Negrelli v 531 W. 19th LLC
2020 NY Slip Op 32357(U)
July 14, 2020
Supreme Court, New York County
Docket Number: 150367/2016
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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LISA NEGRELLI,

Plaintiff,

-against-

531 WEST 19TH LLC, LAN CHEN CORP., and DAVID ZWIRNER GALLERY, LLC,

Defendants.

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531 WEST 19TH LLC,

Third-Party Plaintiff,

-against-

DAVID ZWIRNER, INC.,

Third-Party Defendant.

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DECISION/ORDER
Index No.: 150367/2016
Motion Seq. Nos. 003, 004 & 005

THIRD-PARTY ACTION
Index No.: 595375/2017

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

Recitation pursuant to CPLR 2219 (a) of the papers considered in these motions for summary judgment: documents numbered 1, 11-14, 20-22, 24-36, 46-55, 59, 60, 64, 65, 70, 71, 75, 76, 82, 83, 86, 106-119, 121-162, 169-185, 187-192, 197, 198, 202, 203, and 206[1] listed in the New York State Courts Electronic Filing System (NYSCEF).

In this trip and fall action, defendant David Zwirner Gallery LLC (the Gallery) moves in Motion Seq. 003 (Doc No. 121) for summary judgment (CPLR 3212) dismissing the Summons and Complaint (the Complaint) (Doc No. 1) and all cross claims against it on the ground that it has it no connection to the premises adjacent to the sidewalk where plaintiff, Lisa Negrelli, claims she fell. Moreover, in Motion Seq. 003, third-party defendant David Zwirner Inc. (DZI) moves to dismiss the Third-Party Summons and Complaint (the Third Party Complaint) (Doc

[1] Oral argument was held on 10/28/19 (Court tr) (Doc No. 206). Note also that references to "Doc No." followed by a number refers to documents filed in NYSCEF.

No. 65) on the grounds that no evidence exists to demonstrate that plaintiff fell in front of DZI's leased spaces, and that if the subject sidewalk were defective, DZI was not responsible for repairing it.

In Motion Seq. 004 (Doc No. 106), defendant 531 West 19th LLC (Landlord 531) moves for summary judgment (CPLR 3212) dismissing the Complaint and all cross claims against it for plaintiff's failure to specify the location in which she fell and failure to allege the defect in the sidewalk that supposedly caused her to fall. Alternatively, Landlord 531 seeks summary judgment on its Third-Party Complaint against DZI for contribution and indemnification.

Defendant Lan Chen Corp. (Landlord Chen), moves in Motion Seq. 005 (Doc No. 140) to renew (CPLR 2221) a previously filed summary judgment motion (Motion Seq. 001) (Doc No. 25) that was denied by this Court without prejudice (Doc No. 60), and upon granting the renewal application, Landlord Chen seeks summary judgment (CPLR 3212) dismissing the Complaint and any cross claims asserted against it. Motion Seq. Nos. 003, 004 and 005 are consolidated for disposition.

FACTUAL AND PROCEDURAL BACKGROUND

On or about January 14, 2016, plaintiff commenced the instant action alleging in her Complaint that on May 14, 2015 she was walking on the sidewalk adjacent to the premises known as 533 West 19th Street in Manhattan (the Premises) when she was caused to trip and fall (the accident) due to the careless and negligent manner in which the sidewalk was owned, operated, maintained, controlled, managed, leased, supervised, repaired, inspected, constructed, and designed by defendants Landlord 531, Landlord Chen and the Gallery - all of which plaintiff identified in her Complaint as the owners of the Premises adjacent to the sidewalk where she fell.

Plaintiff specifically alleges that defendants allowed the sidewalk "to be, become and remain broken, raised, cracked, depressed, extended, misaligned, uneven and/or otherwise defective, unsafe and dangerous" and failed to take suitable precautions for the safety of persons who were lawfully on the sidewalk (Complaint at ¶¶ 52 and 53). As a result of defendants' negligence (*see* ¶ 14 of the Verified Bill of Particulars [plaintiff's verified BP] [Doc No. 69]), a "cracked, broken, mis-leveled, misaligned, depressed, raised and uneven portion of the sidewalk" (the hazardous and defective sidewalk conditions) on West 19th Street between 10th Avenue and 11th Avenue in Manhattan [the Street Block] caused plaintiff to trip and fall (plaintiff's 9/19/16 aff at ¶ 4) (Doc No. 47), resulting in severe injuries to plaintiff's right ankle, necessitating medical attention (*see* ¶ 5 of plaintiff's verified BP; and the Complaint at ¶¶ 54 and 55). Plaintiff testified at her deposition on November 7, 2017 (Plaintiff dep tr) (Doc No. 131) that her foot/ankle was caused to roll or turn when she fell into a "hole" and/or "crumbling" and/or "uneven" defective portion of the sidewalk as she was walking on the north side of the Street Block (Plaintiff dep tr at 13:1-6, 15:12-21, 19:8-16, 23:22-25, 28:18-25, and 29:1-8). Plaintiff further stated that she "noticed that there [were] two different doors that have '533' on [the Street Block] and [she was] not sure where one property ends and the next begins," noting that the "property next to '533' on one side has a door marked '525,' which was not far from the location where [she] fell due to the broken sidewalk" (plaintiff 9/19/16 aff).

