Colon v Fives 160th L.L.C.
2020 NY Slip Op 32870(U)
August 31, 2020
Supreme Court, New York County
Docket Number: 159893/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH**, ***Justice*** — **PART** **IAS MOTION 29EFM**

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MARITZA COLON,

Plaintiff,

- v -

FIVES 160TH L.L.C. and RB MART INC.,

Defendants.

---X

INDEX NO. 159893/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

FIVES 160TH L.L.C.

Third-Party Plaintiff,

-against-

RB MART INC.

Third-Party Defendant.

---X

Third-Party
Index No. 595888/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114

were read on this motion to/for JUDGMENT - SUMMARY.

Motion by Defendant/Third Party Plaintiff Fives 160th LLC seeking summary judgment, pursuant to CPLR 3212, against Third Party Defendant RB Mart Inc. on the ground of contractual indemnification is granted to the extent that Fives 160th LLC is granted conditional contractual indemnification, and cross motion by RB Mart Inc. seeking an order compelling, pursuant to CPLR 3124, Fives 160th LLC's response to RB Mart Inc.'s Supplemental Discovery Demand is denied for the reasons stated herein.

BACKGROUND

On August 9, 2017 around 11 PM, Plaintiff Maritza Colon ("Colon") allegedly tripped over a portion of a sidewalk that was broken and cracked. The subject sidewalk fronted 555 West 160th Street, New York, New York, a/k/a 3840-3848 Broadway, New York, New York ("building") that was owned by Defendant Fives 160th LLC ("Fives"). (Summons & Complaint, NYSCEF Doc No 73; *see also* Lease, NYSCEF Doc No 82 at 42; Bill of Particulars, NYSCEF Doc No 76, ¶¶ 1, 5; Colon EBT at 21:12-14.)

The building had a commercial and a residential side. (Building/Property Manager Reyes Marte EBT at 14:03-22.) Colon sued Fives alleging, *inter alia*, that Fives improperly maintained the subject sidewalk fronting the commercial side of the building. (Summons & Complaint, NYSCEF Doc No 73.) Fives thereafter commenced a third party action against its tenant RB Mart Inc. ("RB Mart")—a retail discount store leasing store space at the building at the commercial side at 3848 Broadway New York, New York, at the time of the alleged subject accident—alleging, *inter alia*, that if Fives is found to be liable to Colon, it is entitled to indemnification from and judgment over and against RB Mart for all or part of any verdict or judgment Colon may recover against it. (Third Party Summons & Complaint, NYSCEF Doc No 74; *see also* Lease, NYSCEF Doc No 82 at 42; RB Mart's witness/owner Qaisar Razzaq's EBT at 7:21-23; 8:14-18.) Thereafter, Colon amended the Summons and Complaint to add RB Mart as a direct party defendant. (Amended Pleadings, NYSCEF Doc No 75.)

I. Plaintiff Colon's Deposition

Colon stated in her deposition that she was walking on 160th street when her "foot fell in that hole, the crack." (Colon EBT at 11:19-13:19; 14:03-07; 16:21-24; 17:07-18:08; 20:03-06 21:08-17; 73:07-13.) Colon further stated that she was "right in front of [a discount] store when [she] fell." (*Id.* at 25:15-17; 24:19-25:11; *see also id.* at 18:02-25.) Relatedly, Colon marked a photograph, (NYSCEF Doc No 83), showing where she allegedly fell. (*Id.* at 66:10-71:11.) RB Mart's witness Qaisar Razzaq ("Razzaq"), who is the owner of RB Mart, confirmed that the marked photo shows the location in front of his store. (*Id.* at 24:19-25:17; 66:10-71:11; Razzaq EBT at 19:15-20:10; 39:15-23.)

