SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
AMY BORAS,

Plaintiff, Index No: 515531/2018

-against-

DECISION AND ORDER

284 NORMAN AVENUE LLC, KND MANAGEMENT CO., INC., PT888 INC., G & C IMPORT EXPORT INC., DEEP SEA SEAFOOD INC., and FISHERMAN'S PIER SEAFOOD SUPPLIERS INC.,

Defendants.
x

Recitation as required by CPLR 2219(a), of the papers considered in this motion and cross-motion for summary judgment.

Papers	NYSCEF DOC. NOS.
Order to Show Cause/Motion and Affidavits Annexed.	50-64
Cross motion and affidavits annexed.....	65-78
Answering Affidavits.....	81; 83
Reply Papers.....	
Memorandum of law.....	

Upon the foregoing cited papers, the Decision/Order on this motion and cross-motion is as follows:

In this action to recover damages for personal injuries, the defendants 284 Norman Avenue LLC [Norman] and KND Management Co., Inc. [KND] move pursuant to CPLR 3212 for an order (1) granting them summary judgment dismissing the plaintiff's complaint and all cross-claims insofar as asserted against them, and (2) granting them summary judgment on their claim for contractual indemnification as against co-defendant G & C Import Export Inc. [G & C]. G & C cross-moves for an order granting it summary judgment dismissing the plaintiff's complaint, Norman and KND's cross-claim for contractual indemnification, and all cross-claims insofar as asserted against it.

On the morning of January 18, 2018, the plaintiff allegedly slipped and fell on ice on the sidewalk abutting the property, a warehouse, located at 681 Morgan Avenue, Brooklyn. It is alleged that the ice formed on the sidewalk due to water runoff coming out of an opened garage door of the premises. At the time of the accident, the premises were owned by Norman, managed by KND, and leased to C & G, a seafood distributor.

Under the terms of the lease and riders thereto, C & G was required to, inter alia, "[k]eep and maintain the [p]remises in a neat and clean condition and keep, repair and maintain sidewalks and keep them free from debris, ice and snow." Plaintiff commenced this action, among others, Norman, KND, and C & G, to recover damages for her personal injuries alleging, inter alia, that the defendants were negligent in failing to maintain the premises in a reasonably safe condition, and allowing the sidewalk to be, become, and remain wet, slippery, icy and dangerous[1].

"[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property" (*Torres v City of New York*, 153 AD3d 647, 648 [2d Dept 2017]. "Administrative Code of the City of New York § 7–210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon certain property owners for injuries resulting from a violation of the code provision" (*Hsu v City of New York*, 145 AD3d 759, 759-760 [2d Dept 2016]). Thus, regardless of any lease provisions requiring C & G to remove snow and ice and to otherwise maintain the sidewalk, Norman, as owner of the abutting premises, had a statutory duty to the plaintiff to maintain the sidewalk in a reasonably safe condition (*see Xiang Fu He v Troon Mgmt, Inc.*, 34 NY3d 167 [2019]). "However, Administrative Code of the City of New York § 7–210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable" (*Muhammad v. St. Rose of Limas R.C. Church*, 163 A.D.3d 693, 693 [2d Dept 2018]).

To prevail on their motion for summary judgment Norman, as owner, and KND, its managing agent, have the initial burden of establishing that they neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied the condition (*see Branciforte v 2248 Thirty First Street, LLC*, 171 AD3d 1003 [2d Dept 2019]). Here, while Norman and KND's submissions, including the parties' deposition testimonies, demonstrate prima facie that movants did not cause or create the allegedly dangerous condition on the sidewalk, they fail to demonstrate that they lacked constructive notice thereof. "To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident" (*Butts v. SJF, LLC*, 171 A.D.3d 688, 689 [2d Dept 2019]). Here, the evidence submitted by Norman and KND merely references its general inspection practices of the premises and C & G's maintenance responsibilities under the lease agreement, but fails to specifically state when the sidewalk was last cleaned or inspected relative to when the plaintiff allegedly slipped and fell (*see Zamora v. David Caccavo, LLC*, 190 AD3d 895, 897 [2d Dept 2021]). Thus, Norman and KND fail to establish, prima facie, that they lacked constructive notice of the allegedly dangerous condition that allegedly caused

[1] Pursuant to an order dated July 22, 2019, plaintiff was granted a default judgment against defendants PT888 Inc, Deep Sea Seafoods Inc., and Fisherman's Pier Seafood Suppliers Inc.

plaintiff's fall (*see Torre v Aspen Knolls Estates Home Owners Ass'n, Inc*., 150 AD3d 789 [2d Dept 2017]). Accordingly, Norman and KND fail to demonstrate their prima facie entitlement to summary judgment dismissing the plaintiff's complaint.

With respect to C & G's cross-motion, "a lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty" (*Martin v Rizzati*, 142 AD3d 591, 592 -593 [2d Dept 2016]). C & G's evidentiary submission, namely, the deposition testimony of one of its former owners, Yi Shi Chen, who was no longer affiliated with C & G at the time of the accident and had not been at the premises for two or three months prior thereto, and whose testimony merely provided general information as to C & G's business operations and practices, fails to eliminate all triable issues of fact as to whether C & G created the dangerous condition alleged to have caused the accident (*see Madry v Heritage Holding Corp*., 96 AD3d 1022 [2d Dept 2012]). Moreover, although Mr. Chen testified that C & G had a subtenant, a seafood distributor, who rented half of C & G's leased space, the testimony does not establish that a sublease relieved C & G of its obligation to maintain the premises (*see Iturrino v Brisbane South Setauket, LLC*, 135 AD3d 907 [2d Dept 2016]). Thus, C & G fails to make their prima facie showing of entitlement to summary judgment dismissing the plaintiff's complaint and the cross-claims.

As to the issue of indemnification, Norman and KND makes a prima facie showing of entitlement to conditional summary judgment on their claim for contractual indemnification. Paragraph 59 of the rider to the parties' lease provides that C & G "shall indemnify and save harmless [o]wner and or agents against and from (a) any and all claims… (ii) arising from any negligent or otherwise wrongful act or omission of [t]enant or any of its subtenants or licensees or its or their employees, agents, contracts or invites, and (b) all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon." Moreover paragraph 63 of the rider provides that "[t]enant shall be liable and indemnify and hold [o]wner harmless from any claims [made] against [o]wner as a result of any accidents at the [p]remises." The rider also required C & G to procure comprehensive public liability insurance naming the landlord as an additional insured. To the extent that the parties' agreement requires C & G to indemnify Norman and KND for their own negligence, "the subject indemnification provision is not rendered unenforceable by General Obligations Law §5-321, which provides than an agreement that purports to exempt a lessor from its own negligence is void and unenforceable. [W]here, as here, the liability is to a third party, General Obligations Law § 5–321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when

coupled with an insurance procurement requirement" (*Bilska v Truszkowski*, 171 AD3d 685, 687 [2d Dept 2019]).

In opposition to the motion and in support of its cross-motion to dismiss the indemnification provision, C & G fails to demonstrate that the indemnification clause contained in the parties' lease rider was not the result of an arms' length transaction between sophisticated business entities. Although C & G argues that its signatories, the owners of C & G, were non-English speaking and had no legal or other assistance in reviewing the lease, there is no claim that C & G had no ability to negotiate the terms of this commercial lease and it has not been sufficiently established that C & G did not understand its obligations under said lease. Thus, Norman and KND are entitled to conditional summary judgment on its contractual indemnification claim against C & G i.e. it will be entitled to contractual indemnification to the extent that plaintiff's injuries are found to have arisen from C & G or its subtenants acts or omissions (*see Ohadi v Magnetic Construction Group Corp*., 182 AD3d 474 [1st Dept 2020]).

In view of the foregoing, Norman and KND's motion for summary judgment dismissing the plaintiff's complaint is denied but is granted as to the dismissal of C & G's cross-claims. Norman and KND's motion for summary judgment on their claim for contractual indemnification is conditionally granted as discussed above. C & G's cross-motion for summary judgment is denied in its entirety.

This constitutes the decision/order of the court.

Dated: March 19, 2021

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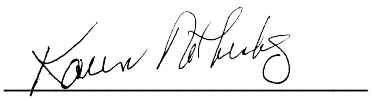

Hon. Karen B. Rothenberg
J.S.C.