgment on liability, if this court should find that 2024 had a nondelegable duty to maintain the sidewalk and was negligent in that respect.

The Applicable Law

The movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant's failure to meet its burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Id.* at 853; *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007) (failure to address the material allegations set forth in the complaint and supplemental bill

of particulars required the denial of summary judgment, irrespective of the opposing papers' adequacy). Where the moving party makes its required showing, the burden shifts to the opponent to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Summary judgment should be denied when "there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 315 (2004 Smith, J., concurring).

Ordinarily, a property owner is not liable for maintaining and repairing the sidewalk abutting its property, but there are exceptions to this rule, including when the owner affirmatively creates the defective condition, when there is a defect created by a special use of the sidewalk, or when a statute or regulation imposes upon the owner the duty to maintain the sidewalk and renders the owner liable for failing to do so. *Alleyne v City of New York*, 89 AD3d 970, 971 (2d Dept 2011); *Hughes v City of New York*, 304 AD2d 618, 619 (2d Dept 2003). The Sidewalk Law, New York City Administrative Code § 7-210 (a), an example of the latter exception, provides that "[i]t shall be the duty of the owner of real property abutting any sidewalk . . to maintain such sidewalk in a reasonably safe condition." When an owner fails to maintain its sidewalk in a reasonably safe condition, the owner, with limited exceptions inapplicable here, shall be liable for any injury to a person proximately caused by such failure. *Id.*, subsection b. A failure to maintain its sidewalk in a reasonably safe condition includes the owner's "negligent failure to remove snow, ice, dirt or other material from the sidewalk." *Id.*

A violation of the Sidewalk Law merely constitutes evidence of negligence. *Martinez v Khaimov*, 74 AD3d 1031, 1032 (2d Dept 2010), citing *Elliot v City of New York*, 95 NY2d 730, 733, 734 (2001) . The duty flowing from the Sidewalk Law is nondelegable. *Spector v Cushman*

& Wakefield, Inc., 87 AD3d 422, 423 (1st Dept 2011). However, this regulation does not impose strict liability on the owner. *Martinez*, 74 AD3d at 1032. Where the owner negligently fails to remove snow and ice from the sidewalk abutting its property, it can be found liable to a plaintiff who is thereby injured. *Kabir v Budhu*, 143 AD3d 772, 773 (2d Dept 2016). At trial, the plaintiff must establish that the owner owed her a duty which it breached, and thereby, caused injury to the plaintiff *(id.)*, i.e., to establish the owner's liability, the plaintiff is required to "prove the elements of negligence." *Id.*

To succeed on a summary judgment motion in such a case, the owner is generally required to show that it neither created a dangerous condition on the sidewalk adjoining its property nor had actual or constructive notice of any such condition within a sufficient period of time to discover and remedy it. *Id.*; *Rejaee v Costco Price Club*, 140 AD3d 641 (1st Dept 2016). Such a burden cannot be met by simply noting gaps in the plaintiff's case. *Martinez*, 74 AD3d at 1033; *see also Saryian v Ramana, Inc.*, 305 AD2d 400 (2d Dept 2003) (pointing at gaps unavailing; defendant must show its claim or defense's merit).

In seeking to demonstrate a lack of notice, the owner must present proof by one with actual knowledge as to the sidewalk's condition before the accident or as to when the owner or its employees last inspected the sidewalk. *Vargas v Cadwalader, Wickersham & Taft, LLP*, _ AD3d _, 2017 NY Slip Op 01269, *1 (1st Dept 2017); *Spector*, 87 AD3d at 423; *see also Romero v Morrisania Towers Hous. Co. Ltd. Partnership*, 91 AD3d 507, 507-508 (1st Dept 2012) (defendants did not meet their burden of demonstrating a lack of notice of the hazardous condition, as they failed to establish, through one with first-hand knowledge, that they carried out their inspection and cleaning duties at the premises). The defendant's burden on the issue of

whether it had actual or constructive notice is not met simply by evidence of its usual practices. *See Johnson-Glover v Fu Jun Hao Inc.*, 138 AD3d 499, 500 (1st Dept 2016).

Further, a defendant who has actual knowledge of a recurring condition can be deemed to have constructive knowledge of every recurrence of that condition. *Osorio v Wendell Terrace Owners Corp.*, 276 AD2d 540 (2d Dept 2000). Thus, when a plaintiff alleges that the dangerous condition was a recurring one, of which the owners had actual notice, the owners failed to meet their burden of demonstrating their entitlement to summary judgment when they simply asserted that they neither created nor had constructive or actual notice of the claimed dangerous condition; instead, they were required to establish that the condition was not frequent, ongoing, or customary, and that they lacked actual notice of the claimed recurring condition. *Id.*; *see also Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294, 295 (1st Dept 1994).

Furthermore, where an abutting owner obtains a special benefit from a public sidewalk, which benefit is not related to the public use, the one receiving that benefit must, to avoid injury to others, maintain the property in a condition that is reasonably safe. *Kaufman v Silver*, 90 NY2d 204, 207 (1997). The special use doctrine imposes liability on adjacent land owners and occupiers who cause injury to another where a municipal authority has permitted that land occupier to interfere with a public street or sidewalk for a private use. *Id.* The obligation to maintain the public sidewalk exists where a portion of the public sidewalk is put to special use for the landowner or occupier's benefit and is subject to the landowner or occupier's control. *Beda v City of New York*, 4 AD3d 317, 318 (2d Dept 2004); *see also Torres v City of New York*, 32 AD3d 347, 348-349 (1st Dept 2006) (where a sidewalk defect is caused by the special use, the owner can be held liable to an injured plaintiff, because the owner has the duty to maintain the

special use area in a reasonably safe condition); *Thomas v Triangle Realty Co.*, 255 AD2d 153, 153-154 (1st Dept 1998) (liability can arise where owner or lessee used the sidewalk for a "special purpose," e.g., where the appurtenance had been installed at its request or for its benefit).

A landowner will have a duty to repair and maintain a special use "in a reasonably safe condition to avoid injury to others," where that owner has "access to and the ability to exercise control over the special use structure or installation," and will, thus, be liable to a third party where the landowner fails to carry out its obligation to properly maintain that special use. *Kaufman*, 90 NY2d at 207, 208; *see generally Feldman v Kings Hero Rest.*, 270 AD2d 1 (1st Dept 2000). An owner can be liable to someone who is injured on the sidewalk adjoining the owner's property, where the owner created the condition which caused the injury or where the "injury is caused by a defect in that portion of the sidewalk which confers a benefit to [the owner] as a special use." *Santorelli v City of New York*, 77 AD2d 825, 826 (1st Dept 1980). To avoid liability on summary judgment, the owner has to show that it did nothing to create the defect or cause it by means of a special use. *Torres*, 32 AD3d at 349; *see also Campos v Midway Cabinets, Inc.*, 51 AD3d 843, 844 (2d Dept 2008).

