| **Brown-Sherman v KRE Broadway Owner, LLC** |
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| 2020 NY Slip Op 33663(U) |
| November 4, 2020 |
| Supreme Court, New York County |
| Docket Number: 155684/2016 |
| Judge: Adam Silvera |
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| This opinion is uncorrected and not selected for official publication. |

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

***Justice***

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PAUL BROWN-SHERMAN,

Plaintiff,

- v -

KRE BROADWAY OWNER LLC,BROADWAY MALL MANAGEMENT, LLC,

Defendant.

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**INDEX NO.** 155684/2016

**MOTION DATE** 02/14/2020

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

KRE BROADWAY OWNER LLC, BROADWAY MALL MANAGEMENT, LLC

Plaintiff,

-against-

PROFESSIONAL SECURITY CONSULTANTS, INC.

Defendant.

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Third-Party
Index No. 595581/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 140, 144, 146, 150, 151, 154

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ORDERED that third-party defendant Professional Security Consultants, Inc's motion to dismiss the third-party Complaint against Professional Security Consultants, Inc with prejudice is denied. This case arises from an accident which occurred on December 18, 2015 while plaintiff was driving his vehicle in a mall parking lot located at 358 Broadway Mall, Hicksville, New York when his vehicle struck a pothole and led to his alleged serious injury.

"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]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

The premises in question is owned by defendant KRE Broadway and operated by defendant Broadway Mall (hereinafter referred to collectively as the "Broadway Defendants"). The Broadway Defendants entered into a retail service contractor agreement with third-party defendant Professional Security on February 5, 2015 for the period of March 1, 2015 to February 29, 2016 (the "Agreement"). The Agreement provided that the security services contractor (Professional Security) was responsible to "Continuously tour and inspect parking areas, stairwells, sidewalks, walkways, loading docks, restroom and other Common Areas" (Mot, Exh I at 15). Additionally, the Agreement provided that Professional Security was to "Inform Manager/Owner of potential life/safety risks, including but not limited to: fire hazards, slip, trip, and other fall hazards (spills, *potholes*, etc.)" (*id.* at 16).

Third-party defendant moves to dismiss this matter against Professional Security on the grounds that Professional Security had no duty with respect to the maintenance and repair of the physical aspects of the parking lot area where plaintiff's accident occurred. Third-party defendant argues that as owner of the property the duty lied with the Broadway Defendants.

"Absent a duty running directly to the injured [party] there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 466 [1st Dept 2016] quoting *Madison Ave Gourmet Foods v Finlandia Ctr.*, 96NY2d 280, 289 [2001]). Plaintiff must show that the defendant either

created the alleged hazardous condition or that they had actual or constructive notice of it (*Piacquadio v. Recine Realty Corp*., 84 N.Y.2d 967 [1994]). "A claim for contribution and apportionment of liability would properly lie in this case upon a showing that [Professional Security] breached a duty to either or plaintiff or [the Broadway Defendants] and thereby contributed to plaintiff's injuries" (*Petrucci v City of New York*, 167 AD2d 29 [1st Dept 1991] citing *Schauer v Joyce* 54 NY2d 1 [1981]; *Trustees of Columbia University in City of N.Y. v Mitchell/Giurgola Associates*, 109 AD2d 449 [1st Dept 1985]). On a motion for summary judgment a contractor needs to show that its alleged negligence is not among the potential proximate causes of the alleged damages to a plaintiff or third-party plaintiff (*Cackett v Gladden Properties*, 183 AD3d 419, 422 [1st Dept 2020]).

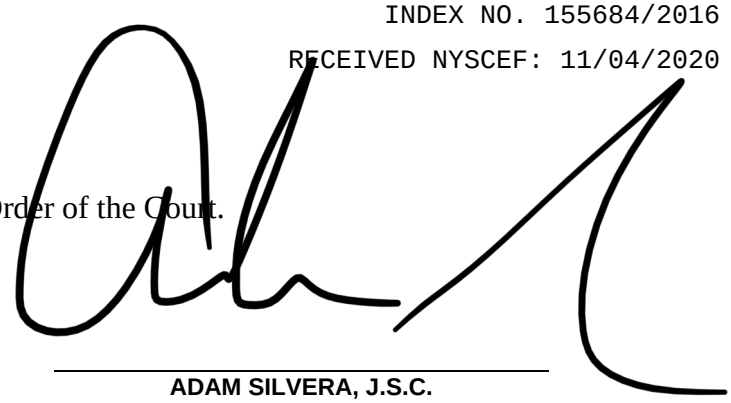
Here, Professional Security has failed to demonstrate that its failure to notify the Broadway Defendants of conditions such as the pothole at issue is not among the potential proximate causes of plaintiff's alleged damages. Professional Security's motion contains an issue of fact as to their duty to notify the Broadway Defendants of conditions such as potholes at the premises. Thus, an issue of fact exists barring summary judgment for a finding that Professional Security owed a duty to plaintiff and the Broadway Defendants with respect to the condition of the premises at issue.

Accordingly, it is

ORDERD that that third-party defendant Professional Security Consultants, Inc's motion to dismiss the third-party Complaint against Professional Security Consultants, Inc with prejudice is denied; and it is further

ORDERED that within 30 days of entry, counsel for plaintiff serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



11/4/2020
DATE

ADAM SILVERA, J.S.C.

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