Lara v Tuck-It-Away at 135th St. Inc.
2021 NY Slip Op 31780(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 156050/2016
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN**, ***Justice*** — **PART** **IAS MOTION 58EFM**

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DUVAL LARA,

Plaintiff,

- v -

TUCK-IT-AWAY AT 135TH STREET INC.,

Defendant.

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INDEX NO. 156050/2016

MOTION SEQ. NO. 003 and 004

DECISION + ORDER ON MOTION

TUCK-IT-AWAY AT 135TH STREET INC.,

Third-Party Plaintiff,

-against-

PEDIATRICS 2000 REAL ESTATE AT 135 LLC,

Third-Party Defendant.

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Third-Party
Index No. 596094/2019

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 148

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 149, 150, 151, 152

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In this negligence action commenced by plaintiff Duval Lara, third-party defendant Pediatrics 2000 Real Estate at 135 LLC f/k/a Pediatrics Real Estate at 185 LLC ("Pediatrics Real Estate") and defendant Pediatrics 2000 (II), P.C. ("Pediatrics 2000 [II])" move for an order (motion sequence 003), pursuant to CPLR 3212: a) granting Pediatrics Real Estate and Pediatrics 2000 (II) summary judgment dismissing all claims and cross claims against them with prejudice;

b) granting Pediatrics Real Estate summary judgment dismissing with prejudice the third-party claim against it; and c) and granting such other relief as this Court deems just and proper. Plaintiff and defendant/third-party plaintiff Tuck-It-Away at 135th Street Inc. ("TIA 135") oppose the motion.

In motion sequence 004, plaintiff moves to renew his motion for summary judgment on liability as against TIA 135. Doc. 128 at 1-2. Upon renewal, plaintiff seeks summary judgment as against TIA 135 as a matter of law, along with such other relief that this Court deems proper. Doc. 128 at 2. TIA 135 opposes the motion.

After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On or about October 17, 2007, nonparty Tuck-It-Away, LP ("TIA LP"), as "owner", leased to Pediatrics Real Estate, as tenant, certain space located at 3320-3332 Broadway in Manhattan ("the premises" or "the building") for use as a medical office. Doc. 97. Paragraph 4 of the lease required TIA LP to "maintain and repair the public portions of the building" and required Pediatrics Real Estate to "take good care" of the sidewalks adjacent to the premises and "make all non-structural repairs thereto as and when needed to preserve them in good working order and condition." Doc. 97.

Paragraph 6 of the lease provided that:

> Except as provided in Article 29 hereof [which addresses sprinklers], nothing herein shall require [Pediatrics Real Estate] to make structural repairs or alterations unless [Pediatrics Real Estate] by its manner of use of the demises premises or method of operation therein, violated any such laws, ordinances, rules, regulations or requirements with respect thereto.

Doc. 97.

Paragraph 30 of the lease provided that:

> if the demised premises are situated on the street floor, [Pediatrics Real Estate] shall, at [its] own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish."

Doc. 97.

Paragraph 2 of the "Rules and Regulations" set forth in the lease required that, if the premises were on the ground floor, then Pediatrics Real Estate was required to "keep the sidewalks and curb in front of said premises clean and free from ice, snow, etc." Doc. 97.

Paragraph 47(A)(1) of the lease rider required Pediatrics Real Estate to procure general liability insurance in the amount of $5 million per occurrence, and to name TIA 135 and TIA LP as additional insureds. Doc. 97.

Paragraph 47(B)(5) of the lease rider required Pediatrics Real Estate to indemnify and hold harmless TIA 135 from any claims arising from its failure to comply with the lease unless they were attributable to the gross negligence or willful misconduct of TIA 135. Doc. 97.

Paragraph 53(C) of the lease rider provided that Pediatrics Real Estate was required to "keep the sidewalks and curbs free from dirt, rubbish, snow and ice." Doc. 97.

Paragraph 59 of the lease rider provided that "[i]n the event of any inconsistency between the provisions of this rider and the provisions of the printed form of this [l]ease, the provisions of this rider shall prevail." Doc. 97.

On May 19, 2016, plaintiff allegedly tripped and fell on a defective sidewalk at the intersection of West 135th Street and Broadway which was adjacent to the premises. Docs. 1, 86. Plaintiff then commenced the captioned action, alleging in his complaint, filed July 20, 2016, that TIA 135 was negligent in its ownership, operation, management, and control of the premises. Doc. 1.

TIA 135 joined issue by its answer filed November 11, 2016, admitting that it owned the premises and asserting several affirmative defenses. Doc. 7.

In his bill of particulars dated September 20, 2017, plaintiff alleged that he was injured when he tripped and fell on a broken sidewalk located in front of the premises. Doc. 96.