II. The Lease

A lease dated April 1, 2012, (the "Lease") was entered into between Fives and RB Mart, as acknowledged in the depositions of both parties. (*See* Lease, NYSCEF Doc No 82.) The Lease and exhibits to the Lease, in relevant part, state:

> **Article 1. Basic Terms and Definitions. Section 1.12 Premises**. The portion of the Building described in Exhibit C to this lease. **Exhibit C. Premises**. (a) certain ground floor retail space . . . commonly known by the street address 3846 Broadway which space was formerly occupied by Mejia Traders, Inc. (the "Ground Floor Premises"); and (b) certain space in the basement of the Building which is accessible from the Ground Floor Premises (the "Basement Premises"). … (c) The Ground Floor Premises and the Basement Premises shall collectively constitute the Premises.
>
> **Article 9. Common Areas. Section 9.1** The "Common Areas" are those areas and facilities which may be furnished by Landlord (or others on behalf of Landlord) in or near the Building for the non-exclusive common use of tenants and other occupants of the Building, their employees, customers, and invitees, including parking areas, access areas (other than public streets), driveways, leading docks and loading areas, **sidewalks**, lighting facilities, and other similar common areas, facilities or improvements.

Section 9.2 Landlord will operate and maintain, or shall cause to be operated and maintained, the Common Areas in a manner deemed by Landlord to be reasonable and appropriate. Landlord shall have the right (i) to establish, modify and enforce reasonable rules and regulations with respect to the Common Areas; (ii) to enter into, modify and terminate any easement and other agreements pertaining to the use and maintenance of the Common Areas; (iii) to close all or any portion of the Common Areas to such extent as may, in the opinion of Landlord, be necessary to prevent a dedication thereof or the accrual of any rights to any person or to the public therein; (iv) to close temporarily any or all portions of the Common Areas; (v) to discourage non-customer parking; and (vi) to do and perform such other acts in and to said areas and improvements as Landlord shall determine to be advisable.

Article 10. Repairs and Maintenance. **Section 10.1 Landlord shall, at Landlord's expense, make all structural repairs needed to the exterior walls, structural columns, structural roof, and structural floors that enclose the Premises** (excluding all doors, door frames, storefronts, windows and glass) provided that Tenant gives Landlord notice of the necessity for such repairs. …

Section 10.3 … **Tenant shall also make, at Tenant's expense, such repairs and replacements as are needed to keep the sidewalks and walkways abutting the Premises in good condition and order, and shall keep such sidewalks and walkways [and areas behind the Building to which Tenant has access] free of rubbish, snow, ice and other obstructions; and otherwise in a safe and clean condition.** All such repairs and replacements shall be made in compliance with the provisions of this lease (including Article 5 [Tenant's Work]).[1]

Article 13. Insurance. **Section 13.1 Tenant shall, at Tenant's expense, maintain at all times during the Term and at all times when Tenant is in possession of the Premises such insurance as shall be required by Landlord, including: (a) commercial general liability insurance (or successor form of insurance designated by Landlord) in respect of the Premises, on an occurrence basis,** with a combined single limit … of not less than one million five hundred thousand ($1,500,000) dollars

[1] This section states:

> **Article 5. Tenant's Work. Section 5.1** Except as may be expressly provided in this lease, Tenant shall not replace any fixtures in the Premises or make any changes, improvements, alterations or additions (collectively, "Tenant' s Work"), to the Premises, the Real Property, the Building systems, or any part thereof, without Landlord's prior consent. Landlord's consent shall not be unreasonably withheld or delayed if Tenant's Work (a) is nonstructural, and (b) does not (i) affect any part of the Real Property outside the Premises (including the Building roof) or the exterior of the Premises, (ii) affect any structural element of the Building, (ill) adversely affect any Building system, or (iv) require an amendment of the certificate of occupancy for the Premises or the Building, (c) is not visible outside the Premises and (d) is performed only by contractors and subcontractors first approved by Landlord …

naming as additional insureds Landlord …, (b) property insurance in an amount equal to one hundred …percent of full replacement value … covering Tenant's Work …., Tenant's Property and the property of third parties located in the Premises, against fire and other risks included in the standard New York form of property insurance, including business interruption insurance covering a period of twelve … months, (c) workers' compensation and employer's liability insurance providing statutory benefits for Tenant's employees at the Premises (d) such other insurance as Landlord may reasonably require. Such liability insurance policy shall include contractual liability, fire and legal liability coverage. Landlord shall have the right at any time and from time to time, but not more frequently than once every two (2) years, to require Tenant to increase the amount of the commercial general liability insurance required to be maintained by Tenant under this lease provided the amount shall not exceed the amount then generally required of tenants entering into leases for similar Permitted Uses in similar buildings in the general vicinity of the Real Property.