When the sidewalk area of special use is under a tenant's exclusive control, and the landlord receives no benefit from the special use, an owner is not subject to liability for a pedestrian's injuries. *Beda*, 4 AD3d at 318; *see also Kaufman*, 90 NY2d at 208. To impose liability on an owner or occupier of land in connection with a special use, there is no requirement that either exclusively possesses or controls the special use area. *Kaufman*, 90 NY2d at 208 (where tenant and owner were in control over sidewalk grating and coping, each had a duty to maintain them, the failure of which would render them jointly liable to injured party); *see also*

Doyley v Steiner, 107 AD3d 517, 519-520 (1st Dept 2013). Where an owner prima facie establishes that it was an out-of-possession landlord, that it had no duty to maintain the sidewalk, and that it retained insufficient control over the sidewalk and did not obtain any benefit from the special use, the owner is entitled to an order granting it summary judgment dismissing the plaintiff's complaint, where plaintiff raised no triable issue in opposition. *Beda*, 4 AD3d at 318.

The duty to maintain the special use area does not depend on whether the owner installed or repaired the special use; it depends on whether the owner "derived a special benefit." *Lebron v City of New York*, 144 AD3d 566, 566 (1st Dept 2016); *see also Torres*, 32 AD3d at 348 (the obligation to maintain an area of special use "runs with the land and is not dependent upon a finding that the defendant actually installed or repaired it"). Thus, for example, where an owner permits the tenant to install a terrazzo sidewalk tile on the sidewalk, which installation benefits the property, the owner also is required to properly maintain that improvement, and could be liable to a pedestrian who trips on a hole in that tile, when that sidewalk is improperly maintained. *See Gage v City of New York*, 203 AD2d 118, 119 (1st Dept 1994); *Nickelsburg v City of New York*, 263 App Div 625, 626 (1st Dept 1942).

The abutting owner can be held liable where the special use itself is "defective or in disrepair," or where the special use directly causes a defect in the adjoining sidewalk. *Santorelli*, 77 AD2d at 826; *see also Granville v City of New York*, 211 AD2d 195, 197-198 (1st Dept 1995). When a sidewalk is adjacent to, but is not part of, the area of special use, the plaintiff on summary judgment has the burden of proving that the sidewalk's special use "contributed to the defect;" but, where the defect is located in the part of the sidewalk where the special use is located, the abutting landowner, on summary judgment, has the burden of proving that it did not

either create the defect or cause it by means of the sidewalk's special use. *Marino v Parish of Trinity Church*, 67 AD3d 500, 501 (1st Dept 2009); *Adorno v Carty*, 23 AD3d 590, 591 (2d Dept 2005).

Administrative Code § 7-210 does not impose tort liability on a tenant. Thus, absent a special use (*Campos*, 51 AD3d at 843), or a regulation or statute imposing such liability, a tenant, cannot, as a general matter, be held liable to a person who slips on snow or ice on a sidewalk and is thereby injured, unless the tenant, or someone acting on its behalf, exacerbated or created the dangerous sidewalk condition. *Forlenza v Miglio*, 130 AD3d 567, 568 (2d Dept 2015); *see also Bleich v Metropolitan Mgt., LLC,* 132 AD3d 933, 935-936 (2d Dept 2015); *Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660-661 (2d Dept 2014). Nevertheless, "where a lease is so comprehensive and exclusive as to sidewalk maintenance, as to entirely displace the landowner's duty" in that respect, the lessee may be liable to a third party. *Hsu v City of New York*, 145 AD3d 759, 760 (2d Dept 2016).

Likewise, a person or entity that contracts with the owner to provide services, including property management services, will not be liable to a plaintiff who is injured as a result of a dangerous sidewalk condition, unless that contractor, in omitting to exercise reasonable care while performing its duties, launches a force or instrument of harm; the contractor completely displaces the owner's duty to safely maintain the premises; or the plaintiff relies to his or her detriment, on the contractor's continued performance of its contractual obligations. *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 (2002); *Romero*, 91 AD3d at 508. It is only where the injured plaintiff alleges the applicability of one of the foregoing *Espinal* exceptions, that a tenant or a party providing property management services, is required, in seeking summary judgment, to

demonstrate the inapplicability of such exception. *Hsu*, 145 AD3d at 760; *Paperman v 2281 86th Street Corp.*, 142 AD3d 540, 541 (2d Dept 2016). Once the tenant, or property manager, makes its prima facie showing, the burden shifts to the plaintiff who must then raise an issue as to the applicability of an *Espinal* exception. *Hsu*, 145 AD3d at 760.

When a plaintiff fails to plead an exception to the general rule, a contracting party can obtain summary judgment by asserting that it owed no duty to plaintiff ,because he or she was not a party to the contract. *Foster v Herbert Slepoy Corp.,* 76 AD3d 210, 214 (2d Dept 2010); *see also Karydas v Ferrara-Ruurds,* 142 AD3d 771, 774 (1st Dept 2016, Andrias, J., dissenting); *Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d 909, 910 (2d Dept 2016). To rebut such a showing the plaintiff must at least raise an issue of fact as to the applicability of one of the three *Espinal* exceptions. *Foster,* 76 AD3d at 214.

Discussion

Romero's Motion for Summary Judgment on Liability Against 2024

Romero's motion for an order granting her summary judgment on liability against 2024 is denied, because she did not attempt to establish that 2024 was independently negligent. Moreover, the professed sole basis for her motion, that 2024 is vicariously liable for Cortes's affirmative actions, which led to the creation of the dangerous icy condition and to Romero's fall and ensuing injuries, is without merit. Specifically, Romero's reliance on case law, which holds that a landlord who hires an independent contractor to perform the landlord's nondelegable duty is vicariously liable for that contractor's negligence in carrying out such duty (*see e.g. Rodgers v Dorchester Assoc.,* 32 NY2d 553, 562-566 [1973]; *LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286, 287 [1st Dept 2008]), is unavailing, because 2024 and its agents did not hire Cortes.

In supporting Deli's application for a stoop line stand, Lev consented to Deli, not Cortes, operating and maintaining the stand. It was Deli that then arranged for Cortes to operate the stand. Because 2024 had the nondelegable duty, under New York City Administrative Code § 7-210, to maintain the sidewalk and remove ice, had Romero established that 2024 was independently negligent in maintaining the sidewalk in front of the stand, contribution, rather than common law indemnity, would apply between Cortes and 2024. *See Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-569 (1987). Because Romero failed to establish her entitlement to partial summary judgment on the ground raised, this court need not resolve whether she was required to, and did in fact, prove a lack of comparative fault. *See Rodriguez v City of New York*, 142 AD3d 778 (1st Dept 2016) (plaintiff, at least in a motor vehicle case, is required to show a lack of comparative fault when seeking summary judgment on liability, where the pleadings raise such an affirmative defense).

