Matias v West 16th Realty LLC
2019 NY Slip Op 31650(U)
June 7, 2019
Supreme Court, New York County
Docket Number: 156142/2015
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 42

JOSE MATIAS,

Plaintiff,

- against -

WEST 16TH REALTY LLC and GREY DOG CHELSEA INC., D/B/A THE GREY DOG RESTAURANT,

Defendant.

Index No.: 156142/2015

DECISION & ORDER

NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiff in this action, Jose Matias, seeks to recover damages for personal injuries he allegedly sustained at premises owned by defendant West 16th Realty, LLC (the owner), on February 19, 2015. At the time of the incident, defendant Grey Dog Chelsea, Inc., d/b/a The Grey Dog Restaurant (the tenant), was the commercial tenant occupying the premises. The owner moves for summary judgment dismissing the complaint and all cross-claims against it (SEQ 002). The tenant moves for summary judgment dismissing the complaint and all cross-claims against it, and on its cross-claim for common-law indemnification against the owner (SEQ 003). Both motions are denied.

II. BACKGROUND

The subject property, located at 242 West 16th Street in Manhattan, consists of a multi-story, mixed-use building with a ground floor commercial space. At the time of the incident, Danilo Martinez managed the subject property as an employee of the owner. Pursuant to a lease dated July 7, 2009, the owner leased the tenant the ground floor commercial space, along with the basement area below it, to operate a restaurant. The plaintiff was employed by the Northeast Linen Supply Company at the time of his accident. The plaintiff's duties included making deliveries of clean linens into the tenant's restaurant and removing soiled linens from the premises. The linen bundles each weighed approximately 40 to 50 pounds.

The basement of the subject property is accessible through metal doors installed in the sidewalk outside of and immediately adjacent to the restaurant, which open onto a staircase installed under the doors. The sidewalk cellar doors were used exclusively by the tenant. The doors were installed by the owner prior to the commencement of the tenant's lease. According to Martinez, the doors open outward from the middle, and were installed with hinges that permit the doors to remain open on their own, at an angle.

The tenant had a temporary air-lock vestibule entrance erected adjacent to the cellar doors for the purpose of keeping

its restaurant patrons warm during the winter. This structure was in place at the time of the plaintiff's accident. The vestibule door was oriented to open outward, in the direction of the cellar doors, such that the vestibule door and the closest cellar door could not both be opened fully at the same time. For instance, if the closest cellar door were left in an open position, the subsequent opening of the vestibule door would cause that cellar door to be pushed closed. Moreover, the location of the vestibule was such that it prevented the closest cellar door from ever opening fully. Rather, the cellar door could open only up to about 90 degrees, at which point it would come into contact with the side of the vestibule.

During the time the vestibule was erected, when the cellar doors were open, the tenant's owner, Peter Stein, testified that someone would be instructed to stand in front of the temporary vestibule entrance and direct customers to use a different entrance. Stein further stated that during any delivery through the cellar doors, the vestibule door would be locked to prevent anyone from coming out.

The plaintiff testified that, on February 19, 2015, he was delivering linen to the tenant. As the plaintiff recounted it, he was advised by an individual who identified himself as a manager that the manager would open the cellar doors located on the sidewalk so that he could enter with the clean linen. The

plaintiff returned to his truck to unload the linen and found the cellar doors open when he returned. He proceeded through the cellar doors, and closed them behind him. After completing his duties, the plaintiff prepared to leave by ascending the cellar stairs and opening the cellar doors. After opening the doors, he descended to pick up the tenant's soiled linen. The plaintiff testified that, while he was ascending the stairs for the second time, while carrying the soiled linen bundle, one of the cellar doors slammed closed on his head. The plaintiff further asserted that the impact of the cellar door caused him to fall to his knees and lose consciousness. After the incident, the plaintiff advised someone associated with the tenant restaurant of what had happened and completed two other linen deliveries. The plaintiff testified that he went to the hospital that night and underwent medical treatment for multiple injuries, including a head injury, and has not returned to work since that date.

The owner now moves for summary judgment dismissing the complaint and all cross-claims against it. In support of its motion, the owner submits an attorney's affirmation, transcripts of the parties' depositions, the pleadings, the bill of particulars, the lease, photographs, and the reports of the parties' retained licensed professional engineers. In opposition, the plaintiff submits an attorney's affirmation, and also relies on documents submitted by the owner. The tenant's

opposition relies on the documents submitted by the owner.