Article 17. **Access, Changes in Building and Real Property**. **Section 17.1** Landlord reserves the right to . . . (b) enter the Premises at reasonable times on reasonable prior notice, . . . to inspect the Premises, to show the Premises to others or to perform any work or make any improvement or repair or perform any maintenance Landlord deems necessary or desirable to the Premises or the Building or for the purpose of complying with Laws. . . . .

Section 17.2 Landlord reserves the right at any time and from time to time to (a) make changes or revisions in the Real Property, including but not limited to the Building areas, walkways, driveways, parking areas, or other Common Areas, . . . (c) construct additions to, or additional stories on, the Building (which right includes the right to make use of structural elements of the Premises, including without limitation columns and footings, for such construction, provided such use does not materially encroach on the interior of the Premises), . . .

Article 23. **No Representations; Liability; Tenant Indemnity**. **Section 23.9** Tenant shall not perform or permit to be performed any act which may subject Landlord, its partners, members, managers, shareholders, officers, directors and principals or Landlord's managing agent, if any, to any liability. **Tenant shall, to the extent not caused by the negligence or willful misconduct of Landlord or its contractors or agents, indemnify, defend and hold harmless Landlord and Landlord's managing agent, if any, from and against all (a) claims arising from any act or omission of Tenant, its subtenants, contractors, agents, employees, invitees or visitors, (b) claims arising from any accident, injury or damage to any person or property in the Premises or any adjacent walkway during the Term or when Tenant is in possession of the Premises, and (c) Tenant's failure to comply with Tenant's obligations under this lease (whether or not a Default), and all liabilities, damages, losses, fines, violations, costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with any such claim or failure.**

(Lease Sections & Exhibits, NYSCEF Doc No 82 [emphasis added].)

III. Third Party Defendant RB Mart's Witness Qaisar Razzaq's Deposition

Qaisar Razzaq ("Razzaq") stated in his deposition that he is the sole owner of RB Mart (or the "store"). (Razzaq EBT, NYSCEF Doc No 78, at 07:05-17.) Razzaq stated that he, along with an employee, ran RB Mart. (*Id.* at 15:02-10.) Razzaq stated that he and his employee kept the front of the store clean. (*Id.* at 13:21-14:15.) Razzaq stated that "sometimes … before [he] open[s] the store, the sidewalk is already cleaned[,]" and attributed this cleaning to Fives' employees. (*Id.* at 16:03-24; 29:08-31:29.)

Razzaq further stated that RB Mart never repaired "the sidewalk in front of his premises." (*Id.* at 14:16-18; 17:18-22; 38:02-18.) Razzaq added that the landlord "takes care of all the repairing, whatever is in front of the store." (*Id.* at 22:20-22; 34:14-24.) Razzaq stated that he "had a routine to check the sidewalk to see if it needed minor repairs." (*Id.* at 48:02-13.) Razzaq stated that he would then notify the landlord to repair these minor defects. (*Id.* at 48:10-15.)

Razzaq stated that the crack that allegedly caused Colon's fall was subsequently repaired but he did not know who repaired it. (*Id.* at 42:16-43:25.) Razzaq stated that because he did not repair it, it must have been Fives who repaired the subject crack. (*Id.* at 43:03-25.)