2024 and BPC's Summary Judgment Motion to Dismiss the Complaint

Regarding the aforementioned *Espinal* exceptions, Romero's complaint, as to BPC, does not allege that its control over the premises was exclusive and comprehensive, or that she relied to her detriment on BPC's continued performance of its duties. Romero's pleadings, as is relevant to this issue, allege that BPC and its agents, employees and servants caused the dangerous condition, a claim which BPC rebuts, and Romero effectively concedes by asserting that such condition was caused by Cortes. Romero's pleadings also allege that BPC had actual and/or constructive notice of a dangerous condition, and failed to take appropriate action to remedy it. As to these latter allegations, BPC did not move to dismiss Romero's complaint on the ground that, as 2024's managing agent, it owed her no duty because she was not a party to any

contract/agreement between it and 2024. Thus, Romero was not required to come forward with evidence showing, for example, that the agreement between BPC and 2024 was so comprehensive that 2024 was completely displaced by BPC. Therefore, the court cannot, at this juncture, grant BPC summary judgment dismissing Romero's complaint on the ground that BPC owed her no duty.

Additionally, the court observes that Romero's counsel's assertion, in reply to 2024's opposition to her motion, that Romero has never alleged that constructive notice is applicable, is unsupported by the record. Romero's pleadings clearly allege constructive notice in her February 2012 and December 2014 complaints (*see* Romero 2012 complaint, ¶ 60; Romero 2014 complaint, ¶ 38) and in her bill of particulars as to 2024. Bill of particulars ¶ 3. Furthermore, Romero has alleged a recurring condition in her bill of particulars as to 2024 (*id.*), a claim which is designed to take advantage of constructive notice, because a defendant is deemed to have constructive notice where it has actual knowledge of a recurring condition. Such a claim is presumably also applicable to BPC, as 2024's managing agent. As previously noted, Romero has failed to mention her pleadings' allegations of a recurring condition, even though the moving defendants addressed that issue in their moving papers. It is not readily apparent whether this was an oversight, in that the constructive notice under a recurring condition theory is different from that under the usual constructive notice claim. In particular, where there is a claim of a recurring condition claim, the plaintiff must have actual prior notice of the dangerous recurring condition, and here Romero's pleadings allege such prior actual notice (*see e.g. id.*). It is also unclear whether Romero intended to abandon all of her pleadings' allegations on the issue of constructive notice. As previously noted by defense counsel, in opposing defendants' summary

judgment motion, Romero disputed 2024's assertion that it lacked notice, as least as to Cortes and his activities, an argument which was unnecessary and irrelevant to Romero's assertion that 2024 was vicariously liable for Cortes's negligence. In any event, it is the moving defendants who have the prima facie burden of eliminating all material allegations raised by the pleadings, irrespective of the adequacy of plaintiff's opposing papers. If Romero, in fact, intended to abandon, as to BPC and 2024, all of her pleadings' allegations of actual and constructive notice, and of a recurring condition of which the moving defendants had prior actual notice, and if she formally withdraws such claims, defendants are free to renew, if they are so advised, their summary judgment motion on such limited grounds.

2024 and BPC's motion to dismiss Romero's complaint is denied. Neither defendant has prima facie met its burden of eliminating the material allegations set forth in Romero's pleadings. While it is undisputed that the icy condition was caused by Cortes, the movants have failed to establish a lack of notice on their part, and on the part of their agents, servants, and employees. Defense counsel's reliance on Alezeb's testimony, that he never received any complaints about the flower stand, is misplaced, because he also testified that he was not involved in running the deli in 2011, when Cortes started operating his flower stand, and was, during that entire year, either driving a taxi or in Yemen. Lev's testimony, that he did not recall what was sold from the stand or when he learned that flowers were being sold from it (Lev tr at 91), only demonstrates a lack of recollection, not a lack of knowledge. Lev's assertion, that he gave no one authority to sell flowers from the sidewalk (*id.* at 91, 92, 104), is seemingly at odds with Alezeb's claim, that he informed Lev that he was having trouble meeting the rent payments and that someone wanted to rent the space in front of the deli, and with Lev's having then

granted permission to Deli to obtain a stoop stand license (Alezev tr at 77-79, 90-91), which authorized Deli to sell flowers on the street. Lev's testimony, that he did not know whether the building received any complaints prior to Romero's accident (Lev tr at 115), was followed by his assertion that the building received no complaints "[t]hat [he] kn[e]w of," (*id.* at 115-116). Such inconsistent and equivocal testimony fails to demonstrate that none of 2024's employees, agents, or servants had received complaints. In this regard, for example, it is unclear what Levy, 2024's other managing member, knew and what his duties entailed. Further, while Lev claimed that he did not know whether Cortes paid rent to Deli or to 2024 and that he never took $500 from Cortes (Lev tr at 95-96, 102), Alezeb asserted that Lev told him to make sure, when the deli closed, to have Cortes pay the rent to him, and that, thereafter, Lev collected the rent from Cortes, who continued to operate his flower stand. Alezeb tr at 85-86; *see also* Cortes aff. (after the deli closed the owner collected his rent). Such latter assertions support that Lev knew that a flower stand was on the property and that Deli had been collecting rent from Cortes.

Lev claimed that he never saw anyone getting water or electric from the vault space, and did not know whether BPC authorized such use. Lev tr at 95. That assertion is, to some extent, disputed by Cortes's affidavit, that before the accident, the "owner" saw him coming out of the basement "in connection with [Cortes] connecting [his] hose and extension cord." Cortes aff, ¶ 5. Further, Alezeb testified that Lev used to come and look at the structure built by Cortes, and saw that he accessed the basement's water source. Alezeb tr at 79-80, 91; *but see id.* at 151 (Lev never saw Cortes or his wife water the flowers in 2011). Lev also claimed that he only visited the outside of the building, perhaps once or twice a year, did not speak to tenants, and could not recall whether he even visited the property in 2011, the year Romero fell (Lev tr at 27, 28, 29).

However, Douglas testified that he saw Lev daily and that, for reasons unknown to Douglas, Lev visited the premises once or twice per month. Douglas tr at 19, 71. From the foregoing, it is unclear how often Lev visited the outside of the building; the extent to which he was involved in managing the property; whether, or when, he knew that a flower stand was being operated on the sidewalk; and whether he was aware that water from the flower stand was spilling onto the sidewalk during the cold winter months.