The tenant moves for summary judgment dismissing the complaint and all cross-claims against it, as well as on its cross-claim for indemnification against the owner. The tenant's submissions in support of its motion include transcripts of the parties' depositions, the pleadings, the bill of particulars, the lease, photographs, and a memorandum of law. In opposition, the plaintiff submits the affidavit of its licensed professional engineer, the report of the owner's expert engineer, and an attorney's affirmation, and also relies on documents submitted by the tenant. The owner's opposition relies on the documents submitted by the tenant.

For the reasons provided herein, both motions are denied.

III. DISCUSSION

A. STANDARDS APPLICABLE TO SUMMARY JUDGMENT MOTIONS

On a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the

opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562.

The evidence must be viewed in a light most favorable to the nonmoving party (see Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 [2007]), and the motion must be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is even arguable." Asabor v Archdiocese of N.Y., 102 AD3d 524, 527 (1st Dept 2013), citing Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439, 441 (1968). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." Vega v Restani Constr. Corp., 18 NY3d 499, 505 (2012) (citation omitted); see Ferrante v American Lung Assn., 90 NY2d 623, 631 (1997). The court's role "is solely to determine if any triable issues exist, not to determine the merits of any such issues." Sheehan v Gong, 2 AD3d 166, 168 (1st Dept 2003); see Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp., 70 AD3d 508, 510-511 (1st Dept 2010).

B. OWNER'S MOTION FOR SUMMARY JUDGMENT DISMISSING COMPLAINT

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." Gronski v

County of Monroe, 18 NY3d 374, 379 (2011) (citations omitted); see Peralta v Henriquez, 100 NY2d 139, 144 (2003); Basso v Miller, 40 NY2d 233, 241 (1976). In premises liability cases, "[a] landowner's duty may arise under the common law, by statute, or by regulation, or it may be assumed by agreement or by a course of conduct." Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 14 (2nd Dept 2011)(some citations omitted). See Chapman v Silber, 97 NY2d 9, 19, (2001); Ritto v Goldberg, 27 NY2d 887, 889 (1970). "That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others.'" Gronski, supra, at 379, quoting Butler v Rafferty, 100 NY2d 265, 270 (2003) (some citations omitted).

Accordingly, an out-of-possession landlord, that is, one who "has surrendered possession and control over premises leased to a tenant" (Mehl v Fleisher, 234 AD2d 274, 274 [2nd Dept 1996]), generally is not liable for the condition of leased premises unless it is statutorily obligated to maintain the premises or "'contractually obligated to make repairs or maintain the premises or . . . has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision.'" DeJesus v Tavares, 140 AD3d 433,

433 (1st Dept 2016), quoting Vasquez v The Rector, 40 AD3d 265, 266 (1st Dept 2007); see Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (1st Dept 2012).

An out-of-possession landlord also can be liable for defective conditions on its property where it has "through a course of conduct . . . become obligated to maintain or repair the property or a portion of the property which contains the defective condition." Melendez v American Airlines, Inc., 290 AD2d 241, 242 (1st Dept 2002); see Ritto, supra at 889; Colicchio v Port Auth. of N.Y. & N.J., 246 AD2d 464, 465 (1st Dept 1998). Thus, where a lease exists, "the court looks not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law." Gronski, supra at 380-381; see Mendoza v Manila Bar & Rest. Corp., 140 AD3d 934, 935 (2nd Dept 2016); Davidson v Steel Equities, 138 AD3d 911, 912 (2nd Dept 2016).

Liability may only be imposed upon an out-of-possession landlord where it had both a duty to maintain the premises and either had actual or constructive notice of the allegedly dangerous condition (see Barbuto v Club Ventures Invs., LLC, 143 AD3d 606, 607 [1st Dept 2016]), or created or exacerbated the condition by its own affirmative acts. See Bleiberg v City of New York, 43 AD3d 969, 971 (1st Dept 2007); Torres v West St. Realty

Co., 21 AD3d 718, 721 (1st Dept 2005); Delguidice v Papanicolaou, 5 AD3d 236, 237 (1st Dept 2004). Where the alleged defect was visible and apparent for a sufficient period of time to permit the owner to discover and remedy it (see Harrison v New York City Tr. Auth., 113 AD3d 472, 473 [1st Dept 2014]), a finding of constructive notice may be permitted where an owner retains the right to enter upon premises for the purpose of inspecting and making repairs, so as to constitute sufficient retention of control. See Gantz v Kurz, 203 AD2d 240 (2nd Dept 1994).