IV. Defendant Fives' Witness Reyes Marte's Deposition

Reyes Marte ("Marte") was employed by Beach Lane Management as a property manager of 555 West 160th Street at the time of the subject accident and also at the time of this deposition. (Marte EBT, NYSCEF Doc No 79, at 9:19-10:02; 12:07-10.) Marte stated that his job duties included making sure that the superintendent of the premises, Patricio, properly swept and cleaned the sidewalk abutting the premises on the residential side of the building. (*Id.* at 13:07-15; 14:13-22; 25:05-15; 27:06-28:02; 34:05; 35:02-06.) On the other hand, Marte stated that his job duties did not include checking for "any cracks on the sidewalks." (*Id.* at 28:18-24.) Marte stated that he did not "do repairs on the sidewalks." (Id. at 28:23-24.) Marte further stated that "if there was a problem with the sidewalks that were in front of the stores that needed repairs, he would not be told about it at all, … the tenants [would not] alert [him] to it." (*Id.* at 14:15-22; 18:09-11; 49:20-25.)

V. Parties Contentions

Fives moves for Summary Judgment seeking contractual indemnification along with attorney's fees as against Third Party Defendant RB Mart. (Fives' Affirm in Supp, NYSCEF Doc No 71, at 3.) Fives argues that Plaintiff's alleged accident on the abutting sidewalk to lessee RB Mart's discount store triggered the Lease's indemnification clause "as it arose on an adjacent walkway during the term of the Lease, which walkway Lessee RB Mart was obligated under paragraph 10.3 of the Lease … to … repair[] … as needed to keep the sidewalks and walkways abutting the premises in good condition and order." (Fives' Memo of Law, NYSCEF Doc No 72, at 9.) Fives argues that it is entitled to full indemnification from RB Mart as the parties agreed to allocate the risk through the use of the indemnification provision and the insurance procurement provision. Fives argues that pursuant to Section 23.9 of the Lease, RB Mart was to "indemnify, defend and hold harmless Landlord … from and against … (b) claims arising from any accident,

injury or damage to any person or property in the Premises [as defined in the Lease] or any adjacent walkway." Fives further argues that the indemnification clause was to indemnify Fives for all "liabilities, damages, losses, fines, violations, costs and expenses (including reasonable attorney's fees and disbursements) incurred in connection with any such claim or failure." Also, Fives argues that RB Mart breached Section 13.1 of the Lease in that it failed to purchase effective insurance and naming Fives as an additional insured.

In opposition, RB Mart argues 1) that the alleged incident was due to a structural defect; 2) that Section 10.3 of the Lease does not impose an obligation on RB Mart to make structural repairs to the sidewalk; and 3) that Fives was responsible for maintaining the Common Areas, which included the sidewalk adjacent to RB Mart's store pursuant to Exhibit C and Article 9 of the Lease. (RB Mart's Affirm in Opp, NYSCEF Doc No 109, at 2; 10-11.) Additionally, RB Mart argues that pursuant to Section 23.9 of the Lease, it is not required to defend and indemnify Fives against claims caused by Fives' own negligence. (*Id.* at 12-13.) Also, RB Mart argues that Fives' post-accident repair of subject portions of the sidewalk establishes that Fives had control over the sidewalk. (*Id.* at 15.) Further, RB Mart argues that Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk, and liability cannot be imposed on itself under the circumstances of this case. (*Id.)* Moreover, RB Mart argues that to the extent Fives is reading Section 10.3 of the Lease in a manner conflicting with Sections 9.1 and 9.2 of the Lease, the document is ambiguous and must be resolved in favor of RB Mart as the tenant. (*Id.* at 15-16.) Further, RB Mart argues that RB Mart was closed at the time of the alleged accident and, therefore, Colon was a "mere passerby." (*Id.* at 5.)

Regarding Fives' breach claim based on insurance coverage, RB Mart argues that pursuant to Section 13.1 of the Lease, RB Mart did not have an obligation to purchase insurance covering the sidewalk because the sidewalk was not part of the Premises as Premises is defined in the Lease. (*Id.* at 12.) Further, RB Mart argues that the Lease does not require it to purchase insurance covering Fives for Fives' own negligence. (*Id.*)

Lastly, RB Mart argues that there is an agreement between Fives and Beach Lane Management requiring Beach Lane Management to repair and maintain the sidewalk and to indemnify the landlord against losses should it fail to do so. (*Id.* at 19-20.) In support of this assertion, RB Mart has made the present cross motion seeking an order compelling, pursuant to CPLR 3124, Fives 160th LLC's response to RB Mart Inc.'s Supplemental Discovery Demand seeking production of the production management agreement and related documents. (*Id.* at 20.)

In reply, Fives argues that "[a] clear reading of [Section 9.2] demonstrates that the [L]ease permits the landlord to either operate and maintain the Common Areas of the premises or to cause same to be operated and maintained in a manner deemed by landlord to be reasonable and appropriate." (Reply Memo, NYSCEF Doc No 113, at 2.) Fives further explains, "[t]he landlord in requiring in Section 10.3 of the lease that [its] lessee, RB Mart, was to make such repairs and replacements of its abutting sidewalk so as to keep it in good condition and order is complying with [S]ection 9.2 of the [L]ease, in that it caused the common area (the sidewalk, abutting RB Mart's leased premises) to be operated and maintained in a manner deemed by

landlord to be reasonable and appropriate, i.e., by obligating [its] [l]essee to repair, replace, and keep clean its abutting sidewalk." (*Id.* at 3.)

Moreover, Fives argues that it is entitled to indemnification based on Section 23.9 of the Lease, which provides that, to the extent not caused by its own negligence, Fives is entitled to indemnification from RB Mart for RB Mart's failure to comply with its obligations under the Lease. (*Id.* at 4, citing Section 23.9 subsection (c) of the Lease.)

DISCUSSION

I. RB Mart's Cross Motion for a More Specific Response to the Supplemental Demand

A court order dated April 23, 2019, stated that, "3P defendant reserves the right to serve D&I for any records of prior sidewalk repairs within 20 days." On April 23, 2019, RB Mart served a Supplemental Demand for Discovery & Inspection-Prior Sidewalk Repair on April 23, 2019. On June 25, Fives responded to the supplemental demand. Counsel for RB Mart did not raise any issues with respect to Fives' response to its supplemental demand until its letter dated January 3, 2020, despite two Conference Orders subsequent to said response stating that all discovery was complete[2] and a Note of Issue was filed according to the second Conference Order dated November 12, 2019. Moreover, RB Mart has failed to make a showing "special, unusual or extraordinary circumstances" to justify its demand for the subject post-NOI discovery requests. (*Pannone v Silberstein*, 40 AD3d 327, 328 [1st Dept 2007].) Therefore, the Court considers any supplemental demands waived and, accordingly, denies RB Mart's cross motion.

II. Fives' Motion for Summary Judgment

A. Standard of Review

"The proponent of a summary judgment motion 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 University Medical Center*, 64 NY2d 851, 853 [1985].) The motion must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof. (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974].) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible

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[2] A Conference Order dated July 23, 2019, as signed by counsel for all parties including counsel for RB Mart, stated that, "All discovery is complete with the exception of a response to defendant Fives 160th LLC's Notice to Admit which is the subject of plaintiff's Protective Order Motion returnable 8/21/19. Parties to call chambers on Monday 7/29/19 at 3 p.m. re status of resolving [the Motion for Protective] Order." The issue concerning the Notice to Admit was subsequently resolved between counsel for Colon and Fives and the motion was withdrawn. (Conference Order dated July 23, 2019, NYSCEF Doc No 62.)

A Conference Order dated November 12, 2019, as signed by counsel for Colon and Fives—and where counsel by RB Mart failed to appear—stated that, "All discovery is complete. Plaintiff to file NOI by Nov. 29, 2019." (Conference Order dated November 12, 2019, NYSCEF Doc No 64.) Colon filed his Note of Issue on November 18, 2019. (NYSCEF Doc No 65.)

form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff ... the court on a summary judgment motion must indulge all available inferences[.]" (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

B. Applicable Law

"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." (*Kennelty v Darlind Const., Inc.*, 260 AD2d 443, 446 [2d Dept 1999]; *see also Goodlow v 724 Fifth Ave. Realty, LLC*, 127 AD3d 1138, 1140 [2d Dept 2015]; *Hedges v E. Riv. Plaza, LLC*, 58 Misc 3d 1211(A), 4-5 [Sup Ct 2018]; *Sturkey v 1824 Park Ave. LLP*, 2016 N.Y. Slip Op. 30605[U], 7 [Sup Ct 2016].) "A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." (*Feldman v Natl. Westminster Bank, N.A.*, 303 AD2d 271, 271 [1st Dept 2003].)

"It is well settled that an agreement to purchase insurance coverage is clearly distinct and treated differently from the agreement to indemnify." (*Kennelty*, 260 AD2d at 445.) "A party seeking summary judgment based on an alleged failure to procure insurance … must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011].)

C. Application

For the reasons discussed below, Fives is entitled to conditional summary judgment on its claim for contractual indemnification against RB Mart. Fives argues that it is entitled to indemnification based on the Lease "to the extent not caused by [its] negligence or willful misconduct." (Fives' Memo of Law at 1, referencing Section 23.9 to the Lease.) "A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence." (*Sobel v City of New York*, 120 AD3d 485, 486-87 [2d Dept 2014] [internal citations omitted]; *Sturkey*, 2016 N.Y. Slip Op. 30605[U], 8; *see also Hughey v RHM-88, LLC*, 77 AD3d 520, 523 [1st Dept 2010].) Fives established its prima facie entitlement to judgment as a matter of law by putting forth evidence that it was not actively negligent. Courts have referred to those indemnitees as actively negligent when said indemnitees cause or create the dangerous defect. (*Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200, 201 [1st Dept 1998]; *Sturkey*, 2016 N.Y. Slip Op. 30605[U], 8; *Torres v City of New York*, 32 AD3d 347, 349 [1st Dept 2006], citing *King v Lenko Realty Co.*, 22 Misc 2d 376, 380 [Sup Ct 1959].) In opposition, RB Mart failed to raise a triable issue of fact.

RB Mart's argument that Administrative Code § 7-210 prevents a finding of indemnification here is unavailing. That statute "imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk." (*Wahl v JCNYC, LLC*, 133 AD3d 552, 552 [1st Dept 2015] [internal citations omitted].) "City Council enacted section 7-210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them—the property owners." (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008] [internal quotation marks and citation omitted]).

However, "[p]rovisions of a lease obligating a tenant to repair the sidewalk abutting the premises do not impose on the tenant a duty to a third party." (*Collado v Cruz*, 81 AD3d at 542 [complaint by plaintiff against tenant dismissed because it was undisputed that the tenant did not create the condition or make special use of the sidewalk]; *see also Xiang Fu He*, 34 NY3d at 175.) Rather, Fives, as owner, is potentially liable to Colon for the subject incident, notwithstanding this Court's finding on the current motion as to RB Mart's duty to indemnify, including Fives' lack of "active negligence." That is to say, for purposes of the instant motion, the Court finds that Fives has made a prima facie showing that it did not cause or create the alleged dangerous condition. Whether Fives may have been negligent in failing to remedy a dangerous condition that it had notice of is a question for trial.