Plaintiff appeared for deposition in September 2018 and testified that, on May 19, 2016, he was injured when he tripped and fell on a hole in the sidewalk while running at the intersection of 135th Street and Broadway in Manhattan. Doc. 93 at 26-28, 45-46. He had never been on the sidewalk at that location prior to the accident. Doc. 93 at 28. Plaintiff circled the location of his fall in photographs marked at his deposition and testified that the photographs accurately represented the condition of the area on the day of the occurrence. Doc. 93 at 124, 130-131.

On May 2, 2019, plaintiff, incorrectly named as "Lara Duval", commenced an action styled *Lara Duval v Tuck-It-Away of Manhattan, Inc., All City Group Ltd., Martinez Gallery, Inc., Pediatrics 2000 (II), P.C. ("Pediatrics 2000(II)", Pediatrics 2000@135 Street PLLC, Pediatrics 2000 Foundation Inc., Pediatrics 2000 III PLLC, Pediatrics 2000 PM PLLC, Pediatrics 2000 Real Estate@135 LLC, and Pediatrics 2000 Real Estate LLC* ("the 2019 action"), pending in this Court under Index Number 154560/19. Doc. 1 filed under Ind. No. 154560/19. In his complaint in the 2019 action, plaintiff alleged that he was injured as a result of the negligence of the defendants named therein at the same time and place, and in the same manner, as he had alleged in the complaint in the captioned action. Doc. 1 filed under Ind. No. 154560/19.

Avi Aarons appeared for a deposition on behalf of Tuck-It-Away Associates, LTD ("TIA LTD") in May 2019.[1] Doc. 99. He testified that TIA LP was the parent company of several individual entities which owned self-storage facilities. Doc. 99 at 10-12. According to Aarons, TIA LP, which was listed as landlord on the lease, rented the building, known as 3330 and 3332 Broadway, from its owner, TIA 135, and operated a self-storage business at the premises. Doc. 99 at 17-20, 40. He had no familiarity with any portions of the lease relating to the care of the sidewalk at the premises but maintained that none of the personnel employed by TIA LP at the site had any responsibility for maintaining the same. Doc. 99 at 24.

Aarons admitted that Fred Zarka, a field manager for TIA LP, visited the premises prior to the incident and that he expected Zarka to report to him if he saw "anything wrong", including "a defect or a crack or a hole in the sidewalk" since such a condition could have been a tripping hazard. Doc. 99 at 35-38. He further stated that he looked for sidewalk defects when walking outside of the building and that, had such a hole or other defect existed, it was TIA LP's responsibility to repair it. Doc. 99 at 55-56. If a small hole needed to be repaired, TIA LP would use a general contractor which worked with its maintenance department. Doc. 99 at 58. If a more substantial repair was needed, TIA LP would pay a larger company to do the work. Doc. 99 at 58-59.

At his deposition, Aarons was shown a photograph of the sidewalk marked as Exhibit 4. Doc. 99 at 71. Although he could not recall whether he saw the sidewalk as it appeared in that photograph, he stated that, had he seen it the sidewalk in an unsafe condition such as that depicted therein, he would have reported it to his boss because it presented "a potential trip and

[1] At his deposition, Aarons was not asked about the relationship between Tuck-It-Away Associates, LTD. And TIA 135 and/or TIA LP.

fall hazard." Doc. 99 at 71-72.[2] However, Aarons did not know whether the sidewalk shown in the photograph accurately depicted how it looked on the day of the alleged incident. Doc. 99 at 75, 90. Nor did he know whether any complaints were made about the sidewalk prior to the incident or whether any prior accidents occurred at that location. Doc. 99 at 78-79.

On July 2, 2019, plaintiff moved (motion sequence 001) for summary judgment on liability as against TIA 135 and TIA 135 cross-moved to dismiss the complaint. Docs. 20, 39.

Plaintiff filed a note of issue and certificate of readiness on September 4, 2019. Doc. 36.

On December 16, 2019, TIA 135 filed a third-party complaint against Pediatrics Real Estate seeking contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. Doc. 61. Pediatrics Real Estate joined issue in the third-party action by its third-party answer filed August 31, 2020. Doc. 69. It denied all substantive allegations of wrongdoing, including a specific denial that it owned the premises, asserted various affirmative defenses, and counterclaimed against TIA 135 for common-law indemnification and contribution. Doc. 69.

In her fourth supplemental bill of particulars, plaintiff claimed that she was injured "on the sidewalk abutting the premises known as 3320-3332 Broadway a/k/a 535-539 West 134th Street a/k/a 536-542 West 135th Street [in Manhattan] and more specifically on the sidewalk located on West 135th Street. Doc. 96.

On January 21, 2020, TIA 135 withdrew its cross motion for summary judgment and this Court denied plaintiff's motion for summary judgment. Docs. 66, 109. In denying plaintiff's

[2] Aarons later testified that he saw "[s]ections of the sidewalk in disrepair" prior to the date of the incident and reported the condition to his boss, although he could not elaborate on precisely what was wrong with the sidewalk at that time. Doc. 99 at 84-87.

motion, this Court reasoned that issues of fact exist regarding whether the sidewalk was dangerous and, if so, whether it caused the plaintiff's accident. Doc. 109.