The owner failed to demonstrate, prima facie, that it had no contractual or statutory obligation to safely maintain the cellar doors, and failed to demonstrate that it lacked constructive notice of the defective condition that caused the plaintiff's injuries. Accordingly, that branch of its motion which is for summary judgment dismissing the complaint must be denied.

1. CONTRACTUAL OBLIGATION TO MAINTAIN PREMISES

The owner contends that it did not have a contractual obligation to maintain the cellar doors in a safe condition, since the condition of those doors did not constitute a significant structural or design defect that was contrary to a specific statutory safety provision. It relies upon the lease and an affirmation of counsel to support these contentions.

The subject lease explicitly reserves for the owner

responsibility for all structural repairs, requiring the tenant only to make non-structural repairs. The lease also permits the tenant use of the sidewalk upon certain conditions, and requires the tenant, if it used any part of the demised premises as a store, to keep the sidewalk and curb clean and free from snow and ice. Finally, the lease furnishes the owner with a right of re-entry for the purpose of inspection, to exhibit the premises for the purpose of sale or rental, and to make repairs and improvements to "all parts of the building." Martinez, the owner's superintendent, testified that he lives in the subject building, that his duties included cleaning the sidewalk, sweeping, and making repairs in the building, that he sometimes had to enter the basement to shut off water for the building, and that he had personally opened the cellar doors in his role as superintendent during the tenant's occupancy, while the lease was in effect.

In light of the foregoing, it is clear that the owner retained a right to re-enter, inspect, and make repairs, and that the owner was solely responsible for structural defects and repairs. The owner failed to satisfy its prima facie burden of showing that the existence of cellar doors lacking a mechanism to secure them in an open position presented a nonstructural problem. See Smith v Szpilewski, 139 AD3d 1342, 1342 (4th Dept 2016); Mayo v Metropolitan Opera Assn., Inc., 108 AD3d 422, 424

(1st Dept 2013); Healy v Carmel Bowl, Inc., 65 AD3d 665, 667-668 (2nd Dept 2009); see generally Guzman, supra; Gantz v Kurz, supra; cf. Raffa v Verni, 139 AD3d 441 (1st Dept 2016) (properly functioning cellar door that was merely left open does not present a structural defect).

In addition, as more fully discussed below, section 19-152(a)(6)(ii) of the Administrative Code of the City of New York (Administrative Code) defines a "substantial defect" in a sidewalk flag to include "cellar doors that . . . are . . . in a dangerous or unsafe condition," and imposes a duty upon a property owner to maintain such doors in a safe condition. That section constitutes a "specific statutory safety provision." There is an issue of fact as to whether the cellar door at issue in this case contravened that provision, as the owner "failed to meet [its] initial burden of establishing as a matter of law that the door did not constitute a dangerous condition in view of the absence of a latch or other mechanism to secure it in the open position." Smith v Szpilewski, supra, at 1342 (4th Dept 2016); see Ortiz v New York City Hous. Auth., 85 AD3d 573, 574 (1st Dept 2011); Wolff v New York City Tr. Auth., 21 AD3d 956, 956-957 (2nd Dept 2005); Torres v New York City Hous. Auth., 270 AD2d 100, 100-101 (1st Dept 2000).

Indeed, the deposition transcripts and photographs relied upon by the owner reveal that the cellar doors were unable to be

secured or latched in the open position. In any event, even had the owner shown that the cellar doors did not constitute a dangerous condition, the plaintiff raised a triable issue of fact in this regard with the affidavit of his expert engineer, who opined that the cellar doors presented a dangerous condition precisely because they lacked a latch or other mechanism to prop them open.

For these reasons, the owner failed to establish, prima facie, that it did not have a contractual obligation to maintain the cellar doors in a safe condition.

