

McColgan v Chand Realty Assoc.

2020 NY Slip Op 32012(U)

June 23, 2020

Supreme Court, New York County

Docket Number: 150826/2013

Judge: Shlomo S. Hagler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17**

-----X
SARAH MCCOLGAN,

DECISION AND ORDER

Plaintiff,

Index No. 150826/2013

- against -

**CHAND REALTY ASSOCIATES, MAKE-UP ART
COSMETICS (U.S.), INC., MAKE-UP ART COSMETICS
(NEW YORK), INC., MAKE-UP ART COSMETICS INC.,
and MAKE-UP ART COSMETICS (DELAWARE), INC.,**

Defendants.

-----X
CHAND REALTY ASSOCIATES,

**Third-Party Index
No. 595794/2018**

Third-Party Plaintiff,

- against -

M.A.C. COSMETICS, INC.,

Third-Party Defendant.

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

This personal injury action arises out of an accident that occurred on April 10, 2012 when plaintiff, a freelance photographer, suffered an electrical shock while working at a “MAC Studio” on the second floor of a building located at 7 West 22nd Street, New York, New York (the Building). In motion sequence no. 004, defendant Chand Realty Associates (Chand) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against it, and for summary judgment on its cross claim for contractual indemnification against defendants Make-Up Art Cosmetics (U.S.), Inc., Make-Up Art Cosmetics (New York), Inc., Make-Up Art Cosmetics Inc., and Make-Up Art Cosmetics (Delaware), Inc. For the reasons set forth below, the motion is granted in part.

BACKGROUND

Chand is the owner of the subject Building (NYSCEF Doc No. 71, affirmation of Jessica L. Suleymanov [Suleymanov], exhibit C, ¶ 17). On March 28, 2007, Chand, as “landlord” and “owner,” and third-party defendant M.A.C. Cosmetics Inc. (MAC), as “tenant,” entered into a standard form loft lease for the premises, which included the second floor of the Building where the accident occurred (the Premises) (NYSCEF Doc No. 70, Suleymanov affirmation, exhibit B [the Lease] at 1). MAC has admitted that it was the tenant of the Premises at the time of the accident (NYSCEF Doc No. 169, affirmation of Jeffrey D. Fippinger [Fippinger], exhibit at 1).

Paragraph 4 of the Lease, titled “Repair,” as modified, provides, in pertinent part, that:

“Owner shall maintain and repair the exterior of and the public portions of the building. Tenant shall, throughout the term of this lease, take good care of the demised premises ... and the fixtures and appurtenances therein, and at the Tenant’s sole costs and expense unless the cause of such repair was due to the negligence or willful act of Owner, its agents, contractors or employees ... promptly make all repairs thereto and to the building whether structural or non-structural in nature, caused by, or resulting from the carelessness, omission, neglect or improper conduct of Tenant ... [i]f Tenant fails, after thirty (30) days notice, to proceed with due diligence to make repairs required to be made by Tenant, the same may be made by Owner at the expense of Tenant ... Tenant shall give Owner prompt notice of any defective condition in any ... electrical lines located in the demised premises and following such notice, Owner shall remedy the condition with due diligence, but at the expense of Tenant, if repairs are necessitated by damage or injury attributable to Tenant ...”

(NYSCEF Doc No. 70 at 1 and 7).

Paragraph 57 of the rider to the Lease discusses indemnification and insurance. Paragraph 57 states, in part:

“(A) Tenant shall indemnify and save harmless Landlord and its agents against and from (i) any and all claims (a) arising from (x) the conduct or management of the demised premises or of any business therein, or (y) any work or thing whatsoever done, or any

condition created by anyone other than Landlord ... in or about the demised premises during the Term or (b) arising from any negligent or otherwise wrongful act or omission of Tenant ... and (ii) all reasonable costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon. In case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, shall resist and defend such action or proceeding at Tenant's expense by counsel reasonably satisfactory to Landlord, without any disclaimer of liability in connection with such claim. Notwithstanding the foregoing, Tenant shall not be liable for all loss or damage caused by any act or negligence of Landlord or its employees, agents or contractors or subcontractors of any tier"

(*id.* at 21). MAC also agreed to secure a commercial general liability policy, a builder's risk insurance policy and worker's compensation insurance, and to name Chand as an additional insured (*id.* at 21-22 [paragraph 57 (B) and (D)]).