To reiterate, the liability of Fives or RB Mart to Colon, however, is not directly at issue on this motion. Moreover, the record fails to establish an issue of fact as to whether the alleged injury was "caused by the negligence or willful misconduct of Landlord [Fives] or its contractors or agents." Thus, RB Mart, as tenant, may be held liable to the owner, Fives, for "all liabilities, damages, losses, fines, violations, costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with" the alleged injury based on the Lease, which imposed on RB Mart the obligation to maintain the sidewalk abutting the Premises. (*See Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 300 [1st Dept 2007] [granting conditional summary judgment to defendant owner from elevator maintenance company for contractual indemnification in the absence of any showing of actual negligence on defendant owner's part and, where, under their exclusive, full-service contract, the elevator company assumed responsibility for the maintenance, repair, inspection and servicing of the elevators, and agreed to indemnify defendant owner for any injuries arising out of and resulting from the performance of that work]; *Collado*, 81 AD3d at 542; *see also Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019] ["[T]o be clear, nothing in section 7-210 prevents a landowner from entering into a maintenance agreement with tenants and third parties. … [I]f litigation ensues, the landowner generally has an indemnification action against a tenant or lessee who covenants to maintain the property."].) Here, the Lease contains several provisions establishing the parties' intent that RB Mart bear responsibility for maintaining the sidewalk abutting the Premises as defined in the Lease. (*See Mojica v Broadway Assoc., SDG Mgt. Corp.*, 2019 WL 1902061, 4 [Sup Ct, Bronx County, 2019].)

Based on the unambiguous terms of the Lease, RB Mart assumed responsibility for the "repairs and replacements . . . to keep the sidewalks and walkways abutting the Premises in good condition and order[.]" (Section 10.3 to the Lease.) RB Mart also agreed to—to the extent not caused by the negligence or willful misconduct of Landlord or its contractors or agents—

"indemnify, defend and hold harmless Landlord and Landlord's managing agent, from and against all … (c) Tenant's failure to comply with Tenant's obligations under this lease (whether or not a Default), and all liabilities, damages, losses, fines, violations, costs and expenses (including reasonable attorneys' fees and disbursements) incurred in connection with any such claim or failure." (Section 23.9 to the Lease.) Whether or not RB Mart failed to comply with a provision of the Lease need not be decided on this motion. It is sufficient on this motion that Fives has made a prima facie showing that the alleged dangerous condition was located in an area that RB Mart had a duty to maintain and repair and that Fives did not cause or create said dangerous condition. As such, if Fives is found to be liable at the time of trial, by necessity, RB Mart will be found liable for contractual indemnification for failing to comply with an obligation under the Lease.

In opposition, RB Mart argues, unpersuasively, that Section 9.2 of the Lease, which states that Landlord "will operate and maintain, or shall cause to be operated and maintained, the Common Areas [such as sidewalks] in a manner deemed by landlord to be reasonable and appropriate," creates ambiguity as to whose responsibility it is to operate and maintain the subject sidewalk. RB Mart's argument regarding Section 9.2 of the Lease fails to raise an issue of fact as to RB Mart's responsibility. First, pursuant to the Lease provision, Fives caused to be operated and maintained the sidewalks in a manner deemed by Fives to be reasonable and appropriate. It did so by requiring, under Section 10.3 to the Lease, RB Mart to maintain and repair sidewalks abutting its storefront. Further, even assuming Fives operated and maintained certain portions of the sidewalk, the Lease is unambiguous as to RB Mart's responsibility to operate and maintain the sidewalk *abutting* its storefront.

As to RB Mart's argument that the alleged defect here was a structural defect, this is unpersuasive. It is true that some New York trial courts have held that repairs to a public sidewalk are considered structural. However, a tenant's obligation to repair or replace a sidewalk will be implied or imposed when a lease specifically obligates the tenant to be responsible for such repairs. (*Mahon v David Ellis Real Estate, L.P.*, 2016 NY Slip Op 31750[U], *9-10 [Sup Ct, NY County, 2016] [internal quotation marks and citations omitted]; *see also Pichardo v The City of New York*, 2020 N.Y. Slip Op. 31240[U], 7 [Sup Ct, New York County, 2020].) Here, the Lease specifically obligates RB Mart to make repairs and replacements as needed to keep the sidewalks and walkways abutting the store front in good condition and order. (Section 10.3 of the Lease; *see also Wahl v JCNYC, LLC*, 133 AD3d 552, 552 [1st Dept 2015].) Moreover, to the extent the Lease refers to obligations regarding structural repairs herein the Lease states that "Landlord shall, at Landlord's expense, make all structural repairs to the exterior walls, structural columns, structural roof, and structural floors that enclose the Premises." (Section 10.1 to the Lease.) In this case, the structural repairs that Fives obligated to itself did not include a crack on an abutting sidewalk which was specifically delegated to RB Mart. To find otherwise would render these specific terms meaningless. (*Northside Tower Realty, LLC v Admiral Ins. Co.*, 180 AD3d 696, 698 [2d Dept 2020] ["A court should not read an agreement so as to render any term, phrase, or provision meaningless or superfluous."].)