2. STATUTORY DUTY TO MAINTAIN SAFETY

The owner also failed to demonstrate the absence of a statutory obligation to safely maintain the subject property. Pursuant to Administrative Code § 7-210, in conjunction with § 19-152, property owners are obligated to maintain and repair the sidewalk abutting their property in a reasonably safe condition, and are liable for injuries resulting from a violation of the statute. See Collado v Cruz, 81 AD3d 542 (1st Dept. 2011). Administrative Code § 7-210 does not impose any duty on a commercial tenant, leaving the issue to the property owner and its agreement with the tenant. The scope of a property owner's responsibility regarding the repair and maintenance of sidewalks mirrors the duties and obligations of property owners with regard

to sidewalks as set forth in Administrative Code § 19-152. See Report of Committee on Transportation, 2003 New York City Local Law Report No. 49 Intro 193.

Administrative Code § 19-152 obligates property owners to repair "a defective sidewalk flag in front of or abutting" their property, which "contains a substantial defect." A substantial defect is defined as including a number of items, among which are "hardware or other appurtenances not flush within 1/2 inch of the sidewalk surface" or "cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition." Administrative Code § 19-152(a)(6). Thus, the obligation to repair is not limited to defects in the actual material of a sidewalk flag, but includes hardware and other items installed in the sidewalk appurtenant to the owner's property for the use and benefit of the owner, such as cellar doors. As the court has stated, there is an issue of fact as to whether the cellar doors contained a substantial defect for which the owner was responsible pursuant to Administrative Code §§7-210 and 19-152(a)(6).

Accordingly, the owner failed to establish, prima facie, that it did not have a statutory obligation to maintain the cellar doors in a safe condition.

3. CONSTRUCTIVE NOTICE

The owner failed to make a prima facie showing that it lacked constructive notice of the condition that caused the plaintiff's injuries. The owner's superintendent testified that the cellar doors were installed prior to his employment, and that he was familiar with functioning of the cellar doors and had personally lifted them in his capacity as superintendent. The tenant's owner testified that the tenant did not make any changes to the cellar doors since they began to occupy the space. Accordingly, there is an issue of fact as to whether the plaintiff had constructive notice of the condition of the cellar doors. In light of the foregoing, the branch of the owner's motion seeking to dismiss the complaint as against it must be denied.

B. TENANT'S MOTION FOR SUMMARY JUDGMENT

A commercial tenant of the property abutting a purported accident location is liable to a plaintiff if the commercial tenant "affirmatively caused or created the defect" that caused the plaintiff's injury, or "put the sidewalk to a 'special use' for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition." Kellogg v All Saints Housing Development Fund Co., Inc., 146 AD3d 615, 617 (1st Dept. 2017); see Collado v Cruz, 81 AD3d 542 (1st Dept. 2011). In

addition, while the provisions of a lease agreement obligating a tenant to repair the sidewalk generally do not impose on the tenant a duty to a third party, such as the plaintiff (see Collado v Cruz, supra), a lease provision may be so comprehensive and exclusive as to sidewalk maintenance as to entirely displace a landlord's duty to maintain the sidewalk (see Abramson v Eden Farm, Inc., 70 AD3d 514 [1st Dept. 2010]; Hsu v City of New York, 145 AD3d 759 [2nd Dept. 2016]).

The commercial lease between the owner and the tenant provided that the tenant was to be responsible for "all non-structural repairs" on the premises, and all repairs necessitated by reason of the tenant's negligence, but that the owner remained responsible for all structural repairs not necessitated by reason of the tenant's negligence. This language cannot be read as so comprehensive and exclusive as to sidewalk maintenance as to displace the owner's duty to maintain the sidewalk. Indeed, in Collado v Cruz, supra, the Appellate Division, First Department found that a more specific, yet similar, provision in a lease that required the tenant to "make all [non-structural] repairs and replacements to the sidewalks and curbs adjacent thereto" was insufficient to impose a duty on the tenant to a third party injured due to a broken sidewalk flag.

However, the tenant fails to establish that it did not

affirmatively cause or create the defect, or that it did not put the cellar doors and abutting sidewalk to a special use for its own benefit, and that such use did not proximately cause the plaintiff's injuries. Accordingly, the branch of the tenant's motion seeking to dismiss the complaint as against it is denied.