Even assuming that, before the accident, Lev and 2024's involvement in the building's management was minimal, and that Lev lacked notice, of any dangerous or recurring condition, Douglas visited the premises "on average" once a week, usually in the mornings, spoke to Francis about ongoing issues, and stayed for about 45 minutes, primarily inspecting the outside. Douglas tr at 20-21, 75, 77. Douglas was well aware of the flower stand's existence; that it was operated by a separate tenant, with whom he was allegedly unacquainted; and, that as far as Douglas knew, the flower stand tenant had no lease with 2024. Douglas tr at 24-25. Douglas, when asked whether he ever saw the cellar doors open with the hose coming out for the flower shop's use, replied, that he saw the doors open, but "this exact condition, I don't recall." Douglas tr at 60. Douglas's lack of recollection in that regard, and, more significantly, in regard to whether he had ever seen the sidewalk covered in water as a result of the flower stand operator watering his flowers (*see id.* at 60, 67, 75), fails to eliminate the possibility that he saw both, and when, and under what temperature conditions, he may have seen both. Further, it is undisputed that Cortes used the building's, rather than the deli's, electricity and water; and that his friend, Francis, provided access to that water and electricity. *See* Cortes affidavit; *see also* Alezeb tr at 229. BPC and 2024 may have been aware of the increased water and electricity usage from the

utility bills and from the aforementioned statements received by 2024 from BPC, and of Cortes's access to the basement's utilities via the vault space's sidewalk doors.

The moving defendants have presented no evidence as to when they, their employees, servants, and agents last inspected the sidewalk before Romero's accident. Lev's testimony, that he did not know when he last passed by the building prior to the accident (Lev tr at 116), fails to meet 2024's burden. Douglas also did not address the issue of when, before the accident, he last inspected the premises. Douglas could not even recall if he had been at the premises on the day of Romero's accident. Douglas tr at 71. Further, prior to his deposition, Douglas, in his role as property manager for many New York City buildings, was unaware of New York City Administrative Code § 7-210, and the obligations and liabilities it imposed on the buildings' owners to maintain the adjoining sidewalks and keep them clean and free of ice. Douglas tr at 26-29. Lev did not know who had the responsibility for maintaining the sidewalk, thought that Francis was possibly responsible for cleaning the sidewalk, and was unaware of whether Deli had that responsibility. Lev tr at 96. Douglas could not recall ever having seen the lease signed by Alezeb, which set forth the parties' rights and responsibilities, and answered, "[n]o, I can't say," to the question of whether he knew what those rights and responsibilities were in 2011. Douglas tr at 33-37. Douglas testified that as a property manager, he knew little of commercial leases. *Id.* at 46. Yet, he contended, based on the fact that it was standard practice, and not based on any document, that it was his understanding that the deli was responsible for maintaining the sidewalk in front of its section of the building (*id.* at 25-26) and for clearing snow and ice (*id.* at 29-30). Nonetheless, Douglas claimed that, when he saw snow or ice on the sidewalk, he would ask Francis, who kept snow melt and shovels in the basement, and not Deli, to clean it up.

Douglas tr at 25-26, 29-30, 77-78.

The moving defendants do not disclose what Francis's duties were with respect to the sidewalk adjacent to the deli, i.e., whether he had a concomitant duty to clean all of the building's sidewalk, or what he told anyone at BPC and 2024 regarding that sidewalk before Romero's accident. Alezeb testified that Francis used to clean the sidewalk in front of the deli "every day." Alezeb tr at 125. Neither moving defendant has disclosed Francis's employment status, or his exact relationship to BPC and 2024. Nor have they presented any evidence from Francis as to whether he was present on the morning in issue, or whether he had seen water spilled on the sidewalk that morning before Romero fell, and, if so, as to when he had first seen it. While Romero's counsel alleges that he never sought Francis's testimony because he lived in Florida and was too sick to be deposed, no medical affidavit has been provided to substantiate that assertion, and the moving defendants make no such claim; nor do they allege that they were unable to obtain Francis's affidavit. Defense counsel's contention, that the ice was formed and Romero slipped at the exact time the water spilled onto the sidewalk, is unsubstantiated. Although the deli opened for business at 7:00 a.m., the movants presented no evidence as to when Cortes arrived and started watering his plants on the morning of Romero's accident. Thus, 2024 and BPC have failed to establish how long the water and ice existed before Romero's fall, and whether that ice existed long enough that morning for Francis, if he were present, to have seen and cleared it. *See Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 (1st Dept 2009).

Furthermore, Romero's pleadings allege that the sidewalk condition was a recurring one and that 2024 was aware that the flowers were being watered in temperatures which would cause the water to freeze on the sidewalk. Such a claim may well have validity, because flowers

generally require regular watering, and here, the watering was done, not via a watering can, but by a hose with a greater flow capacity, and presumably less precision. It is alleged that 2024, its agents, employees, and servants should have remedied that defective recurring condition. Movants have failed to meet their prima facie burden of eliminating the pleading's allegations of a recurring condition. No affidavit has been provided by Francis or Douglas disputing the complaint's allegations of a recurring condition, or asserting that they had no actual notice of the plants being regularly watered, or of water repeatedly spilling or being sprayed onto the sidewalk, seeping under the stand, and flowing toward the curb, irrespective of the air temperature. Douglas's deposition did not address the allegation of a recurring condition, and, as previously indicated, he could not recall whether he had ever seen a wet sidewalk as a result of Cortes's watering prior to the accident, and merely testified that, if he had seen ice, he would have had Francis remedy it. Douglas's testimony, that he was unaware of prior incidents involving the sidewalk, does not equate to a lack of knowledge of a recurring dangerous condition. Also, defense counsel did not depose anyone on the issue of whether there was a recurring condition, including Francis, Cortes, or Shamshun, who managed the deli in 2011. Defense counsel's assertion, that the condition was not recurring (Despas-Barous affirmation, ¶ 38), is unavailing, because she lacks personal knowledge.

The moving defendants also have failed to eliminate Romero's pleading's allegations that a special use was made of the premises, and that there was a failure to maintain the special use. Defense counsel's claim, that there was no special use because plaintiff failed to establish that such use caused the icy condition and was a proximate cause of her injuries, is without merit. Movants, who have the prima facie burden of eliminating such issues on their summary judgment

motion, cannot meet that burden by pointing at gaps in the plaintiff's proof. Moreover, if the construction and operation of the flower stand constituted a special use, there is no dispute that its operation was the cause of the sidewalk's icy condition upon which Romero slipped. Even if Romero was comparatively negligent in not looking down at the sidewalk and in talking to her daughters while she was walking, that does not eliminate the icy condition as a cause of her injuries. The moving defendants' second ground for seeking dismissal of the special use claim, that Cortes's use of the hose in freezing weather to water his plants was an unforeseeable intervening cause which broke the chain of causation, vis-a-vis the movants' liability, is equally unavailing. It cannot be said, as a matter of law, that it is unforeseeable that a sidewalk florist will water his flowers, and that, in so doing, water might spill onto the sidewalk, freeze in cold weather, and create a dangerous condition. The only other ground raised by the moving defendants, for dismissal of the special use claim, is that the premises were exclusively in Cortes's possession and under his control. However, New York City Administrative Code § 7-210 obligated 2024 to maintain the sidewalk. Also, while the lease and its assumption obligated Alezeb and Deli to maintain the sidewalk adjacent to its premises, it also gave 2024 the right to enter the leased premises, examine them, and make any needed repairs. Lease, ¶ 13. That latter provision, and 2024's obligations under New York City Administrative Code § 7-210, demonstrate that the area where the ice spilled was not under Cortes's exclusive control; moreover, as previously indicated, exclusive possession or control is unnecessary. In any event, it is questionable whether the ice upon which Romero slipped was in the special use area. Although that area obviously included the part of the sidewalk enclosed by the flower stand's walls, Romero described the place where she fell as outside that enclosure, and about 12 inches from it.

No other grounds were raised by the moving defendants for dismissal of Romero's special use claim. However, the court notes that Lev permitted the installation of a stoop line stand, allegedly because Alezeb advised him that Deli was unable to pay its rent, a factor of which Lev was already aware. Deli's rental of the sidewalk space to Cortes for $500 a month, presumably would help Deli pay its rent to 2024. The installation of Cortes's stand on the outside wall of Deli's leasehold, would appear to have increased the leasehold's value, thereby benefitting the building's owner, especially if Deli's rent was too high in the first place. The moving defendants do not urge that such benefit to 2024 would be insufficient to constitute a special use on the owner's behalf, or assert that such benefit was too indirect. In light of all of the foregoing, the branch of 2024 and BPC's motion, which seeks an order granting them summary judgment dismissing Romero's complaint, is denied.

2024 and BPC's Application for Summary Judgment on its Cross Claims

There are a number of threshold issues which must be addressed. First, 2024 and BPC are not entitled to relief simply because Deli or Alezeb failed to submit opposing papers. The moving defendants must still demonstrate their prima facie entitlement to relief. *See Campisi v Gambar Food Corp.*, 130 AD3d 854, 856 (2d Dept 2015) (unopposed motion for summary judgment on contractual indemnification cross claim should have been granted where prima facie showing of entitlement was made); *cf. Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006) (a party moving for a default judgment must submit proof of the facts demonstrating a viable cause of action, via a verified pleading or an affidavit by a party with personal knowledge).

Second, the branch of 2024 and BPC's motion, which seeks an order granting them summary judgment on their third-party complaint's claims against Cortes, is denied as moot.

During this motion's pendency, 2024 and BPC's motion for a default judgment was granted, and an assessment of damages against Cortes was ordered. *See* County Clerk's e-file system's filing in this action, document 457. Third, to the extent that BPC seeks any relief against Deli, its motion must be denied. BPC's answer, which was issued before Romano's actions were consolidated, only asserts cross claims against Alezeb; there is no indication that, after the actions were consolidated, BPC amended its answer to assert any cross claims against Deli. Similarly, 2024, in its original answer, never asserted any cross claims against Alezeb, because it was not a party to the original complaint. 2024 does not indicate that it amended its answer, after the two actions were consolidated, to assert cross claims against Alezeb. Thus, to the extent that 2024 and BPC now seek summary judgment on cross claims that were never asserted, respectively against Deli and Alezeb, these movants' motions are denied, without prejudice to 2024 and BPC seeking leave to amend their answers, if they are so advised, to assert any proper cross claims.

A) Common-Law Indemnification and Contribution

To establish their entitlement to summary judgment on their common-law indemnification claims, the movants must demonstrate that they were free of negligence as to any part of the liability for which they seek indemnification. *Mas v Two Bridges Assoc.*, 75 NY2d 680, 688-691 (1990). Movants also must demonstrate that the proposed indemnitors were negligent, and that such negligence was a cause of the accident for which the proposed indemnitees were "held liable to the injured party by virtue of some obligation imposed by law," such as a statute imposing a nondelegable duty giving rise to strict liability (*see e.g. Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]) or based on the indemnitee's vicarious liability for the negligence of an independent contractor hired by the indemnitee to fulfill its nondelegable duty under a statute.

See Mas, 75 NY2d at 687-691; *see also Naughton v City of New York*, 94 AD3d 1, 10 (1st Dept 2012) (as applicable to the Labor Law § 240 [1] context). Common-law indemnification has its roots in equity principles and, to prevent unjust enrichment, recognizes that one is entitled to indemnity when he has "discharged a duty which is owed by him but which as between himself and another should have been discharged by the other." *McDermott v City of New York*, 50 NY2d 211, 217 (1980). It is often applied when one is held vicariously liable for another's negligence, or where an obligation imposed under a law results in liability without any negligence on the proposed indemnitee's part.

2024 and BPC's application for common-law indemnification is denied, since, among other things, they have failed to prima facie eliminate the issue of their own negligence, and because any liability on movants' part will not be due to their vicarious liability for any negligence on the part of Deli or Alezeb, but rather because they were negligent. Unlike Labor Law § 240 (1), which can impose liability on an indemnitee without a showing of negligence, New York City Administrative Code § 7-210 does not impose strict liability on the owner (*Martinez*, 74 AD3d at 1032) but requires a showing that the owner was negligent (*id.*; *Kabir*, 143 AD3d at 773).

2024 and BPC's application for contribution also is denied, because apportionment/contribution would apply only as to any moving defendant found liable, where one or more of the codefendants were also found liable. *See generally Mas,* 75 NY2d at 689-690; *see also Smith v Sapienza*, 52 NY2d 82, 87 (1981) (contribution claim only exists when at least two "tort-feasors share responsibility for an injury, in violation of duties they respectively owed to the injured person"). Since neither moving defendant has been found liable to Romero, the issue of contribution is premature.

B) Contractual Indemnification

To the extent, if any, that BPC seeks an order granting it summary judgment on any contractual indemnification cross claim it has alleged against Alezeb, that branch of BPC's motion is denied, because the lease and its rider do not confer any such entitlement on BPC. As for 2024's request for contractual indemnification from Deli, a party's right to contractual indemnification depends on the contract's language. *Bleich,* 132 AD3d at 934; *Campisi,* 130 AD3d at 855. An obligation to indemnify ought "not be found unless it can be clearly implied" from the whole agreement's language and purpose, as well as from the "surrounding facts and circumstances." *Bleich,* 132 AD3d at 934 (internal quotation marks and citation omitted). The proposed indemnitee who seeks summary judgment on its contractual indemnity claims has the burden of demonstrating its entitlement to such relief. *Id.* at 935.