RB Mart's argument as to the unenforceability of the indemnification provision in light of General Obligations Law § 5-321 is also unpersuasive. In *Great N. Ins. Co. v Interior Const. Corp.*, (18 AD3d 371, 372 [1st Dept 2005], *affd*, 7 NY3d 412 [2006]), the Court of Appeals held

that "[w]here … a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity." *Great N. Ins. Co.*, 7 NY3d at 419.) In that case, the Court of Appeals held that the lease's broad indemnification provision, requiring the tenant to indemnify the landlord for any accident occurring in the leased premises "unless caused solely by landlord's negligence," was enforceable and not in violation of General Obligations Law § 5-321 in part due to the use of the insurance to allocate the risk of liability to third parties between themselves. (*Great N. Ins. Co.*, 7 NY3d at 415.) In the present case, the Lease is similarly enforceable and not in violation of General Obligations Law § 5-321 in part because the parties used insurance to allocate the risk of liability to third parties between themselves. Further, the Lease provision for indemnification here is much less broad than that of *Great Northern Insurance Company* in that the Lease here does not purport to exempt Fives from liability for its own negligence.

As for Fives' other claim on the motion, for breach of provision requiring RB Mart to obtain insurance, the Lease provides:

> "**Section 13.1** Tenant shall, at Tenant's expense, maintain at all times during the Term and at all times when Tenant is in possession of the Premises such insurance as shall be required by Landlord, including: (a) commercial general liability insurance (or successor form of insurance designated by Landlord) in respect of the Premises, on an occurrence basis, with a combined single limit (annually and per occurrence and location) of not less than one million five hundred thousand ($1,500,000) dollars naming as additional insureds Landlord and any other person designated by Landlord . . . ."

Fives failed to establish prima facie that RB Mart failed to purchase the necessary insurance required under the Lease. There is no submission into the record by Fives from someone with personal knowledge of the facts that RB Mart failed to purchase the required insurance. Therefore, Fives is not entitled to judgment on its cause of action for breach of the requirement to procure insurance. (*See Sturkey*, 2016 N.Y. Slip Op. 30605[U], 9.) At any rate, RB Mart argues, relying on the deposition testimony of its president, that it has acquired insurance in respect of the Premises, as defined in the Lease, and that the Lease only requires RB Mart to purchase liability insurance and name Fives as additional insured as to occurrences in respect of the Premises. (Razzaq EBT at 80:08-23.)

The Court has considered the parties' other arguments and finds them to be unavailing.

CONCLUSION

Accordingly, and for the reasons so stated, it is hereby

ORDERED that the motion by Defendant/Third Party Plaintiff Fives 160th LLC seeking summary judgment, pursuant to CPLR 3212, against Third Party Defendant RB Mart Inc. on the grounds of contractual indemnification is granted to the extent that Fives 160th LLC is entitled to conditional contractual indemnification upon a finding of liability in favor of Plaintiff Maritza Colon; and it is further

ORDERED that the cross motion by RB Mart Inc. seeking an order, pursuant to CPLR 3124, compelling Fives 160th LLC's response to RB Mart Inc.'s Supplemental Discovery Demand is denied.

The foregoing constitutes the decision and order of the Court.

8/31/2020
DATE

ROBERT DAVID KALISH, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**	
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ] **OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**	
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**