1. CREATION OF THE HAZARD

The tenant fails to demonstrate that it may not be held liable for the plaintiff's injuries based on its affirmative creation or contribution to the hazard that caused the plaintiff's injuries. It is undisputed that the tenant's installation of a temporary vestibule interfered with the opening of one of the cellar doors. Specifically, the vestibule door opened outward, directly over the cellar doors, so that the vestibule door and the cellar doors could not be used simultaneously. Moreover, even when the vestibule door was closed, the location of the vestibule prevented the closest cellar door from opening past about 90 degrees, even though the cellar doors were designed to open further. Both the plaintiff's expert engineer and the owner's expert engineer opine that the temporary vestibule created a dangerous or unsafe condition. The testimony of the tenant's owner that it was the policy of the tenant to prevent use of the vestibule entrance while the cellar doors were in use further confirms that the configuration of the

vestibule in such close proximity to the cellar doors was hazardous. Further, there has been no testimony that the policy was actually being followed at the time of the plaintiff's accident.

The tenant's argument that it is nonetheless entitled to summary judgment dismissing the complaint because it has not been conclusively established that it was the placement of the vestibule door alone that caused one of the cellar doors to hit the plaintiff is unavailing. "Proximate cause may be established without direct evidence of causation by inference from the circumstances of the accident," as long as the record renders other possible causes "sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation." Bilska v Truszkowski, 171 AD3d 685 (2nd Dept 2019) (citations omitted); see Schneider v Kings Highway Hosp. Center, Inc., 67 NY2d 743 (1986); Brewster v Prince Apartments, Inc., 264 AD2d 611 (1st Dept. 1999). Moreover, it is well-settled that in order for a plaintiff to recover damages, a defendant's negligence need not be the sole cause of the injury; it need only have been a substantial factor in bringing the injury about. "The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury." Demetro v Dormitory

Authority of State, 170 AD3d 437, 439 (1st Dept. 2019) (citations omitted); see, e.g., Jaber v Todd, 171 AD3d 896 (2nd Dept. 2019); Enriquez v Joseph, 169 AD3d 1008 (2nd Dept. 2019); Pineiro v Rush, 163 AD3d 1097 (3rd Dept. 2018).

The evidence produced by the tenant, including the parties' deposition testimony and photographs of the accident scene, is sufficient to enable a jury to find that the opening of the vestibule door while the plaintiff was ascending the cellar stairs was the cause of the plaintiff's injuries. A jury could also rationally find that even if the vestibule door remained closed, the configuration of the vestibule caused the closest cellar door to close unexpectedly, since the vestibule prevented that cellar door from entering a fully open position. Even if the tenant's evidence had established that it was not the proximate cause of the plaintiff's injuries, the affidavits of both engineering experts raise a triable issue of fact insofar as both experts opine that the proximity of the vestibule to the cellar door was a substantial factor in causing the plaintiff's accident.

2. SPECIAL USE

"To recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and

control of the alleged special-use area, and the plaintiff must demonstrate the special use caused the defective condition which proximately caused his or her injuries." O'Toole v City of Yonkers, 107 AD3d 866, 867 (2nd Dept. 2013) (citations omitted).

The cellar doors provided access to a basement, which the tenant utilized in connection with its restaurant business. See Navarreto v 995 Westchester Avenue LLC, 35 AD3d 267 (1st Dept. 2006). Among other things, the tenant used the cellar doors for the pick up and delivery of linens from the company that employed the plaintiff at the time of the accident. It also used the sidewalk abutting the leased property in connection with its business, constructing a temporary vestibule thereupon for the entry and egress of its customers. While the owner's superintendent would periodically inspect the property, including the sidewalk adjacent to the premises, the tenant was the entity responsible for cleaning snow and debris from the sidewalk and cellar doors. Finally, the lease permitted the tenant "exclusive use of the basement area," accessed through the cellar doors, and required the tenant perform certain non-structural maintenance of the sidewalk. See Navarreto v 995 Westchester Avenue LLC, supra; Keane v 85-87 Mercer Street Associates, Inc., 304 AD2d 327 (1st Dept. 2003).

In light of the foregoing, there are triable issues of fact as to whether the tenant made special use of the cellar doors and

abutting sidewalk, and whether such use, as it related to the tenant's use of cellar doors and the tenant's installation of a temporary vestibule that interfered with the opening of the cellar doors, was a proximate cause of the plaintiff's injuries.

Accordingly, the branch of the tenant's motion seeking to dismiss the complaint as against it must be denied.