Any contract, covenant, or agreement in connection with, or collateral to, a lease of real property, which purports to exempt the lessor from liability to any person injured by the negligence of the owner, its agents, employees and servants in their maintenance or operation of the demised premises or the property containing those premises, is deemed void and unenforceable. General Obligations Law § 5-321. That provision was enacted to counter the widespread use of contracts requiring tenants to indemnify their landlords, which "result[ed] in unequal bargaining power between lessor and lessee." *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 160 (1977) (internal quotation marks and citations omitted). As a general matter, whether the party from which contractual indemnity is sought was negligent is usually immaterial to the indemnitee's entitlement to contractual indemnification. *Correia*, 259 AD2d at 65. To entitle itself to summary judgment, the lessor must ordinarily establish that it, its agents, servants,

and employees were free from negligence and that the agreement provides for contractual indemnification. *Id.* Nevertheless, where the lease was "negotiated at arm's length between . . . two sophisticated . . . [parties]," they can agree that the lessor can be indemnified for its own negligence, where the lease is coupled with an insurance procurement clause requiring the coverage of the lessor for its negligence. *Hogeland*, 42 NY2d at 158; *see also Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419 (2006). That is because in such instance "the parties are allocating the risk of liability to third parties between themselves, essentially thorough the employment of insurance." *Hogeland*, 42 NY2d at 161.

Although 2024's counsel urges that 2024 was not negligent, its counsel, seemingly moves for contractual indemnification from Deli, for 2024's negligence, relying on, and citing only to, lease paragraph eight, entitled "Tenant's Liability Insurance for Property Loss, Damage, Indemnity." 2024's counsel asserts that such provision is valid, because it is coupled with an insurance procurement clause, thereby permitting indemnification for the party's own negligence. *See* Despas-Barous affirmation ¶ 72. That assertion is without merit, because the sole clause upon which 2024 grounds this part of its motion, does not require the tenant to indemnify 2024 for its own negligence. Specifically, lease paragraph eight states that the owner will not be liable for damages for injury to a person unless it was caused by the owner, its agents, servants, or employees' negligence. This provision does not require the tenant to indemnify the owner for its own negligence, but provides that 2024 will be liable for its negligence and that of its agents, servants and employees. *Cf. Stern's Dept. Stores, Inc. v Little Neck Dental*, 11 AD3d 674, 675 (2d Dept 2004) (court properly denied owner and its managing agent's post-verdict application for contractual indemnification from tenant, where lease provided that tenant would not be liable for

owner's, its agents, or its contractor's negligence). Further, paragraph eight provides that the tenant will indemnify the owner for liability and damages, for which the owner shall not be reimbursed by insurance, and which are incurred as a result of a breach by the tenant, its agents, servants, invitees, contractors, licensees, or its subtenants, of any lease covenant or condition or due to the negligence or improper conduct of the tenant, its agents, servants, invitees, contractors, licensee, or its subtenants, i.e., not the breaches and negligence of the owner and its agents, servants, employees, invitees, licensees, and contractors. Given the terms of lease paragraph eight, the branch of 2024's motion, which seeks an order requiring Deli to indemnify 2024 for its own negligence, pursuant to lease paragraph eight, is denied.

While lease paragraph eight, standing alone, does not violate General Obligations Law § 5-321, 2024 has failed to mention, or seek any relief on, its contractual indemnification claim against Deli based on the provisions of the lease rider paragraphs 14 and 15, respectively, the lease rider's indemnification and insurance procurement clauses. Paragraph 14, entitled "Indemnification by Tenant," as is relevant, provides that the tenant will indemnify 2024 against any and all liability for injury to persons or property,

> "arising from or in connection with the occupancy or use of the demised premises, or any work, installation or thing whatsoever done in, at or about the demised premises, or resulting from any default by Tenant in the payment or performance of Tenant's obligations under this lease or from any act, omission or negligence of Tenant or any contractors, agents, employees, customers, subtenants, licensees, guests or invitees of Tenant,"

Rider paragraph ¶ 15, entitled "Insurance," requires the tenant to provide liability insurance, in specified amounts, naming the landlord as an insured; if the tenant fails to procure insurance, the provision permits the landlord to procure such insurance and demand premium payments from the

tenant. Any breach by the tenant of any part of paragraph 15 entitles the landlord to the uninsured amount of any liability or damages, including reasonable counsel's fees and the amount of premiums not paid by the tenant.

There appears to be a conflict between lease paragraph eight and the rider's indemnification clause. While the former does not provide for indemnification of the owner's negligence, the rider's indemnity clause is broader, in that the landlord was to be indemnified for all liability by reason of injury to a person arising out of, or in connection with, the premises' occupancy or use or anything done in or about the premises. Unlike lease paragraph eight, the rider's indemnification clause does not require negligence, a breach of any covenant, or improper conduct by the tenant, its agents, contractors, invitees, licensees, or subtenants. Similar indemnification clauses have been interpreted to include the indemnitee's own negligence. *See Amato v Our Lady of Peace R.C. Church*, 56 NY2d 999, 1000-1001 (1982); *Campisi,* 130 AD3d at 855*; Port Parties, Ltd. v Merchandise Mart Props., Inc.,* 102 AD3d 539, 539-540 (1st Dept 2013).

However, because 2024 failed to raise the applicability of the rider's indemnification provision, or address its seeming discrepancies with lease paragraph eight, and the impact of such discrepancies, including through the affidavit of Levy, who acted as 2024's counsel, regarding his preparation and review of the lease and its rider, the court declines to grant 2024's application for summary judgment against Deli for contractual indemnification. Thus, whether the entire lease evinces, as a matter of law, an unmistakable intent to require the tenant to indemnify the owner for its negligence and that of its agents, servants, and employees, should be left for trial. *Cf. Putter v Sued*, 292 AD2d 222 (1st Dept 2002).

Moreover, irrespective of how the lease and its rider's indemnity provisions are to be interpreted, because 2024 has failed to prima facie demonstrate, or attempt to develop the issue of, whether the indemnification clause was the product of a contract negotiated at arm's length between sophisticated parties, the branch of 2024's motion, which seeks contractual indemnification for any of its negligence, must be, and hereby is, denied. *Berger v 292 Pater Inc.*, 84 AD3d 461, 462 (1st Dept 2011) (summary judgment motion on contractual indemnification cross claim properly denied, where record was devoid of evidence regarding parties' sophistication and whether negotiations were at arm's length); *see also Hogeland*, 42 NY2d at 158 ; *Great N. Ins. Co.,* 7 NY3d at 418-419.

Here, a review of Alezeb's deposition transcript, provided by 2024 for an unrelated purpose, suggests that Alezeb may not have been a particularly sophisticated party. The transcript reveals that Alezeb was born in Yemen, came to the United States as an infant, went to public schools through ninth grade, returned to Yemen to complete high school in his native language, because his parents believed that he was receiving a poor education at Wingate High School, and received no further education. Alezeb tr at 105-107. It also appears that Alezeb returned for significant blocks of time to Yemen, where his family resided. Before leasing the deli, Alezeb, who previously managed another deli, had never owned a business, and did not retain an attorney to represent him in connection with the lease (Alezeb tr at 24-25; *see also* Lev tr at 53). Alezeb allegedly first met and spoke with Lev at the lease signing, which Alezeb attended with his brother, who had previously leased a store from Lev, and did all the talking for Alezeb at the signing. Allen tr at 24-25, 114-115.

According to Alezeb, neither he nor his brother had a good command of English. *Id.* at

52. Alezeb testified that he informed Lev that he could not read English well, and that his brother could not read English. *Id.* at 108, 114-117. Alezeb, in response to questioning at his deposition, could not comprehend a question because he did not understand what the term "negotiate the lease" meant. Alezeb tr at 24. Although it was undisputed that Alezeb was first presented with the lease and its rider, which comprised about 40 pages, at the lease signing, (Alezeb tr at 227-228), Lev testified that there were no discussions at the lease signing about Alezeb's need to have an attorney read over the lease before he signed it. Lev tr at 118-119. Alezeb testified that, prior to signing the lease, the only matter discussed with Lev and Rosenberg (Alezeb tr 95), who was also at the lease signing, was the amount of rent. Alezeb claimed that he had no other concerns. *Id.* at 114-116. Alezeb further testified that no one, including Lev and Rosenberg, ever mentioned the requirement that he buy liability insurance. *Id.* at 49. At his second deposition, Alezeb, when asked, "You don't remember anyone mentioning insurance?," answered, "No." *Id.* at 227-228. Alezeb also testified that he never purchased liability insurance, and that, following the lease signing, no one ever asked him whether he had procured the insurance. *Id.* Alezeb, who separately signed the lease and its rider, admittedly did so without reading them. *Id.* at 100. Alezeb conceded that he did not care about any obligations he would have under the lease documents, other than the rent payments, because he "so badly" wanted to set up his business at that location. *Id.* at 126.

2024, on the other hand, was represented by counsel on the lease, i.e., by its managing member, Levy. Lev tr at 55. Lev testified that he was not involved in the negotiations and that Rosenberg negotiated the lease for 2024. *Id.* at 31. 2024 has not, however, presented any evidence from Rosenberg as to his lease negotiations with Alezeb or as to what he discussed with

Alezeb before the signing, including whether indemnification was ever mentioned. A lessee does not usually show up at a lease signing without having had prior discussions regarding the premises and the lease, but here what earlier discussions were had was never developed at Alezeb's deposition sessions. Lev did not dispute that, at the signing, only the rent was discussed and that insurance was not mentioned. Further, while Alezeb consulted an accountant, he did so after he signed the lease and apparently before he opened the store about three months later, following the work he did preparing the store. That accountant also helped Alezeb obtain Workers' Compensation Insurance and, later, the stoop stand license.

Whether Alezeb's brother advised Alezeb that he needed to consult an accountant regarding Workers' Compensation insurance, and of the possible tax liabilities that Alezeb could personally face if he failed to obtain such insurance for the store's employees are not revealed. From all of the foregoing, including the fact that, after 2010, Alezeb worked as a taxi driver in an attempt to earn a living, there is at least an issue of fact as to whether Alezeb was sufficiently sophisticated, and whether the lease and its rider's indemnification and insurance terms were mentioned, much less discussed with Alezeb, or negotiated with him. Given the foregoing, it cannot be determined as a matter of law that the lease was negotiated at arm's length between two sophisticated parties.

Although, based on the foregoing, the branch of 2024's motion, which seeks contractual indemnification against Deli, is denied, one other point bears mentioning. While 2024's counsel's moving affirmation is silent as to the type of damages 2024 seeks on its contractual indemnification cross claim against Deli, 2024's answer demands that 2024 be indemnified for the "amounts recovered by plaintiffs [sic] . . . as well as such costs, attorneys' fees and disbursements

as may be incurred." 2024's answer, ¶ 34. It is undisputed that neither Alezeb nor Deli procured liability insurance, much less insurance naming 2024 as an insured. On the contractual indemnification claim, the most 2024 could ultimately recover under this cause of action would be damages unreimbursed by comprehensive liability insurance procured by 2024, such as the cost of the insurance premiums, and related out-of-pocket costs. *See Collado v Cruz,* 81 AD3d 542, 543 (1st Dept 2011)*; Wilson v Haagen Dazs Co.*, 201 AD2d 361, 362 (1st Dept 1994).

Notwithstanding Lev's assertion, that he never exercised his right to procure insurance for the building when the tenant failed to do so (*see* Lev tr at 82), during discovery, 2024 provided a response to Romero's demand for insurance coverage, appending a renewal declaration page from Tower National Insurance Company for general liability coverage applicable to the period in issue. *See* Despas-Barous affirmation, exhibit Z, 2024's Response to Court's Orders and Plaintiff's Discovery and Inspection, dated 12/8/14; Despas-Barous aff, ¶ 26. That declaration page reveals that 2024 had procured comprehensive liability insurance with an aggregate limit of $2,000,000, a $1,000,000 limit for each occurrence, and a $1,000,000 personal injury limit.

Lease paragraph eight, when coupled with the lease assumption agreement, required Deli to acquire general liability insurance in favor of itself and 2024, in an amount, and with a carrier, acceptable to 2024, and to deliver the policy to 2024. Pursuant to lease rider paragraph 15, Alezeb was required to procure insurance, as is relevant, in the amounts of $1,000,000 per person and $2,000,000 per accident. Deli eventually assumed the performance of all of the lease's covenants and obligations, and Alezeb, after the assignment, remained liable for all of the lease's obligations and covenants. Because there was only one person injured in Romero's accident, 2024's policy's $1,000,000 limit will likely be sufficient to meet the lease's insurance

procurement requirements. 2024 does not assert that, for the policy period, there were any claims made, other than Romero's, that the policy has been exhausted, that the policy was ever cancelled, or that coverage was disclaimed.

Lease paragraph eight requires the tenant to indemnify 2024 for damages, claims, costs, and attorneys' fees unreimbursed by insurance, caused by covenant breaches, negligence, and carelessness of the tenant, its agents, contractors, employees, invitees, licensees, and subtenants. Unreimbursed by insurance means those amounts unreimbursed by any insurance, whether procured by the tenant or the owner. *See e.g. Diaz v Lexington Exclusive Corp.*, 59 AD3d 341, 342-343 (1st Dept 2009). Lease paragraph eight provides that, if the tenant failed to procure liability insurance in favor of the tenant and the owner, as required by paragraph eight, the owner could procure it and charge the amount paid for such insurance as additional rent. Similarly, the lease rider's insurance procurement clause, paragraph 15, requires the tenant to maintain comprehensive liability and property damage insurance naming the tenant and the landlord, and provides that, if the tenant fails to procure comprehensive liability insurance protecting the landlord, the landlord, as the tenant's agent, could procure that insurance, and demand from the tenant, reimbursement for the premiums paid. Additionally, lease rider paragraph 15 recites that any breach of that paragraph's terms entitles the landlord to the uninsured amount of any liability, loss, or damages, including reasonable counsel's fees and the amount of premiums not paid by the tenant. It thus appears, when reading the lease as a whole, that if 2024 is found negligent and liable to Romero, and if the contractual indemnification provision is found to be valid, Deli would only be required to contractually indemnify 2024 for unreimbursed damages.

Furthermore, had 2024 failed to procure liability insurance, and if 2024 were found

negligent, it would not be entitled to contractual indemnification for its own negligence from Deli, because to permit a negligent party to be indemnified in the absence of insurance coverage, would contravene statutes rendering void and unenforceable agreements exempting the indemnitees from liability for their own negligence. *Cf. Port Parties, Ltd.*, 102 AD3d at 541 (as applied to a case involving General Obligations Law § 5-323).

C) Breach of Insurance Procurement Provision

Turning to 2024's breach of contract cross claim against Deli, based on its failure to procure insurance, where an owner demonstrates that its tenant has failed, in violation of a contractual provision, to procure liability insurance naming the owner as an insured, the owner is entitled to an order granting it summary judgment on that cross claim. *See Bleich,* 132 AD3d at 935. Upon Alezeb's lease assignment to Deli, it assumed all of the lease's terms and covenants, including those requiring the tenant to procure comprehensive liability insurance naming 2024. Given Deli's failure to purchase such insurance naming 2024 as an insured, as required by both lease paragraph eight and rider paragraph 15, the branch of 2024's motion, which seeks an order granting it summary judgment against Deli on its breach of the provisions requiring it to procure insurance, is granted , and the amount of damages shall be determined at the trial of this action, upon the presentation of proper proof. A determination of liability on a failure to procure insurance claim does not have to await the resolution of which parties, if any, were negligent in causing the plaintiff's injuries. *DiBuono v Abby, LLC*, 83 AD3d 650, 652 (2d Dept 2011).

The court notes that 2024's damages against Deli on this cross claim will, assuming 2024's policy is able to pay out the same amount that could have been paid under the policy required by lease rider paragraph 15, be limited to the cost of premiums paid by 2024, and any out-of-pocket

costs that it may have incurred incidental to procuring such insurance. *See McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 (1st Dept 2013); *Cucinotta v City of New York*, 68 AD3d 682, 684-685 (1st Dept 2009); *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 268 AD2d 121, 126-127 (1st Dept 2000), *affd* 96 NY2d 111 (2001) .

The court further observes, in passing, that Alezeb's failure to read the lease and its rider is unavailing as to this cause of action, because there is no claim or evidence that their terms were misrepresented or that he was forced to sign the lease. As a general matter, absent a confidential relationship, a party who signs a document without reading it is bound thereby, unless he has a valid excuse for not doing so. *See Matter of Augustine v BankUnited FSB*, 75 AD3d 596, 597 (2d Dept 2010); *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 266 (1st Dept 2008); *Bishop v Maurer*, 33 AD3d 497, 500 (1st Dept 2006), *affd* 9 NY3d 910 (2007). Where the signer could read a document but fails to do so, he is grossly negligent, as he is when he cannot read the document but fails to have someone read it for him. *Sterling Natl. Bank & Trust Co. of N.Y. v I.S.A. Merchandising Corp.*, 91 AD2d 571, 572 (1st Dept 1982). When a person has a disability he "must make a reasonable effort to have the document read to him," and "[t]he same should be true of a person who claims not to understand English." *Sofio v Hughes*, 162 AD2d 518, 520 (2d Dept 1990). Irrespective of whether Alezeb, who was deposed in English, was sophisticated, and whether the contractual indemnification clause is valid, he is bound by the insurance procurement provisions of the lease and its rider.

In conclusion, it is

ORDERED that plaintiff Aireen Romero's motion, for an order granting her partial summary judgment against 2024 Second Avenue LLC, is denied; and it is further

ORDERED that the branch of BPC Management Corp. and 2024 Second Avenue LLC's motion, for an order granting them summary judgment dismissing plaintiff Aireen Romero's complaint, is denied; and it is further

ORDERED that the branch of BPC Management Corp.'s motion, for an order granting it summary judgment against Alezeb Deli, Inc. for contribution, and for common-law and contractual indemnification, is denied; and it is further

ORDERED that the branch of 2024 Second Avenue LLC's motion, for an order granting it summary judgment on its alleged cross claims against Mousa Alezeb for contribution, common-law and contractual indemnification, and breach of contract to procure liability insurance on behalf of 2024 Second Avenue LLC, is denied; and it is further

ORDERED that the branches of BPC Management Corp.'s motion, seeking an order granting it summary judgment on its contribution, and common-law and contractual indemnification cross claims against Mousa Alezeb, are denied; and it is further

ORDERED that the branches of 2024 Second Avenue LLC's motion seeking an order granting it summary judgment on its contribution, and common-law and contractual indemnification cross claims against Alezeb Deli, Inc., are denied; and it is further

ORDERED that the branch of BPC Management Corp. and 2024 Second Avenue LLC's motion, seeking an order granting them summary judgment against third-party defendant Julian Cortes on any claims of common-law and contractual indemnification, contribution, and breach of contract, is denied, as moot; and it is further

ORDERED that the branch of 2024 Second Avenue LLC's motion, seeking an order

granting it summary judgment on its cross claim against Alezeb Deli, Inc. for breach of its contract to procure general liability insurance naming 2024 Second Avenue LLC as an insured, is granted, and 2024's damages on this cross claim shall be determined at trial on the presentation of proper proof; and it is further

ORDERED that the parties proceed to meditation/trial forthwith.

Dated April 20, 2017

ENTER:

JOAN M. KENNEY
J.S.C.