At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of March, 2020.

PRESENT:

HON. DAWN M. JIMENEZ-SALTA,
Justice.

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MARLENE PAUL,

Plaintiff,

- against -

THE MARY MANNING WALSH NURSING HOME COMPANY, INC., ARCHCARE COMMUNITY SERVICES, INC., ARCHDIOCESE OF NEW YORK, BARR & BARR, INC., AND URBAN FOUNDATION/ENGINEERING, LLC,

Defendants.

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BARR & BARR, INC.,

Third-Party Plaintiff,

- against -

URBAN FOUNDATION/ENGINEERING, LLC AND SCOTTSDALE INSURANCE COMPANY,

Third-Party Defendants.

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DECISION AND ORDER

Index No. 522865/16

The following papers numbered 1 to 12 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 6-7
Opposing Affidavits (Affirmations)	3, 4-5, 8 8
Reply Affidavits (Affirmations)	9, 10, 11 12

Upon the foregoing papers, defendants Mary Manning Walsh Nursing Home Company, Inc. (MMW) and Archcare Community Services, Inc. (Archcare) (collectively, the moving defendants) move, in motion sequence (MS) six, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint as against them, or granting them contractual and common-law indemnity against defendant/third-party plaintiff Barr & Barr, Inc. (Barr) and defendant/third-party defendant Urban Foundation/Engineering, LLC (Urban). Barr moves, in MS five, for an order, pursuant to CPLR 3212, granting it summary judgment and indemnity against Urban.

Plaintiff, Marlene Paul (Paul) brings this action for personal injuries allegedly sustained by her on April 21, 2016 when she tripped and fell on a crack in the sidewalk adjacent to the nursing home at 1339 York Avenue in New York (property). Plaintiff testified that she observed construction workers in the area where she fell, and a wooden fence blocked a portion of the sidewalk from the public. She returned to the property two days after her accident to photograph the defect that caused her fall.

Paul originally named four defendants in her December 19, 2016 complaint: MMW, Archcare, and the Archdiocese of New York (Archdiocese), as the owners of the property,[1] and Barr & Barr, Inc. (Barr), the construction manager moving defendants retained in 2016 to manage the needed work for their "Chiller Replacement Project" (i.e. to replace the nursing home coolant system). Barr brought a third-party complaint against Urban, the

[1]This action was discontinued as against the Archdiocese pursuant to a February 13, 2017 stipulation of discontinuance.

subcontractor Barr retained to remove, excavate and restore the sidewalk adjacent to the nursing home (to, in turn, allow removing the old chiller from the subbasement and installing the new one), and Scottsdale Insurance Company (Scottsdale), the company who allegedly insured Urban under a commercial general liability policy at the time. Plaintiff filed an amended complaint on July 19, 2017 and named Urban as an additional direct defendant. A November 22, 2017 court order granted Scottsdale's motion, MS two, to sever and transfer the third-party action against it to New York County.

The moving defendants presented Edward J. Dowling, Jr. (Dowling), an Archcare consultant involved in renovations and construction projects at the nursing home as a deposition witness. Dowling testified that he solicited the agreement by which the moving defendants retained Barr to act as its construction manager. Dowling knew that Barr retained Urban as a subcontractor to perform the sidewalk excavation and repair, but he did not know when each stage of the work was completed. Dowling only visited the worksite two or three times but he had weekly calls with Barr's senior project manager, James Schultz, to discuss problems and progress. Dowling testified that he was not sure if the moving defendants performed any inspections of the sidewalk before plaintiff's accident.

Barr presented James Schultz as a deposition witness, and he confirmed having worked closely with Dowling throughout the project. Schultz, as construction manager, testified that Barr had a constant presence at the work site. A Barr employee was always assigned to the site to inspect the work the subcontractors performed. Schultz and other Barr

employees made daily reports and took photographs of the worksite. Even if Schultz was not present at the site, the Barr foreman would call to notify him of any issues that arose. Schultz testified that, when necessary, Barr could halt work, withhold payment and/or direct any subcontractor to take remedial measures if Barr found a subcontractor's work unsatisfactory.

Schultz confirmed that Urban was the only subcontractor Barr retained to perform work on the subject sidewalk. He admitted that Barr was in charge of supervising Urban's sidewalk installation. When shown photographs of the alleged defect, Schultz testified that he never saw the crack, but even if he had, he would not have considered it a tripping hazard. He said the crack would not have warranted Barr to direct Urban to take corrective action.

Urban presented its Vice President, David Van Leeuwen as a deposition witness. Van Leeuwen oversaw and managed the project from his office and confirmed that Urban performed excavation work and poured the temporary sidewalk. He testified that Urban's employees decided how far the temporary sidewalk would extend, and he did not know if Barr directed any of Urban's work. Van Leeuwen could not recall if Barr held safety meetings or how often Barr was present at the project, but he testified that Barr had the authority to stop Urban's work if Barr felt the work was not being performed in accord with good and safe practices. Van Leeuwen testified, after having been shown a photograph of the alleged defect, that he did not believe Urban would have needed to react if the crack had surfaced before plaintiff's accident.

Summary Judgment Standards

A party seeking summary judgment has the burden of establishing his or her defense "sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor, and he [or she] must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; *see* CPLR 3212 [b]). The moving party bears the prima facie burden of showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material factual issue (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). "A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case" (*Seedat v Capital One Bank*, 170 AD3d 769, 769 [2d Dept 2019]). Conflicting inferences and issues of credibility will preclude summary judgment to a party and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*see Open Door Foods, LLC v Pasta Machs., Inc.*, 136 AD3d 1002, 1004-1005 [2d Dept 2016]; *see also Benetatos v Comerford*, 78 AD3d 750, 751 [2d Dept 2010]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). Failing to make that showing requires denying the motion, regardless of the opposing papers' adequacy (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]). Once movant has made its prima facie showing, the burden shifts to the nonmoving party to show "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]).

Parties' Contentions

The moving defendants argue that they are entitled to summary judgment dismissing the complaint because, although they own the property abutting the sidewalk where plaintiff allegedly tripped and fell, they neither created the defect nor had actual or constructive notice of the defect. They argue that the record clearly shows that Urban created the defect by installing temporary concrete topping on the sidewalk and they were completely unaware that a defect was created from that work. The moving defendants claim that neither Barr nor Urban informed them about the crack and that their limited visits to the site were reasonable because they did not perform any of the work. They relied on Barr, their construction manager, for updates and progress reports. The moving defendants also argue that Barr and Urban were responsible for ensuring a safe sidewalk under the express terms of their contracts, and they did nothing to usurp that responsibility. Hence, they submit that Barr and Urban owe them contractual and common-law indemnity for injuries sustained from the negligently completed sidewalk repairs.

In opposition, plaintiff argues that the moving defendants failed to satisfy their prima facie burden that they did not have a duty to maintain and repair the sidewalk abutting their property given that they have a nondelegable duty under Administrative Code of the City of New York § 7-210. Further, plaintiff argues that the moving defendants failed to show they lacked constructive notice of the alleged condition because they failed to submit evidence when the subject sidewalk was last inspected or cleaned. Alternatively, plaintiff argues that,

should the court find the moving defendants sustained their prima facie burden, there is a triable factual issue as to whether they had constructive notice of the defect because the crack was sufficiently visible and apparent before the accident.

In response, the moving defendants argue that their admitted reliance on Barr does not defeat their motion because they hired Barr to coordinate the sidewalk construction work for them, thus making their daily inspection of the sidewalk unnecessary. Further, the moving defendants contend that their lack of knowledge about the defect should not serve as grounds to deny their motion because Urban caused the defect without direction or input from them.

Barr supports the moving defendants' request for dismissing the complaint but objects to their request that it must indemnify them. Barr argues that it is also owed indemnification from Urban. Further, Barr alleges that the moving defendants' motion fails because they did not request that Barr tender their defense. In response, the moving defendants argue that their failure to send Barr a tender request does not serve as a legal basis to preclude them from Barr's indemnification.

Urban objects to the moving defendants' motion and argues that they failed to satisfy their prima facie burden because Scottsdale was removed from this action and triable factual issues remain as to the cause of the accident. In reply, the moving defendants argue that Urban's indemnity of them was not removed from this court's purview by severance of the third-party action against Scottsdale. The moving defendants also claim the record shows that Urban definitively created the defect without direction from them, and Urban was nonetheless responsible for ensuring the sidewalk was safe after it performed work.

Discussion

Administrative Code of the City of New York § 7-210 abrogates the common law and imposes a nondelegable duty on property owners to maintain the sidewalk adjacent to their property in a reasonably safe condition (*see Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 176 [2019]). "While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210" (*id.* at 174). However, "subject landowners are not strictly liable for personal injuries resulting from accidents on abutting sidewalks because section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation" (*id.* at 171). Therefore, "the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable," and "to prevail on its summary judgment motion, the defendant [owner] [is] required to establish that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2d Dept 2018]). "To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff tripped" (*Marchese v St. Martha's R.C. Church, Inc.*, 106 AD3d 881, 882 [2d Dept 2013]).

Here, the moving defendants, as owners of the property abutting the sidewalk where plaintiff tripped and fell, cannot shift their liability for injuries caused by negligent

maintenance of that sidewalk to Barr or Urban even though it contracted with Barr to oversee the excavation and repair of the sidewalk. Therefore, the moving defendants' claims for common-law and contractual indemnity fail (*see He*, 34 NY3d at 176). Further, although the record supports the moving defendants' assertion that they did not create the alleged defect, they failed to offer evidence when they last inspected or cleaned the subject sidewalk. They further failed to present sufficient evidence that the defect was not apparent and did not exist a sufficient length of time. Hence, the moving defendants failed to establish their prima facie entitlement to judgment as a matter of law, and their summary judgment motion must be denied regardless of the opposition papers' sufficiency (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]).

Turning to Barr's motion for common-law and/or contractual indemnity from Urban, Barr asserts it is not liable to plaintiff because her injuries directly resulted from Urban's work, and Urban contracted to provide defense and indemnification to Barr if a lawsuit resulted from Urban's work. Barr argues that it is entitled to indemnity because Urban was the only subcontractor retained to perform work on the sidewalk, and the subcontract clearly stated Urban's responsibility to remove, excavate and restore the sidewalk adjacent to the nursing home. Further, Barr argues it did not perform sidewalk work, supply tools or equipment to Urban, or supervise, direct or control any of Urban's workers on the project. It claims Urban violated their subcontract and should not have refused to defend and indemnify Barr when Barr originally sent its tender request. Barr presents, as evidence it is

not at fault, photographs it took on March 16, 2016, approximately one month before the accident, showing the sidewalk free of any defects before Urban brought heavy machinery and performed work. Barr argues that it had no legal duty to plaintiff or any of the codefendants because it had "no role whatsoever in any work at this subject area at the time of the alleged incident" (affirmation of Barr's counsel dated June 20, 2019 at ¶ 34).

In opposition, Urban argues that denying Barr's motion is required because Barr's indemnity from Urban will be decided in New York County following this court's order severing and transferring Barr's third-party action against Scottsdale. However, that order does not indicate that Barr's claims against Urban would be similarly transferred. Urban also argues that Barr's motion must be denied because it is a named defendant in plaintiff's amended complaint, and Barr and moving defendants failed to file cross claims against Urban in their answers to that complaint. However, Barr asserts two cross claims against Urban in its August 1, 2017 answer to the amended complaint.

Urban also argues that the motion must be denied because there are factual questions regarding who caused the defect. Urban claims it was not required under its subcontract to indemnify Barr for its own negligence, and that Barr was negligent in its work supervision. Urban highlights Schultz's testimony that he would not have told Urban to stop or change its work if he had observed the crack because he did not consider it a hazard or dangerous condition. In reply, Barr reiterates its arguments that it is owed indemnity because Urban was responsible for removing and replacing the sidewalk, deciding the size and scope of the concrete topping on the sidewalk, and causing the crack to form.

A contractor may be granted summary judgment for its contractual indemnity claim from a subcontractor where the indemnification agreement purports to indemnify a party for its own negligence if it authorizes indemnification "to the fullest extent of permitted by law" (*see Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869 [2d Dept 2008]). "[A]n indemnification clause is enforceable where the party to be indemnified is found to be free of any negligence" and the contractor can prove it did not have actual or constructive notice of the defect which caused the accident (*id.*). The contractor may meet its prima facie entitlement to judgment as a matter of law when it shows that the subcontractor's work caused the subject defect and the subcontractor was solely responsible for supervising its employees and instructing them in the manner of their work (*see Hopes v New Amsterdam Restoration Group, Inc.*, 83 AD3d 784, 786 [2d Dept 2011]).

Urban agreed to indemnify Barr to the fullest extent permitted by law in its subcontractor agreement, but factual questions exist precluding the award of summary judgment in Barr's favor. Even if this court found that Urban caused the alleged defect through its excavation of the sidewalk and installation of temporary topping, the record does not show that Barr was free from negligence and did not supervise or instruct Urban employees at the site. Schultz testified that Barr continuously supervised the worksite and Urban's work. He testified that Barr had the power to stop and alter the work being completed. Consequently, the record shows that Barr had a role in supervising and controlling the work Urban performed at the site. Therefore, Barr failed to meet its prima

facie burden of establishing its entitlement to judgment as a matter of law based on contractual or common-law indemnity from Urban. Accordingly, it is

ORDERED that the moving defendants' motion, MS six, for an order granting them summary judgment dismissing the complaint and any cross claims as against them, or granting them contractual and common-law indemnity over Barr and Urban is denied, and it is further

ORDERED that Barr's motion, MS five, for an order granting it summary judgment against Urban and awarding it defense and indemnification is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,

J. S. C.

Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

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