After completion of discovery and all party depositions, it was revealed that Landlord 531 is the owner/landlord of the premises known as 531 West 19th Street, New York, NY which includes the addresses of 527 through 533 West 19th Street in Manhattan (the Landlord 531 Premises) (*see* also the Deed for the Landlord 531 Premises, Doc No. 179; and Court tr at 14:14-17). Landlord Chen is the owner of the premises known as 521-525 West 19th Street in

Manhattan (the Chen Premises) (*see* also Deed for the Chen Premises, Doc No. 33; and Court tr at 14:23-25, 15:2-3). Both the Landlord 531 Premises and the Chen Premises are located on the Street Block identified by plaintiff as West 19th Street between 10th Avenue and 11th Avenue in Manhattan.

In its Answer (Chen Answer) (Doc No. 11), Landlord Chen generally denies the allegations in the Complaint, asserts affirmative defenses including, but not limited to, the claim that it did not owe plaintiff a duty of care under common law, statute, or contract because it did not own or control 533 West 19th Street in Manhattan, the location in front of which plaintiff allegedly fell due to the hazardous and defective sidewalk conditions (Chen Answer at ¶¶ 18 and 19). Landlord Chen also cross claims against Landlord 531 and the Gallery for contribution and/or indemnification according to the respective degrees of negligence to be ascertained, determined and adjudicated at trial because if Landlord Chen is found liable it will be due to the recklessness, carelessness and negligence of the co-defendants (Chen Answer at ¶ 20).

The Gallery in its Answer (the Gallery Answer) (Doc No. 13) also generally denies the allegations in the Complaint and asserts numerous affirmative defenses, none of which deny ownership or occupancy of the spaces in the buildings on the Street Block where plaintiff claims she fell. During oral argument, however, the Gallery represented that it was not connected to, nor was a tenant at, any of the buildings in front of the subject sidewalk (Court tr at 30:14-25, and 31:1-5). Moreover, Kyle Rafferty (Rafferty), the director of operations for David Zwirner (Zwirner) who owns and controls the Gallery and third-party defendant DZI, avers in his April 12, 2019 affidavit (Rafferty aff) (Doc No. 139) that the Gallery did not own or lease space at the Landlord 531 Premises, nor did it undertake, or have any obligation, to manage, maintain, repair, control, construct, design or inspect the sidewalk adjacent to the Landlord 531 Premises at any

point in time (Rafferty aff at ¶¶ 6, 7 and 8). The Gallery also cross claims against Landlord 531 and Landlord Chen for contribution and common law indemnification (the Gallery Answer at ¶¶ 11 and 12).

Landlord 531 in its Answer (531 Answer) (Doc No. 22), generally denies the allegations in the Complaint, asserts affirmative defenses, including claims under the Labor Law (531 Answer at ¶¶ 13, 14, 18 and 19), and cross claims against the Gallery and Landlord Chen for indemnification and contribution (531 Answer at ¶¶ 27-34). Landlord 531 also served and filed the Third-Party Complaint against third-party defendant DZI alleging that pursuant to the parties' 12-year lease dated December 21, 2005 (the 531 Lease) (Doc No. 138) DZI, as tenant of commercial spaces in the Landlord 531 Premises, agreed to maintain the sidewalk adjacent to the premises and therefore Landlord 531 is entitled to contribution, contractual and common law indemnification against DZI.

In response to the Third-Party Complaint, DZI in its Answer (DZI Answer) (Doc No. 71) generally denies the allegations therein and asserts numerous affirmative defenses including, but not limited to, claims and defenses related to products liability (DZI Answer at ¶¶ 11 and 12). DZI also interposes counter claims against Landlord 531 and a non-party to the third-party action, Landlord Chen (collectively, the landlords), for contribution, common law indemnification, and contractual indemnification pursuant to the 531 Lease and an April 9, 2002 lease agreement (the Chen Lease) (Doc No. 34) (collectively, the leases), that DZI executed with Landlord Chen for the rental of commercial spaces at the Chen Premises. DZI maintains that the leases required the landlords to indemnify and/or hold DZI harmless for all claims, losses, liability and damages for any injury to any person. DZI also seeks an award of damages against the landlords for their failure to name DZI on their insurance policies (DZI Answer at ¶¶ 15-23).

Landlord 531 maintains that DZI was contractually responsible for maintaining the leased premises, including the sidewalk. Article 2.02 (2) of the 531 Lease states, in pertinent part:

> "Tenant shall at all times keep the interior and exterior of the demised premises and the building neat, clean, sanitary and orderly, including, but not limited to the immediate and continuous removal of graffiti on the exterior of the demised premises when and if it occurs. Tenant, at its expense, shall maintain the existing ventilating system in the demised premises, including all additions and replacements thereto, in proper state of repair unless such additions, replacements or repair is necessitated by the gross negligence or willful acts of Owner, in which event such additions, replacements or repairs shall be at Owner's expense."

Article 4.02 of the 531 Lease further states, in part:

> "... all damage or injury to the demised premises caused by Tenant or Tenant's use of the demised premises or by Tenant's servants, employees, customers or invitees shall be repaired promptly by Tenant at its sole cost and expense to the satisfaction of Owner reasonably exercised, and all damage or injury to any other part of the building, or to its fixtures, equipment and appurtenances and the sidewalks, curbs and vaults appurtenant thereto, whether requiring structural or non-structural repairs, caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's servants, employees, invitees or licensees, shall be repaired promptly by Tenant at its sole cost and expense, to the satisfaction of Owner reasonably exercised. The foregoing shall in no event require Tenant to repair any structural damage to the building unless caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's servants, employees, invitees or licensees. ..."

Article 35.02 of the 531 Lease additionally required DZI to make sure the sidewalk adjacent to the Landlord 531 Premises was not obstructed or encumbered, and Article 40.01 of the 531 Lease required DZI, at its expense, to comply with all laws, orders and regulations related to the rented spaces.

Landlord 531 also asserts that DZI orally agreed to maintain the subject sidewalk where plaintiff claims she fell. Keith Jacobson (Jacobson), a principal of Landlord 531, testified at his

deposition (Jacobson depo tr) (Doc No. 132) that Zwirner orally agreed to take care of the sidewalk in front of the Landlord 531 Premises (Jacobson dep tr at 14:12-25, 15:1-9). It is not clear whether this alleged oral modification occurred before or after the 531 Lease was executed (Jacobson dep tr at 24:6-10; and, Court tr at 39:8-15). However, Rafferty corroborated the claim that DZI maintained the subject sidewalk area when he testified at his deposition (Rafferty dep tr) (Doc No. 135) that Zwirner employed a facilities team, which Rafferty directed, to maintain the art gallery and the sidewalks in front of Zwirner's art gallery and that if there was a problem with the sidewalk in front of the art gallery, his facilities team would take care of it (Rafferty dep tr at 12:9-25; 13:9-12; and 34:13-22). Rafferty further testified that on at least on one occasion, he hired a contractor on behalf of Zwirner to perform demolition and repaving of a section of the sidewalk in front of the art gallery (Rafferty dep tr at 36:19-25; and 37:11-20).

Nevertheless, DZI asserts that even if the alleged oral agreement is acknowledged, it would not be enforceable (Court tr at 31:13-17) as the parties could not orally modify the 531 Lease (Court tr at 31:6-13) because Article 20 of the 531 Lease states, in pertinent part:

> "All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely express the agreement between Owner and Tenant, and any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it in whole or in part, unless such executory agreement is in writing and signed by the party against whom enforcement of the change, modification, discharge or abandonment is sought."

Furthermore, DZI asserts that since it did not create the alleged hazardous and defective sidewalk conditions, it need not indemnify Landlord 531 pursuant to Article 8.02 of the 531 Lease which states, in pertinent part:

> "Tenant shall indemnify and save harmless Owner and its agents against and from (i) any and all claims (a) arising from (x) the Tenant's conduct, use or management of the demised premises or of

> any business therein, or (y) any work or thing whatsoever done, or any condition created in or about the building or the demised premises by Tenant, including the sidewalks leading to the entrance of the demised premises and the ramps, doorway entrances, and driveway leading into and out of the demised premises during the term hereof or during the period of time, if any, prior to the Commencement Date that Tenant may have been given access thereto, or (b) arising from any act, omission or negligence of Tenant or any of its subtenants or licensees or its or their employees, agents, visitors, invitees or contractors or subcontractors of any tier even if the claims described in (a) and (b) above arise out of the concurrent negligence of Owner (in which event the Tenant's indemnification obligations shall be mitigated to the extent of the proportionate negligence of Owner and its agents), and (ii) all 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 Owner by reason of any such claim, Tenant, upon notice from Owner, shall resist and defend such action or proceeding at Tenant's expense by counsel reasonably satisfactory to Owner, without any disclaimer of liability in connection with such claim."

All parties agree that Section 7-210 of the New York City Administrative Code imposes liability upon certain qualified premises, such as those owned by Landlord 531 and Landlord Chen, for the condition of the sidewalk adjacent to it and states, in relevant portion:

> "(a). It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. ... (c). Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks ... in a reasonably safe condition... ."

On or about July 6, 2016, Landlord Chen moved for summary judgment dismissing the Complaint against it. This Court denied the motion by decision and order dated February 6, 2017 (Doc No.60) which stated as follows:

> "Upon the foregoing papers, it is ordered that this motion is denied without prejudice for the parties to conduct discovery to determine the precise location where the plaintiff allegedly fell in this case. The plaintiff alleges that she fell near the border of the adjoining

> properties, so a survey may be necessary to determine who owned the property where the subject accident occurred."

Having completed all discovery, defendants Landlord 531, Landlord Chen and the Gallery, together with third-party defendant DZI now seek dispositive relief from this Court.

ARGUMENTS

MOTION SEQ. 003

The Gallery contends that the Complaint must be dismissed against it as a matter of law because: (1) plaintiff's accident occurred at a sidewalk location which the Gallery did not own, lease, operate, manage, control or repair; (2) plaintiff cannot indicate precisely where she fell, or what exactly caused her to fall; and (3) the City of New York is responsible to repair and maintain the curb, and therefore the Gallery cannot be held liable as a matter of law.

Third-party defendant DZI argues that the Third-Party Complaint must be dismissed because: (1) there is no evidence that plaintiff's accident occurred in front of DZI's leased spaces; (2) DZI did not have a contractual obligation to maintain or repair the alleged hazardous and defective sidewalk conditions; (3) DZI did not cause the alleged hazardous and defective sidewalk conditions; (4) Article 4.01of the 531 Lease contractually obligates Landlord 531 to repair the sidewalk adjacent to its premises: (5) there is no allegation that the alleged hazardous and defective sidewalk conditions giving rise to the accident were created or "caused by or resulting from carelessness, omission, neglect or improper conduct of [DZI], [DZI's] servants, employees, invitees or licensees" which would be the only reason DZI would be contractually obligated to repair sidewalk conditions pursuant to Article 8.02 of the 531 Lease, and without a duty to repair any portion of the sidewalk, there cannot be a finding of negligence against DZI (Court tr at 37:1-7); (6) plaintiff did not know where the alleged hazardous and defective sidewalk conditions was located, nor whether she was caused to fall as a result of a defect in the

sidewalk as opposed to the curb; and (7) DZI was never notified of the alleged hazardous and defective sidewalk conditions, nor was it made aware of any prior accidents or complaints concerning any conditions on the subject premises.

Landlord 531 opposes the Gallery and DZI's motion for summary judgment, contending that to the extent plaintiff demonstrates the accident occurred on the sidewalk in front of Landlord 531's premises, the Gallery and DZI are liable because: (1) Zwirner orally agreed on behalf of DZI to assume the obligation and duty to control, maintain and repair the sidewalk in front of the art gallery; (2) Zwirner's employee, Rafferty, admitted performing maintenance and repair on the sidewalk in front of the art gallery; (3) the Gallery provided no evidence of a distinction between it and third-party defendant David Zwirner, Inc.; (4) DZI had a contractual and common law duty to repair any defect involving the sidewalk adjacent to the art gallery; (5) movants failed to provide evidence that they did not: (i) create the alleged hazardous and defective sidewalk conditions, (ii) make repairs to the sidewalk adjacent to the art gallery, or (iii) make special use of the sidewalk in front of the art gallery; (6) movants have not made out a prima face showing that they are free of negligence; and (7) the hazardous and defective sidewalk conditions, if any, occurred though carelessness, omission, neglect or violation of the law by DZI in breach of the 531 Lease and Zwirner oral agreement.

Plaintiff contends the court must deny movants' application to dismiss the Complaint and Third-Party Complaint because: (1) plaintiff identified the cause and location of her accident in the verified Complaint, pre-deposition affidavit(s), and deposition testimony; (2) Landlord 531 admitted that it had no procedures or protocols for inspecting or maintaining its premises, nor any protocols to ensure its tenant, DZI, was maintaining the leased premises; and (3) there is a factual dispute as to whether DZI breached its contractual duty to Landlord 531 to maintain the

sidewalk in front of the art gallery in good condition and therefore the Third-Party Complaint cannot be dismissed.

MOTION SEQ. 004

Landlord 531 argues that its motion for summary judgment dismissing the Complaint and cross claims against it must be granted, or alternatively its Third-party Complaint against third-DZI must granted in Landlord 531's favor because: (1) plaintiff failed to set forth the proximate cause of her accident; (2) plaintiff failed to identify the purported hazardous and defective sidewalk conditions which caused her accident; (3) plaintiff failed to specify the location of the purported accident; (4) Landlord 531 did not create, nor have notice of the alleged hazardous and defective sidewalk conditions adjacent to its property prior to the date of the accident; and (5) if the application to dismiss the Complaint is denied, Landlord 531 is entitled to contractual and common law indemnification from DZI pursuant to 531 Lease Article 2.02 (2), 8.02 and Zwirner's oral agreement, and course of action over the years, to maintain the subject sidewalk.

In opposition, plaintiff contends that the Landlord 531's motion must be denied because: (1) movant failed to eliminate all questions of fact; (2) plaintiff claimed that she fell "because of a cracked, broken, mis-leveled, misaligned, depressed, raised, and uneven portion of the sidewalk" on the Street Block near where there was a door marked "533"; (3) Landlord 531: (i) failed to meet its initial burden on the issue of lack of notice of the hazardous and defective sidewalk conditions because there are no inspection records, logs, notes, or testimony, and generally no evidence to show that it ever inspected the sidewalk outside its premises; (ii) failed to demonstrate that it maintained its premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition; and (iii) is liable under Section 7-210 of the New York City Administrative Code for the condition of the sidewalk

adjacent to its property; (4) the Landlord 531 was not an out of possession landlord at the time of the accident because it retained control over the premises pursuant to 531 Lease Articles 3.01, 3.02, 3.08, 4.01, 4.02, 13.03, 33.20, 35.07 and 35.13, which essentially required that the Landlord 531 maintain the sidewalk, and any structural changes to the exterior, including the sidewalk, could not be made by DZI without prior written consent from Landlord 531; (5) pursuant to the 531 Lease, DZI was responsible for repairing dangerous conditions to the sidewalk that it created; and (6) factual disputes as to plaintiff's own purported negligence in the happening of her accident do not entitle Landlord 531 to judgment in its favor.

Defendants the Gallery and DZI oppose the Landlord 531's application for contractual and common law indemnification against them and argue the court must deny movant's relief sought because: (1) Landlord 531 was contractually obligated to repair all structural conditions, including the sidewalk adjacent to the art gallery; and (2) DZI's alleged verbal agreement to maintain and take care of the sidewalk is unavailing because Article 20 of the 531 Lease and established law, renders an oral agreement to modify a written agreement invalid given that the 531 Lease could not be amended except by another written agreement.

In Reply, Landlord 531 argues that: the statements in the Complaint are not evidence as to the location of the alleged accident because plaintiff did not verify it as true and did not disclose in her Complaint the source of her information or the grounds of her belief.

MOTION SEQ. 005

Landlord Chen contends that its motion to renew (CPLR 2221) its previous summary judgment motion, denied without prejudice so that discovery could be completed, should be granted. Upon renewal, Landlord Chen argues that this Court must dismiss the Complaint and cross claims against it because: (1) Landlord Chen never owned, operated, maintained,

controlled, or made special use of the property located at 533 West 19th Street, New York, New York, the location in front of which the accident occurred according to plaintiff's Complaint, verified BP and affidavit(s) (*see also* Court tr at 25:22-25; and 26:1-9); (2) plaintiff never pleaded, implied, alleged, or asserted that the accident occurred on 521-525 West 19th Street, New York, New York, Chen's Premises (*see also* Court tr at 25:19-21); (3) Landlord Chen had no notice of any hazardous and defective sidewalk conditions in front of its premises (*see also* Court tr at 28:21-23); and (4) plaintiff's failure and inability to specify the location of her accident through any landmark, street address, or photograph makes her claims too vague to impute liability against Landlord Chen.

Landlord 531 opposes Landlord Chen's summary judgment motion and contends that the court must deny it because Landlord Chen: (1) failed to provide any legal authority for relying on allegations in the Complaint and plaintiff's BP, rather than on plaintiff's deposition testimony and the evidence presented; (2) failed to demonstrate that it complied with § 7-210 of the New York City Administrative Code; and (3) failed to demonstrated that the sidewalk abutting the Chen Premises was not the proximate cause of plaintiff's injuries.

In opposition, plaintiff argues that the court must deny Landlord Chen's motion to dismiss the Complaint because: (1) plaintiff identified the location of her accident in the Complaint, by affidavits, in her deposition and/or in her verified BP as "[t]he portion of the sidewalk" located in the "general area" where there was a door was marked "533" and "not far from" a door marked "525;" and (2) plaintiff stated she fell "because of a cracked, broken, mis-leveled, misaligned, depressed, raised, and uneven portion of the sidewalk" on West 19th Street between 10th Avenue and 11th Avenue in Manhattan (*see* plaintiff's 9/19/16 aff at ¶ 4).

In Reply, Landlord Chen agrees that § 7-210 of the New York City Administrative Code imposes a duty upon landowners to maintain its sidewalk in a reasonably safe condition and that landowners can be liable for personal injury proximately caused by such failure, but argues that none of the parties have alleged that the sidewalk in front of Chen's Premises was defective, or had a dangerous condition which contributed to plaintiff's accident because there is no evidence to suggest that the accident occurred on the sidewalk abutting the premises located at 521-525 West 19th Street, owned by Landlord Chen. Moreover, pursuant to CPLR 105 (u), the verified Complaint and Bill of Particulars may serve as an affidavit supporting the statement as to where plaintiff allegedly fell.

The Gallery and third-party defendant DZA did not submit opposition papers to Landlord Chen's summary judgment motion to dismiss the Complaint and cross claims against it.

DISCUSSION

"On a motion for summary judgment, the moving party must 'make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019], *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden then shifts to the opponent of the motion to "to establish the existence of material issues of fact which require a trial of the action" (*Xiang Fu He,* 34 NY3d at 175, *quoting Vega v Restani Constr. Corp.,* 18 NY3d 499, 503 [2012]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 [1st Dept 2017], *quoting Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231

[1978]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues, or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]).

MOTION SEQ. 003

The Gallery's summary judgment motion to dismiss the Complaint against it is denied. There is no dispute that DZI occupied commercial spaces as an art gallery at both the Landlord 531 Premises and the Chen Premises pursuant to respective leases. No admissible evidence was presented, however, to demonstrate that the Gallery was a separate and distinct entity from DZI and that the Gallery did not occupy the leased space.

At his deposition, Rafferty did not make a distinction between DZI and the Gallery and when asked what is "David Zwirner," Rafferty responded, "Art Gallery" (Rafferty dep tr at 7:10-14). In fact, DZI was actually mentioned once in Rafferty's deposition to explain that it was the actual business entity of his employer (Rafferty dep tr at 41:14-15), but he did not disavow the existence of the Gallery as the occupant/tenant of the subject leased spaces. It was only by affidavit dated 4/2/19 that Rafferty, without setting forth the factual basis for his personal knowledge of the conclusory statement, asserted that the Gallery did not own or lease space at the 531 Premises or the Chen Premises and was in fact a separate entity from DZI. At most, these seemingly contradictory statements raise a factual dispute as to whether the Gallery actually occupied the subject leased spaces, warranting the denial of its summary judgment motion since credibility issues can only be decided by the trier of fact (*Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010]). Notable too is the fact that the Gallery interposed cross claims against Landlord 531 and Landlord Chen for contribution and common law indemnification (the Gallery

Answer at ¶¶ 11 and 12) which may demonstrate the possibility that at the time of the accident it occupied the subject leased spaces. Indeed, representations were made at oral argument that the Gallery occupied the premises in question even though it is not the named tenant in the lease (Court tr at 37:17-25).

The Gallery's assertion that plaintiff was unable to identify where she fell or what caused her to fall, is simply unfounded. Plaintiff's verified Complaint, the verified BP, affidavits and deposition clearly identifies that plaintiff fell on a defective, uneven and broken sidewalk of the Street Block in front of a door of a building identified as "533" with an adjacent building door identified as "525". Any alleged inconsistency in her testimony respecting the precise location and the precise cause of her accident is one to be resolved by the trier of fact (*Patton v Taszo Coffee, LLC*, 156 AD3d 443 [1st Dept 2017]; *Aller v City of New York*, 72 AD3d at 564). Furthermore, the argument that the Complaint must be dismissed because the City of New York is responsible for repairing and maintaining the curb, and therefore the Gallery cannot be held liable as a matter of law, is unavailing and unsupported by any factual and/or admissible evidence.

That portion of the motion by third-party defendant DZI seeking summary judgment dismissing the Third-party Complaint, is denied. Plaintiff has alleged her accident occurred in front of one of DZI's leased spaces – Landlord 531 Premises or Landlord Chen Premises. Although Article 4.01of the 531 Lease contractually obligated Landlord 531 to repair the sidewalk adjacent to its premises, contrary to DZI's contention, DZI had a contractual obligation, under some circumstances, to maintain or repair any alleged defects in the subject sidewalk pursuant to Article 2.02 (2) and 4.02 of the 531 Lease, and in fact did, at some point according to Rafferty's deposition testimony, hire contractors to repave the sidewalk (Rafferty dep tr at 13:6-

23). Moreover, as mentioned, plaintiff sufficiently identified the location and cause of her alleged trip and fall.

DZI asserts that there is no allegation that it caused the hazardous and defective sidewalk conditions. To recover damages for injuries sustained as a result of a failure to maintain its property in a reasonably safe condition, a party must establish that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536, 536 [1st Dept 2015]). Here, DZI's own witness, Rafferty, testified at his deposition that the sidewalk was repaved/repaired by DZI (Rafferty dep tr at 13:6-23) and factual issues have been raised respecting whether or not the alleged sidewalk defect was "caused by or resulting from carelessness, omission, neglect or improper conduct of [DZI], [DZI's] servants, employees, invitees or licensees" triggering the contractual obligation to repair, or not, the subject sidewalk pursuant to Article 4.02 of the 531 Lease. Whether DZI was negligent is itself a question for the trier of fact to determine and it is not clear to the court whether there was a duty to maintain the sidewalk imposed upon DZI once it, on at least one occasion as testified to by Rafferty, assumed the task of retaining a contractor to repave the sidewalk adjacent to the leased properties (*see Johnson v Ann-Gur Realty Corp.*, 117 AD3d 522 [1st Dept 2014]). Furthermore, as more fully discussed below, DZI failed to meet its initial burden of proving it was neither notified of the alleged hazardous and defective sidewalk conditions, nor made aware of any prior accidents or complaints concerning any conditions on the subject premises. DZI failed to offer evidence as to when the accident site was last inspected prior to the accident (*Socorro v New York Presbyt. Weill Cornell Med. Ctr.*, 160 AD3d 544, 544 [1st Dept 2018]). This Court will not consider plaintiff's argument against dismissal of the Third-party Complaint because plaintiff, as a non-party to that action, has no

standing to challenge the claims asserted therein by Landlord 531 against third-party defendant DZI.

MOTION SEQ. 004

Landlord 531's motion for summary judgment dismissing the Complaint is denied. As previously noted, plaintiff sufficiently identified the location and cause of her fall and dismissal based on plaintiff's purported inability to pinpoint exactly where she fell on the Street Block is insufficient grounds upon which to dismiss this action where enough information and detail has been provided by plaintiff to warrant a trial of this matter (*see Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460, 461 [1st Dept 2010] [rejecting the contention that plaintiff is required to identify exactly where she fell and the precise condition that caused her to fall] [citations omitted]).

Landlord 531's contention that this matter must be dismissed because it did not create, nor have notice of the alleged hazardous and defective sidewalk conditions adjacent to its property prior to the date of the accident, is equally unavailing because Landlord 531 failed to satisfy its burden of proof on this issue. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History,* 67 NY2d 836, 837 [1986]).

"A defendant who moves for summary judgment in a [trip]-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Here, none of the moving party defendant landowners, Landlord 531 and Landlord Chen, nor its tenant DZI, made out a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence.

To establish a prima facie case that it lacked constructive notice of a hazardous condition, the defendant must offer some evidence as to when the accident site was last inspected or cleaned prior to the plaintiff's fall (*Reyes v Latin Am. Pentecostal Church of God Inc.*, 181 AD3d 459, 459 [1st Dept 2020]). The burden of establishing lack of constructive notice may be met by testimony of regular maintenance (*Raposo v New York City Hous. Auth.*, 94 AD3d 533 [1st Dept 2012]; *Raghu v New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010]) but testimony as to general cleaning practices without specific details is generally not sufficient to entitle judgment in the defendant's favor (*Socorro*, 160 AD3d 544, 544). In this case, the landlords could not recall when they last inspected property (Court tr at 22:14-18) and indeed none of the movants were able to state when its premises were last inspected (Court tr at 29:1-12). Accordingly, Landlord 531's application to dismiss the Complaint based upon lack of notice of the hazardous and defective sidewalk conditions, must be denied.

Landlord 531's alternative application for contractual and common law indemnification against DZI pursuant to 531 Lease Article 2.02 (2), 8.02 and Zwirner's oral agreement, and course of action over the years to maintain the subject sidewalk, is also denied. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York,* 137 AD3d 492, 492-493 [1st Dept 2016], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d

Dept 2010]). Indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" which the parties did not intend to assume (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

There can be no dispute that Article 8.02 expressly specified that DZI would indemnify Landlord 531 from claims arising out of DZI's management of the lease spaces including claims arising from a condition or work done to the leased spaces, including the sidewalk, or claims arising out of any act, omission or negligence of DZI. Here, work was specifically performed on the sidewalk on behalf of DZI and negligence, if any, on the part of DZI remains a factual dispute. Accordingly, at this juncture in the litigation, contractual indemnification cannot be awarded until the facts of this case have been determined at trial. Moreover, a party seeking any type of indemnification has the burden of proving that there is no possibility that there could be a finding of negligence against that party (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [1st Dept 2010]; *Correia v Professional Data Mgt.*, 259 AD2d 60, 64 [1st Dept 1999]). Landlord 531 has failed to meet the burden of proof and summary disposition in its favor on the Third-Party Complaint for contractual and common law indemnification against DZI, must be denied. The facts and circumstances surrounding the purported oral agreement by DZI to assume full responsibility and maintenance of the sidewalk is also disputed and although the parties agreed pursuant to Article 20 of the 531 Lease that modifications thereto must be in writing, it was unclear whether this purported oral agreement was made before or after the lease agreement was executed and whether there was a repeated course of action by DZI in maintaining the sidewalk area. These factual disputes alone warrant denial of Landlord 531's summary judgment motion in its favor on the Third-Party Complaint.

MOTION SEQ. 005

At the outset, that portion of Landlord Chen's application to renew (CPLR 2221) its previously denied summary judgment motion, is granted, without opposition. Upon renewal, Landlord Chen's summary judgment motion is denied.

Landlord Chen is correct in asserting that it never owned, operated, maintained, controlled, or made special use of the property located at 533 West 19th Street, New York, New York, where plaintiff pled in her Complaint is the location in front of which the accident occurred. However, plaintiff elaborated in her September 19, 2016 affidavit, which was also submitted when Landlord Chen interposed its first summary judgment application, that the location of her accident was in "[t]he portion of the sidewalk" located in the "general area" where there was a door marked "533" and "not far from" a door marked "525" (plaintiff aff at ¶¶ 5, 6 and 7). This alone presents a factual dispute to be determined at trial because the building marked "525" is owned by Landlord Chen.

Additionally, contrary to Landlord Chen's factual representation, plaintiff did identify the location and cause of her accident. Plaintiff's alleged failure to specifically mark or identify the location of the accident as presented to her in photographs during her deposition does not, in itself, render her claims against Landlord Chen vague to warrant dismissal of the action against it. From the beginning of this litigation, pre and post discovery, the parties were aware, and this Court noted at oral argument, that the exact and specific location of plaintiff's accident - whether in front of Landlord 531, Landlord Chen's property or both - was ambiguous (Court tr at 5:2-4). Indeed, this Court not only denied Landlord Chen's prior motion pending completion of discovery, but outlined for the parties the potential factual dispute respecting the exact location of the accident and suggested in the Court Order itself that a "survey may be necessary to

determine who owned the property where the subject accident occurred" (Doc No. 60; February 6, 2017 Court Order) because, as this Court again noted during oral argument, the exact location in which one property began and the other ended could not be determined by testimony and/or photographs alone (Court tr at 5:17-22). In other words, this Court made clear that Landlord Chen's first application for summary judgment was denied based in part on the fact that a property survey was not attached marking the location in which plaintiff fell (Court tr at 5:23-25, 6:1-2).

Admittedly, none of the parties submitted a land survey of the properties in question (Court tr at 15:6-11). Landlord Chen failed to address plaintiff's affidavit which clearly implicates its property as a possible location in front of which she fell and failed to present any new evidence, other than copies of deposition transcripts, upon which to renew its application even though a presentation of a land survey may have disclosed the location of the property lines of both the 531 Premises and the Chen Premises to support movant's claim that plaintiff's accident occurred on the sidewalk in front of the 531 Premises rather than on the sidewalk in front of Chen's Premises (*see Aller v City of New York*, 72 AD3d at 564).

"As part of its prima facie showing of entitlement to summary judgment, [defendant is] required to do more than simply demonstrate that the alleged defect was on another landowner's property" but must demonstrate "that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff's injuries" (*Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 799 [2016]). Landlord Chen failed to demonstrate that it was free of negligence in regard to plaintiff's alleged accident by showing that it maintained the sidewalk in front of its own property in a reasonably safe

condition as required by section 7-210 of the New York City Administrative Code, and/or that its sidewalk was not the proximate cause of plaintiff's injuries.

A motion for summary judgment is a drastic measure and should only be granted when there are no issues of triable fact (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]). In this case, there are a plethora of factual disputes precluding summary disposition of this matter, including the issue of proximate cause of the accident which can only be determined by a trier of fact (*see McKinnon v Bell Sec.*, 268 AD2d 220 [1st Dept 2000]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (Motion Seq. 003) by defendant David Zwirner Gallery LLC and third-party defendant David Zwirner Inc. for summary judgment (CPLR 3212) dismissing the Summons and Complaint and the Third-Party Summons and Complaint, is denied; and it is further

ORDERED that the motion (Motion Seq. 004) by defendant 531 West 19th LLC for summary judgment (CPLR 3212) dismissing the Summons and Complaint, or alternatively for judgment in its favor on the Third-Party Summons and Complaint against David Zwirner Inc., is denied; and it is further

ORDERED that the motion (Motion Seq. 005) by defendant Lan Chen Corp., for summary judgment (CPLR 3212) dismissing the Summons and Complaint, and any cross claims against it, is denied.

DATED: July 14, 2020

ENTER

J.S.C.