At her deposition, plaintiff testified that she was a self-employed freelance photographer, and that her work involved photographing fashion editorials and cosmetics advertisements (NYSCEF Doc No. 76, Suleymanov affirmation, exhibit H at 11-13). "MAC" occupied the entire 5,000 square foot open loft space on the second floor (*id.* at 50), and she had visited the Premises several times in the year prior to the accident for her work (*id.* at 38).

Plaintiff testified that on the day of the accident, she was present at the Premises for a personal project, rather than for a commercial client (NYSCEF Doc No. 76 at 102). She and Victor Henao (Henao), a makeup artist, had been "working on a series of shoots together" (*id.* at 30), and Henao had arranged to use the photography studio at the Premises (*id.* at 28). Plaintiff supplied all her own photography equipment for the shoot, which included a Profoto Acute 1200-2R lighting kit and a 25-foot or 50-foot extension cord, among other items (*id.* at 57-58 and 72). She explained that the Profoto Acute 1200-2R kit was comprised of a "power pack generator" or "flash generator" and a "strobe head" type flash (*id.* at 58 and 65). There were three dedicated outlets on

the flash generator to which the strobe head or other lighting device could be attached (*id.* at 63 and 82-83). Since the flash generator did not operate on battery power (*id.* at 59), her assistant, Shalim Rodriguez, plugged the power cord for the flash generator into the extension cord, and then he plugged the extension cord into a wall outlet at the studio (*id.* at 71 and 100-101). Plaintiff testified that from previous visits, she was aware the electrical outlet closest to the set did not work, although she never complained to anyone about the condition (*id.* at 105-106). She did not know when the wall outlet she used on the day of the accident was installed (*id.* at 108). Plaintiff testified that her equipment remained plugged into the wall outlet the entire morning (*id.* at 104), and that she had used the flash generator and strobe head without incident prior to the accident (109-110 and 144).

Plaintiff explained that the accident occurred when she went to “unplug the strobe light in order to plug in the continuous light,” which she explained was a different lighting device used for taking video (*id.* at 115-116). Plaintiff testified that she intended to disconnect the flash generator from the extension cord, which was still attached to the wall outlet (*id.* at 119). She testified that when she gripped the cord for the flash generator in one hand and the extension cord in the other, she felt a surge of electricity run through her body (*id.* at 125-126 and 149). Plaintiff sustained burns and nerve damage to her left hand requiring surgery (*id.* at 152 and 154).

Plaintiff testified that she was unaware if any renovation work had taken place at the Premises in the year prior to the accident (*id.* at 34). The space looked substantially similar on each prior visit (*id.* at 33). Plaintiff further testified that she was unaware of any complaints about the Premises prior to the date of the accident (*id.* at 112).

Shiela Wright (Wright) was employed by defendant Make-Up Art Cosmetics (U.S.), Inc. as the retail store manager of MAC’s professional showroom at the Premises (NYSCEF Doc No.

79, Suleymanov affirmation, exhibit K at 10-11). Wright testified that the showroom, which included the photography studio, occupied the entire second floor of the Building (*id.* at 14). She was acquainted with plaintiff, who had used the photography studio on prior occasions (*id.* at 29). Wright did not witness the accident (*id.* at 30). Wright testified that she was unaware of a regular practice or procedure MAC employed to inspect the six electrical outlets in the showroom (*id.* at 23). Wright expressed that no one had ever complained to her, the assistant showroom manager, or the two showroom floor managers about the electrical outlets at the Premises (*id.* at 24-25). During her tenure as the showroom manager, no outside electrical contractor performed work at the Premises (*id.* at 35). Had the New York City Department of Buildings issued a violation for the Premises, the violation would have been sent to the manager of retail operations (*id.* at 27).

Thomas Cozzo (Cozzo) testified that he was employed as the Building's superintendent on the day of the accident, and that he had been so employed for 30 years (NYSCEF Doc No. 78, Suleymanov affirmation, exhibit L at 10-11). He could not recall Chand performing any electrical work in the Building between 2010 and 2013 (*id.* at 26). However, in July 2011, Graystone Management, the Building's management company, retained an electrical contractor to correct an issue in the basement (*id.* at 58). Cozzo explained that a demolition crew had cut a wire for the Building's fire alarm system, and that the corrective work did not affect the second floor (*id.*). Cozzo also testified that no one inspected the electrical wiring at the Building (*id.* at 51).