C. INDEMNIFICATION AND CONTRIBUTION

The owner interposed cross-claims against the tenant for contractual indemnification, common-law indemnification, and contribution. The tenant interposed cross-claims against the owner for common-law indemnification and contribution. The owner moves to dismiss the tenant's cross-claims. The tenant moves to dismiss the owner's cross-claims, and for summary judgment on its cross-claim for common-law indemnification. The applications are denied.

1. CONTRACTUAL INDEMNIFICATION

Contractual indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E.

86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973). Contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying accident. See General Obligations Law § 5-322.1(1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013). Moreover, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence." Kilfeather v Astoria 31st Street Associates, 156 AD2d 428, 429 (2nd Dept. 1989).

The lease contains two indemnification provisions. The first provides that the tenant shall "forever indemnify and save harmless" the owner against all liability occasioned "wholly or in part by any act or acts, omission or omissions of the tenant" and also "for any matter or thing growing out of the occupation of the demised premises or of the street, sidewalks or vaults adjacent thereto." The second provision requires the tenant to indemnify the owner against all claims asserted against the owner "by virtue of its ownership of the premises demised to the tenant pursuant hereto."

The first of these provisions requires the tenant to indemnify the owner for liability arising from the tenant's own

negligence, and, hence, is enforceable. The second provision, to the extent that it obligates the tenant to reimburse the owner for losses occasioned by the owner's own wrongful conduct, is unenforceable pursuant to General Obligations Law § 5-322.1. See Federal Ins. Co. v Walker, 53 NY2d 24, 29 [1981]; 8-40 Corbin on Contracts § 40.19. The court has considered and rejects the owner's argument that circumstances exist that would warrant enforcement of the second provision.

Nonetheless, since the tenant has not established that it is free from fault in the underlying incident, it can potentially be held liable to the owner pursuant to the first indemnification provision, pending a determination of liability in this action. Accordingly, the branch of its motion seeking to dismiss the owner's cross-claim for contractual indemnification is denied.

2. COMMON-LAW INDEMNIFICATION

To establish the right to common-law indemnification, "'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident.'" Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681, 684-685 (2nd Dept. 2005), quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 (1st Dept. 1999). "Since the predicate of common-law indemnity

is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." Konsky v. Escada Hair Salon, Inc., 113 A.D.3d 656, 658 (2nd Dept. 2014) (citations omitted).

Since the tenant has not established that it was not guilty of any negligence, it is not entitled to common-law indemnification at this juncture, nor is it entitled to dismissal of the owner's cross-claim for common-law indemnification. Similarly, since the owner has not established that it was not guilty of any negligence, it is not entitled to dismissal of the tenant's cross-claim for common-law negligence.

3. CONTRIBUTION

A claim for contribution lies where the contributing party owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages. Rosner v Paley, 65 NY2d 736, 738 (1985). "[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp., 71 NY2d 599, 603 [1988]; see Nelson v Chelsea GCA Realty, Inc., 18 AD3d 838, 840-841 [2nd Dept 2005]; Trump Vill. Section 3, Inc. v New York State Hous.

Fin. Agency, 307 AD2d 891, 896 [1st Dept 2003]), and will lie whether or not the culpable parties are allegedly liable for the injury under the same or different theories (see Raquet v Braun, 90 NY2d 177 [1997]), and "whether or not the party from whom contribution is sought is allegedly responsible for the injury as a concurrent, successive, independent, alternative, or even intentional tort-feasor." Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp, supra, at 603. Moreover, a cause of action for contribution may also be stated where it is alleged a contributor breached a duty owed to the defendant whom the plaintiff seeks to hold liable, even if no duty exists between the contributor and the injured plaintiff. See Raquet v Braun, supra, at 182; Sommer v Federal Signal Corp., 79 NY2d 540, 593 NE2d 1365 (1992); Darzimanova v Le Clere, 122 AD3d 421, 422 (1st Dept 2014).

Since there remain issues of fact as to whether either of the defendants negligently breached their duties, resulting in the plaintiff's injuries, both the owner's and the tenant's cross-claims for contribution survive.

IV. CONCLUSION

For the reasons set forth herein, it is

ORDERED that the motion of the defendant West 16th Realty, LLC, is denied; and it is further,

ORDERED that the motion of the defendant Grey Dog Chelsea, Inc., d/b/a The Grey Dog Restaurant, is denied.

This constitutes the Decision and Order of the court.

Dated: June 7, 2019

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON