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| <b>Shala v 750 8th Ave., LLC</b>                                                                                                                                                                                               |
| 2021 NY Slip Op 31018(U)                                                                                                                                                                                                       |
| March 31, 2021                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 160690/2017                                                                                                                                                                                                     |
| Judge: Lynn R. Kotler                                                                                                                                                                                                          |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

XHEVRUE SHALA and SOKOL SHALA

INDEX NO. 160690/2017

- v -

MOT. DATE

750 8th AVENUE, LLC et al.

MOT. SEQ. NO. 002

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s). \_\_\_\_\_

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s). \_\_\_\_\_

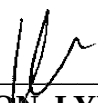
Replying Affidavits

ECFS Doc. No(s). \_\_\_\_\_

This personal injury action arises from a slip and fall on snow and ice on a sidewalk. Defendant 750 8<sup>th</sup> Avenue, LLC ("750 8<sup>th</sup> Ave") moves for summary judgment pursuant to CPLR § 3212 dismissing plaintiffs' complaint and all crossclaims, with prejudice, against it. Alternatively, 750 8<sup>th</sup> Ave seeks summary judgment on its claim for contractual indemnification against defendant/third-party plaintiff Pret 750 Eighth Avenue, Inc. d/b/a "Pret A Manger" ("Pret"). Pret cross-moves for summary judgment dismissing plaintiffs' complaint as well, and opposes 750 8<sup>th</sup> Ave's motion for contractual indemnification against it. Defendants/third-party defendants The Board of Managers of the Platinum Condominium (the "Board"), Halstead Management Co., LLC ("Halstead") and 1904 Platinum Condo, LLC (the "Condo") also cross-move for summary judgment in their favor, joining the arguments advanced in the motion and Pret's cross-motion and oppose 750 8<sup>th</sup> Ave's motion only to the extent that plaintiffs' complaint, the third-party complaint or any crossclaims survive. Plaintiffs have filed opposition to the motion and cross-motions, noting that they "take no position as to the disputes between the defendants and the Shala Plaintiffs take no position as to the summary judgment motions and cross-motions filed by Defendants (1) 750 8th AVENUE, LLC; (2) PRET 750 EIGHTH AVENUE INC., d/b/a "PRET A MANGER"; and/or (3) 1904 PLATINUM CONDO, LLC." Plaintiffs further request that the court search the record and grant them summary judgment on liability.

Issue has been joined and note of issue was filed on January 27, 2020. The motion-in-chief was filed on February 6, 2020 and the affidavit of service indicates that it was served on February 5, 2020. Therefore, the motion is timely. Pret's cross-motion was filed on June 2, 2020 and according to Pret's counsel, is "timely as per the current COVID crisis and the governor's most recent PAUSE order as the initial summary judgment motion was timely." The cross-motion by the Board, Halstead and the Condo was filed November 16, 2020 and they also maintain that their cross-motion is also timely. The Board, Halstead and the Condo point to the Governor Cuomo's executive order extending such suspension of

Dated: 3/31/21

  
\_\_\_\_\_  
HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☐ CASE DISPOSED    ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED    ☐ DENIED    ☒ GRANTED IN PART    ☐ OTHER

3. Check if appropriate:

☐ SETTLE ORDER    ☐ SUBMIT ORDER    ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT    ☐ REFERENCE

deadlines to November 28, 2020 and represent that the handling attorney left the firm and once the case was reassigned, new counsel "moved expeditiously to seek an adjournment from this Court in filing opposition to the Co-Defendants' motions, and to file the instant motion." No party argues that the cross-motions should be denied as untimely. Therefore, the court will consider both the motion and cross-motions.

The facts are as follows. Plaintiff Xhevrije Shala ("Shala") seeks to recover for personal injuries she sustained on March 15, 2017 when she allegedly slipped and fell due to what she claims was snow and ice on the sidewalk adjacent to 750 8th Avenue, New York, New York (the "building"). The building is managed by Halstead and owned and operated by the Board and/or Condo (this latter point is unclear as the parties interchangeably refer to the Board and Condo through this motion sequence). 750 8<sup>th</sup> Ave owns a ground floor commercial condominium unit in the building and in turn leases it to Pret.

At her deposition, Shala testified that her accident occurred on the east sidewalk on 8th Avenue near its corner with 46th Street at approximately 7:30 PM. At that time, Shala described the conditions as dark and cold. Shala further claimed that she didn't believe it had rained or snowed on the date of her accident. She stated "I know that there was snow like maybe, I don't know, a day or two before that or so. I know that it had snowed."

Immediately prior to her accident, Shala was standing on the sidewalk approximately ten to fifteen feet away from the crosswalk. Shala waited approximately two minutes for the light to change in order to cross the street. She claimed that there was a large group of people in front of her. To Shala's left was Pret A Manger, what she described as a coffee shop on the corner. After the light changed, Shala testified the following occurred:

- Q. What happened after that approximate two-minute time?
- A. The worst thing that happened to me is what happened.
- Q. Did the light change color?
- A. The light changed.
- Q. Did the people continue to walk southbound?
- A. The people started to move.
- Q. Did you continue to walk southbound?
- A. I just took one step. That was it.
- Q. Which foot did you take the step with?
- A. It was my left foot.
- ...
- Q. While you were waiting, where were you looking?
- ...
- Q. Looking straight ahead?
- A. Yes.
- Q. You weren't looking at any lights or anything?
- A. No.
- Q. What happened once you took that first step with your left foot after the light had changed and the pedestrians continued moving south?
- A. The minute I took that step, just like all of a sudden I see my feet going here (indicating). I am actually like this (indicating).
- Q. Your feet went out in front of you?
- A. Yes. It was like that step and I just went whoof (phonetic).
- ...
- Q. Did both your feet go out in front of you or just your left foot?
- A. I saw both feet. I was just looking at the sky.
- Q. Which foot slipped?
- A. The left foot.

Eventually, police were able to help Shala up off the sidewalk and took her into the Pret A Manger shop. Thereafter, Shala was taken by ambulance to the hospital. Shala did not recall ever looking at the sidewalk from the time of her accident until she left the area via ambulance. Nonetheless, Shala claims that snow and ice caused her to fall:

- Q. From the time of your accident until you left in the ambulance, did you ever see the sidewalk in the area where you fell? Did you ever look at it?
- A. No. I don't recall.
- Q. Do you know what caused you to fall?
- A. Yes.
- Q. What?
- A. The snow and the ice.
- Q. Did you ever see that snow and ice?
- A. I know that when I feel I could feel the coldness and the slipperiness and the snow underneath me and the slippery there. I could feel it with this hand (indicating).
- ...
- Q. You felt coldness, you said?
- A. Yeah.
- Q. And that's while you were on the ground before the police officers assisted you up?
- A. Exactly.
- Q. Could you describe this coldness?
- A. Like when you touch ice, you can feel slippery with your hand. You could feel it.
- Q. Other than coldness, any other way you can describe it?
- A. Slippery, icy, snowy. You could feel both.
- Q. Do you know how big that cold, slippery area was, if you know?
- A. All I know, I was on the ground. I wouldn't know the measurements of this thing.
- ...
- Q. But did you see it?
- A. Yeah, of course. You could see it. You could see the snow everywhere.
- Q. Can you describe what you saw?
- A. Snow and ice.
- Q. This is while you were lying on the ground?
- A. What else would cause me to fall?

The Board produced its resident manager, Vincent Conigliaro, who testified that prior to March 2017, the Board's employees cleared snow and ice on Eighth Avenue and 46th Street. Conigliaro further testified as to the procedures used to clear snow and ice from the sidewalk. A copy of Pret's lease has been provided to the court. Section 18.09 of the lease provides in relevant part as follows:

Tenant shall, at its sole cost and expense, keep the sidewalks in front of the demised premises and the curbs adjacent thereto free from snow, ice, dirt and rubbish and shall make all necessary repairs and replacements thereto to the extent caused by the acts of Tenant or its employees, customers or invitees.

As well, the Board, Halstead and the Condo have submitted a meteorological report to the court, wherein Alicia C. Wasula, Ph.D. of Shade Tree Meteorology, LLC opines that "although precipitation had ended at the incident site by 6:00 PM on March 14, storm impacts continued through the day on March 15 in the form of very cold temperatures and gusty winds. Storm impacts finally began to subside on March 16."

## DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a

trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court will first consider the parties' arguments as to plaintiffs' claims. 750 8<sup>th</sup> Ave argues that it cannot be held liable for Shala's accident pursuant to the New York City Sidewalk Law (NYC Admin. Code § 7-210) as the owner of a commercial condominium unit, citing *Araujo v. Mercer Sq. Owners Corp.*, 944 NYS.2d 126 (1st Dept 2012). In that case, the First Department stated: "[t]he LLC, as an owner of an individual unit in the building, is not an 'owner' for purposes of Administrative Code of the City of New York § 7-210; thus, it is not liable for injuries sustained as a result of defects in the sidewalk."

750 8<sup>th</sup> Ave further argues that it is entitled to summary judgment because it did not owe Shala a duty, nor did it cause or create the slippery condition which caused her accident as it did not remove snow and ice from the subject sidewalk.

Since it is undisputed that 750 8<sup>th</sup> Ave is not an owner for purpose of liability under the Sidewalk Law, and there is otherwise no dispute that 750 8<sup>th</sup> Ave did not owe Shala a duty nor cause or create the slippery condition, its motion dismissing plaintiffs' complaint against it is granted. Since that branch of the motion is granted, the court declines as moot the balance of the motion seeking alternative relief against Pret. The Condo's cross-motion for summary judgment dismissing plaintiffs' complaint against it is also granted without opposition.

Both Pret and the Board/Halstead argue that plaintiffs' complaint should be dismissed against them because Shala has failed to identify the cause of her accident with sufficient specificity. Plaintiffs' counsel argues tersely that "Plaintiff, however, was asked at her deposition if she knew what caused her to fall, and Plaintiff clearly stated 'the snow and the ice'".

There is an issue of fact as to what caused Shala to slip and fall which the court cannot resolve on this motion. While Shala's testimony is the sole basis on this record to find that she slipped due to snow and/or ice on the sidewalk abutting the building, her testimony is sufficient to raise a triable issue of fact. Contrary to the defendants' contention, Shala's testimony is sufficient for a factfinder to determine that a slippery condition due to snow and/or ice existed on the sidewalk which caused her to slip and fall. Shala clearly testified that although she didn't see the snow or ice she claims caused her to fall, she felt "coldness and the slipperiness and the snow underneath [her] and the slippery there." As for plaintiffs' request for the court to search the record, that request is denied. Shala's credibility must be assessed by a factfinder, which remains for trial.

Pret argues that it is entitled to summary judgment dismissing plaintiffs' claims against it because it is not liable under the Sidewalk Law and Conigliaro's testimony establishes that the Board assumed the duty to shovel, remove and clear the entire area sidewalk including the location of Shala's accident. Pret is correct, as there is no evidence on this record that Pret created the slippery condition nor did Pret otherwise owe Shala a duty of care to keep the subject sidewalk clear. Therefore, Pret's motion dismissing plaintiffs' complaint against it is granted.

Halstead and the Board's motion for summary judgment, however, must be denied. They argue that a storm was in progress due to inclement weather, conceding that no precipitation had fallen within four or (or more) of Shala's accident. Halstead and the Board, in essence, urge this court to widen the storm in progress rule, citing a number of cases from various courts of coordinate jurisdiction. However,

there is no precedent for the rule which Halstead and the Board urges the court to apply, which is that a defendant would be entitled to summary judgment as a matter of law if certain winter weather conditions were severe enough. This result, the court declines to reach. Rather, a factfinder should determine whether the defendants were negligent under all the circumstances, assuming *arguendo* that the defendants' meteorologist's report is admissible on this record.

Accordingly, the motion and cross-motions are granted to the extent that plaintiffs' claims against 750 8<sup>th</sup> Ave, Pret and the Condo are severed and dismissed. In light of this result, the court declines to consider the parties' arguments as to the crossclaims as moot.

## **CONCLUSION**

In accordance herewith, it is hereby

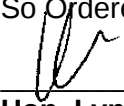
**ORDERED** the motion and cross-motions are granted to the extent that plaintiffs' claims against 750 8<sup>th</sup> Ave, Pret and the Condo are severed and dismissed and the Clerk is directed to enter judgment according; and it is further

**ORDERED** that the balance of the motion and cross-motions are otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 3/31/21  
New York, New York

So Ordered:

  
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**Hon. Lynn R. Kotler, J.S.C.**