Cozzo testified that "MAC" was the tenant on the second floor in 2012 (*id.* at 16), and that it performed construction work to renovate the Premises before moving in (*id.* at 28). He recalled that MAC retained a contractor to perform electrical work in its leased space (*id.* at 39-40). There was a separate electrical panel for each floor within each tenant's demised space, and MAC had installed its own electrical panel for the second floor (*id.* at 43). Cozzo testified that he had never

received a complaint from MAC about the electricity in the Premises (*id.* at 39), and if he had received a complaint, the management company would have retained an electrical contractor to address the issue (*id.* at 49). He also explained that if MAC had experienced an electrical problem in its space, then MAC would have retained its own contractor to rectify the issue (*id.* at 49).

In March 2011, the New York City Department of Buildings (DOB) issued violation no. M311968 to Chand (NYSCEF Doc No. 81, Suleymanov affirmation, exhibit M at 3). The comments section of the violation read, “NO APPLICATION FOR NEW 800 AMPS SVC SW & SVC ENT. INSTALLED AND OTHERS VIOLATIONS RELATED TO NEW INSTALLATION” (*id.*).

Winston McKenzie (McKenzie) testified that he had worked as a chief electrical inspector in the electrical division at DOB, and that he had issued violation no. M311968 to Chand (NYSCEF Doc No. 80, Suleymanov affirmation, exhibit L at 7 and 63). McKenzie stated that he was present at the Building on March 2, 2011 for application no. M308008, which had been filed by Switch Electrical Corp., to inspect “cell site, one three wire meter and one 200 amp switch” related to new cell phone service on the roof of the Building (*id.* at 21, 33-34 and 49). McKenzie explained that he “inspected [the] 200 amp service in the basement [of the Building], but while I was there was also a 800 amp service, brand new service” (*id.* at 59). He noted that there was no application for the 800 amp service posted in the basement area, so he issued a “pick up violation” (*id.* at 57-58). He added, “[t]his was ... just a violation related to the new installation” that he happened to observe while at the Building (*id.* at 65-66). He did not know when the new service was installed because no permit was posted in the area (*id.* at 68). At that time, the 800 amp switch was “energized,” meaning that it provided service for the entire Building (*id.* at 67, 70 and 102).

At his deposition, McKenzie was asked whether the new 800 amp service could have caused plaintiff to suffer an electrical shock (NYSCEF Doc No. 80 at 118). In response, McKenzie stated that had the 800 amp service not been properly grounded, each floor would have suffered from the same condition (*id.* at 111), meaning “anybody in anyone [sic] of those apartments would get hurt the same way that person get [sic] hurt” (*id.* at 112). He added, “[i]f the problem originate[d] from the 800 amp service then you’d have the same problem in all of the apartments that have that 800 amp service” (*id.* at 113). McKenzie expressed that the pick up violation had nothing to do with the second floor of the Building (*id.* at 69-70), the outlets (*id.* at 99), or a specific threat of shocks or burns (*id.* at 97). He explained that “from that 800 amp switch, you have another switch which fuse [sic] that protected circuit that feed [sic] into each apartment ... [s]o how [are] you going to blame what happened on the 800 amp? What about the switch that protect directly [sic] that apartment” (*id.* at 118). He further testified that “when the [DOB] inspector went back and he inspect[ed] the work [that] had the violation ... if there was a defect, he would have indicated it” (*id.* at 121). The inspector who conducted the follow-up on the pick up violation did not indicate issues “like ... bonding and open – not properly fused” on the report (*id.* at 122). The violation was removed in 2012 (*id.* at 56).

PROCEDURAL HISTORY

Plaintiff commenced this action on by filing a summons and complaint pleading claims sounding in negligence against Chand and defendants Make-Up Art Cosmetics (U.S.), Inc., Make-Up Art Cosmetics (New York), Inc., Make-Up Art Cosmetics Inc., and Make-Up Art Cosmetics (Delaware), Inc. According to the verified bill of particulars, plaintiff alleges defendants were negligent in their ownership, operation and maintenance of the subject Premises, “more particularly, the aforesaid electrical wiring ... and/or outlet located in the MAC Studio on the

second floor” (NYSCEF Doc No. 69, Suleymanov affirmation, exhibit A, ¶ 5). Plaintiff claimed that defendants had actual notice of the allegedly dangerous condition because of the DOB violation from 2011 (*id.*, ¶ 7; NYSCEF Doc No. 171, Fippinger reply affirmation, exhibit F, at 1). After Chand interposed an answer, it commenced a third-party action against MAC for contribution, common-law and contractual indemnification, and for breach of contract (NYSCEF Doc No. 149, Fippinger reply affirmation, exhibit A, at 12). The complaint and the cross claims against defendants Make-Up Art Cosmetics (New York), Inc. and Make-Up Art Cosmetics (Delaware), Inc. have been dismissed (NYSCEF Doc No. 175). Chand now moves for summary judgment dismissing the complaint and the cross claims asserted against it. The motion is timely.

DISCUSSION

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212 [b]*). The movant’s “failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

A. Chand’s Liability to Plaintiff

Chand argues that it bears no liability to plaintiff because as an out-of-possession landlord, it was not obligated to maintain the Premises per the Lease terms nor did it have constructive notice of a specific defect with the electrical wiring that was a violation of a specific statutory safety

provision. Plaintiff did not plead a violation of a specific safety provision in her verified or supplemental bill of particulars. Chand submits that it did not have prior notice of a defect with the electrical system, which it claims is a non-structural element. Chand admits that on March 2, 2011, DOB issued a violation pertaining to a purported failure to secure a permit for the installation of a new 800 amp service at the Building. Chand maintains, though, that McKenzie concluded that there was no evidence of an improper installation.

Chand also posits that the happening of the accident as described by plaintiff is physically impossible (NYSCEF Doc No. 68, Suleymanov affirmation, ¶ 29). In support of this contention, Chand proffers an affidavit from James Crabtree (Crabtree), a licensed engineer, who reviewed the deposition transcripts and the architectural drawings for MAC's build-out of the space, which included the installation of electrical branch circuits and receptacles (NYSCEF Doc No. 82, Suleymanov affirmation, exhibit N [Crabtree aff], ¶¶ 6 and 11). Crabtree conducted an on-site inspection on December 14, 2015 of the photography equipment and the electrical outlet involved in the accident (*id.*, ¶ 7). At the inspection, Crabtree opined that the 120 VAC electrical outlet was "appropriately polarized, grounded and operating at the appropriate voltage. The electrical box in which the subject receptacle was reportedly located was also found to be electrically grounded" (*id.*, ¶¶ 7 and 12). Testing of the subject electrical outlet revealed that the outlet was "functioning as designed and intended at the time of the inspection" (*id.*, ¶ 8). An examination of plaintiff's photography equipment, including the flash generator and the extension cord, showed that the electrical cords were visually intact and free from defects (*id.*, ¶ 10).

Crabtree opined that "[i]n order to receive an electrical shock, an unintended electrical current path through the body must occur," and that "[t]he only source of electrical power that could have caused the shock was the male plug blade of the flash generator's power cord" (*id.*, ¶

13). He further opined that the Building’s “electrical outlet and receptacle branch circuit building wiring were non-structural and were not causal to the plaintiff’s accident despite the presence of the New York City Department of Buildings complaint dated March 2, 2011” (*id.*, ¶ 16). He reasoned that only a code-compliant ground system and a properly bonded and ground connection, as opposed to a non-code compliant ground system, could have caused an electric shock (*id.*, ¶ 15). Crabtree concluded with a reasonable degree of engineering certainty that the accident occurred because plaintiff’s left hand came into contact with one of the prongs on the plug for the flash generator or the extension cord (*id.*, ¶ 14).

Plaintiff, in opposition, contends that defendants were on notice of a hazardous condition related to “an electrical distribution panel which had ground fault problems and other defects,” as evidenced in DOB’s March 2, 2011 violation (NYSCEF Doc No. 154, affirmation of Gregory C. McMahon [McMahon] at 2-3). Plaintiff relies on the affidavit of James Pugh, Ph.D., P.E. (Pugh), a licensed engineer who specializes in forensic engineering and biomedical and biomechanical injury analysis (NYSCEF Doc No. 156, McMahon affirmation, exhibit B [Pugh aff], ¶ 1). Pugh describes the violation as an “800 amp service not bonded to the metal grounded enclosure as well as lack of fuse coordination in the same enclosure, constituting a ground fault, which was not corrected until after the accident (*id.*, ¶ 6). Pugh averred that he reviewed the deposition transcripts and “photographs taken of the plaintiff demonstrating her method of disconnecting the extension cord from the power cord” (*id.*, ¶ 3), and rejected Crabtree’s statement that plaintiff’s left hand must have come into contact with one of the prongs of the plug (*id.*, ¶ 7). Plaintiff sustained an injury over a substantial portion of her left index finger near the proximal medial phalanx; this portion of her finger could not have fit between the small gap between the prongs (*id.*, ¶¶ 7-8). Pugh further opined upon a reasonable degree of engineering certainty that an “uncorrected ground

fault in the electrical system in the [B]uilding ... in the circuit in the room where the electrocution occurred” was the cause of plaintiff’s injuries (*id.*, ¶ 9).

“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises” (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005], citing *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). As such, “[l]andowners generally owe a duty of care to maintain their property in a reasonably safe condition, and are liable for injuries caused by a breach of this duty” (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). To prevail on a common-law negligence claim for an injury resulting from a dangerous premises condition or defect, a plaintiff must demonstrate that the property owner created or had actual or constructive notice of the dangerous condition (*see Ceron v Yeshiva Univ.*, 126 AD3d 630, 631-632 [1st Dept 2015]).

“[A] landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property” (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *rearg denied* 19 NY3d 856 [2012]). That said, an out-of-possession landlord who affirmatively creates a dangerous condition on its premises may be held liable for causing a plaintiff’s injuries (*see Torres v West St. Realty Co.*, 21 AD3d 718, 721 [1st Dept 2005], *lv denied*, 7 NY3d 703 [2006]). Likewise, an out-of-possession landlord may be held liable for a dangerous premises condition where it “has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is ‘a significant structural or design defect that is contrary to a specific statutory safety provision’” (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011], quoting *Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [1st Dept 2010]). Faulty wiring may constitute a significant structural defect for purposes of

holding an out-of-possession landlord liable (*De Souza v Jocar Realty Co.*, 302 AD2d 336, 336 [1st Dept 2003]).

As applied herein, Chand has met its prima facie burden on summary judgment (*see Salazar v Fives 160th LLC*, 91 AD3d 523, 524 [1st Dept 2012] [dismissing the plaintiff's complaint seeking damages for an electrical shock where the defendants showed that the owner was an out-of-possession landlord who lacked actual or constructive knowledge of a hazardous condition and where the plaintiff failed to plead that the defendants violated a specific statutory safety provision with respect to the structural elements of the leased premises]; *Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698, 699 [2d Dept 2009] [same]). Chand has established that it is an out-of-possession landlord, and that under the terms of the Lease, it is not contractually obligated to maintain the Premises.

The evidence also demonstrates that Chand lacked actual or constructive notice of a specific, hazardous condition with the electrical system, including the outlets at the Premises (*DeVizio v Hobart Corp.*, 142 AD2d 508, 510-511 [1st Dept 1988] [concluding that the plaintiff failed to establish that the defendant owner had actual or constructive notice of a defect with a "pigtail" electrical outlet or wiring at the demised premises]). The Lease required MAC to notify Chand in writing of any issues with the electrical lines, and both Wright and Cozzo testified that they had never received any complaints about the electrical outlets at the Premises. Likewise, plaintiff never complained to anyone at MAC or staff at the Building about an issue with the electrical outlets at the Premises prior to the accident. Although plaintiff testified that the outlet closest to the photography studio did not work, and had not worked during her prior visits to the Premises, these statements are insufficient to raise a triable issue of fact whether Chand had notice of a defect with the specific electrical outlet involved in the accident (*see Vushaj v Insignia*

Residential Group, Inc., 50 AD3d 393, 394 [1st Dept 2008] [concluding there was no evidence that the defendant management company had actual notice of the specific defect that caused a building's electrical fuse block to explode during a repair]; *Andrews v Porreca*, 227 AD2d 940, 941 [4th Dept 1996] [dismissing a complaint brought by the plaintiff, who had suffered an electrical shock while attempting to pull an electric cord out of a wall outlet, against the landlord of the photography studio where the accident occurred because the landlord lacked actual or constructive notice of a dangerous condition of the outlet]).

As noted above, the Lease also grants Chand the right to re-enter the Premises to make repairs at MAC's expense (NYSCEF Doc No. 70 at 1 and 7). In that instance, a landlord's liability may be predicated upon "a significant structural or design defect that is contrary to a specific statutory safety provision" (*Babich*, 75 AD3d at 440). Thus, even though a landlord has constructive notice of an allegedly dangerous condition, "it could only be found liable if the defect that caused plaintiff's accident was 'a significant structural or design defect that was contrary to a specific statutory [safety] provision'" (*Marie D. v Roman Catholic Church of the Sacred Heart*, 161 AD3d 448, 448 [1st Dept 2018] [internal citation omitted]). Here, Chand has shown that plaintiff did not plead a violation of a specific statutory safety provision in her verified or supplemental bill of particulars.

Plaintiff in opposition fails to raise a triable issue of fact. Plaintiff has not shown that the pick up violation issued by DOB resulted from a violation of a specific statutory safety provision or that the alleged violation caused the accident, both of which are necessary to impose liability upon Chand (*see Uppstrom v Peter Dillon's Pub*, 172 AD3d 497, 498 [1st Dept 2019]; *Kittay v Moskowitz*, 95 AD3d 451, 452 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Significantly, Pugh did not opine that Chand violated a specific statutory safety provision, nor did he identify in

his expert report the exact statutory safety provision Chand allegedly violated (*see Dinkins v Kansas Fried Chicken, Inc.*, 158 AD3d 420, 421 [1st Dept 2018]; *Raffa v Verni*, 139 AD3d 441, 441 [1st Dept 2016]). Hence, Chand cannot be charged with constructive notice of the alleged defect (*see Whitney v Valentin*, 105 AD3d 519, 520 [1st Dept 2013]).

Furthermore, Pugh's opinion that the pick up violation noted a "ground fault" problem at the Building is unsupported (*see Reif v Nagy*, 175 AD3d 107, 125 [1st Dept 2019] [concluding that the "experts' speculations are unsupported by the evidence in the record and are insufficient to defeat summary judgment"]). The notice of violation makes no mention of a ground fault issue (NYSCEF Doc No. 81 at 3), and therefore, the notice cannot have given Chand actual notice of a dangerous condition (*see e.g. Shiebler v City of New York*, 208 AD2d 709, 710 [2d Dept 1994] [reasoning that the defendant City of New York had actual notice of an allegedly dangerous sidewalk condition because its own Department of Highways had twice directed the adjacent property owner to repair the subject sidewalk]). Additionally, McKenzie testified that the pick up violation had "nothing to do with the outlets" (NYSCEF Doc No. 80 at 99), and that the violation had nothing to do with the second floor of the Building (*id.* at 70). Thus, that part of the motion for summary judgment dismissing the complaint and the cross claims against Chand is granted.

B. Chand's Cross Claim for Contractual Indemnification

Chand also moves for summary judgment on its second cross claim for contractual indemnification against the remaining defendants, Make-Up Art Cosmetics (U.S.), Inc. and Make-Up Art Cosmetics, Inc. (NYSCEF Doc No. 73, Suleymanov affirmation, exhibit E at 2-3).

"It has long been recognized that a party may protect itself from losses resulting from its liability for negligence by means of an agreement to indemnify" (*Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]).


The parties' agreement must express clear and unmistakable intent to indemnify (*see Manfredonia v Gateway Sch. of N.Y.*, 150 AD3d 434, 435 [1st Dept 2017]). Here, Chand has not demonstrated that either Make-Up Art Cosmetics (U.S.), Inc. or Make-Up Art Cosmetics, Inc. expressly agreed to indemnify it, since the Lease, rider to the Lease, guaranty, and a lessee's estoppel certificate all identify only the third-party defendant, MAC, as the tenant of the Premises (NYSCEF Doc No. 70 at 1, 11, 33 and 36). Thus, that part of the motion for summary judgment on Chand's second cross claim is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Chand Realty Associates for summary judgment is granted to the extent that the complaint and the cross claims asserted against said defendant are dismissed in their entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the motion is otherwise denied.

Dated: June 23, 2020

ENTER: 

J.S.C.