On September 20, 2020, plaintiff discontinued his claims against Pediatrics 2000@135 Street, PLLC, Pediatrics 2000 Foundation, Inc., Pediatrics 2000 PM PLLC, and All City Group Ltd., which had been named as defendants in the 2019 action. Doc. 83.

On November 23, 2020, TIA 135 denied the allegations against it set forth in Pediatrics Real Estate's answer. Doc. 84.

Pursuant to stipulations filed December 2 and 9, 2020 (Docs. 92 and 107, respectively), the parties agreed to consolidate the captioned action with the 2019 action. Although the stipulation filed on NYSCEF on December 9, 2020 bore a notation stating "request to so order", it was not sent to chambers and, thus, was not so-ordered until May 19, 2021, when the instant order was being drafted. Docs. 107, 154-155. [3]

Pediatrics Real Estate and Pediatrics 2000 (II) now move (motion sequence 003), pursuant to CPLR 3212, for summary judgment: 1) dismissing all claims and cross claims against them; granting Pediatrics Real Estate summary judgment dismissing the third-party claim against it; and 3) for such other relief as this Court deems just and proper. Doc. 85.[4]

In support of its motion, Pediatrics 2000 (II) argues that the claims against them must be dismissed since TIA had a nondelegable duty pursuant to New York City Administrative Code §7-210 to maintain the sidewalk, that it had no duty to make structural repairs thereto, and that it had no duty to plaintiff. Doc. 86 at 3, 11-12. Specifically, Pediatrics 2000 (II) asserts that the

[3] A stipulation to consolidate the 2016 and 2019 actions was also filed in the related action and it, too, contained a notation requesting that it be so-ordered, although it was not until May 19, 2021. Docs. 70, 79-80 filed under Ind. No. 154560/19.

[4] An identical motion was made in the 2019 action under motion sequence 002. Doc. 48 filed under Ind. No. 154560/19. Since the motion is being decided herein, motion sequence 002 filed in the 2019 action is denied as moot. Doc. 81 filed under Ind. No. 154560/19.

claims against it must be dismissed since it was not a party to the lease, it did not own the premises, and it was never asked to inspect or repair the premises. Doc. 86 at 12-13. It further maintains that Aarons even admitted at his deposition that TIA 135 was responsible for inspecting, maintaining and repairing the sidewalk for the type of defect which injured plaintiff and that he was aware that the sidewalk was dangerous prior to the occurrence. Doc. 86 at 3.

Pediatrics Real Estate also argues that it is entitled to summary judgment because TIA 135 had a nondelegable duty to maintain and repair the sidewalk. Doc. 88. It further asserts that, since plaintiff's own expert, Irvin S. Lowenstein, formerly the Deputy Director/Director of Sidewalk Management for the New York City Department of Transportation, opines that the sidewalk had a substantial defect which took months or years to develop, such was a structural defect which it was not required to repair. Docs. 87, 102.

In support of their motion, Pediatrics Real Estate and Pediatrics 2000 (II) submit the affidavit of Juan Tapia Mendoza, M.D., the founder, CEO, and President of Pediatrics 2000 (II) and sole Managing member of Pediatrics Real Estate. Doc. 98. Dr. Mendoza asserts, inter alia, that Pediatrics Real Estate was formerly known as Pediatrics 2000 Real Estate @ 185 LLC, the entity named as lessee on the lease. Doc. 98. He further represents that neither Pediatrics Real Estate nor Pediatrics 2000 (II) owned or managed the premises and had no control over the structural condition of the sidewalk. Doc. 98. Additionally, he states that Pediatrics 2000 (II), which operates a medical office at the premises, is not a party to the lease and thus had no contractual obligation to maintain the sidewalk. Doc. 98. Further, Dr. Mendoza maintains that "nothing in the lease requires [Pediatrics Real Estate] to maintain or repair the sidewalks for structural conditions and/or otherwise fix broken sidewalk flags." Doc. 98.

In opposition to the motion, plaintiff does not address any of the specific arguments made by Pediatrics Real Estate and Pediatrics 2000 (II) but merely sets forth the standard of review on a motion for summary judgment and asserts that any arguments made by the movants for the first time in their reply papers cannot be considered. Doc. 108.

TIA 135 argues that the motion must be denied because it is an out-of-possession landlord and Pediatrics Real Estate agreed: 1) to repair the sidewalk pursuant to paragraph 30 of the lease; 2) to procure general liability insurance in the amount of $5 million, naming TIA 135 as an additional insured on its policy; and 3) to indemnify TIA 135 for any failure on its part to comply with the lease. Doc. 113. It further maintains that the motion is premature since depositions must be held to determine which party was responsible for the maintenance of the sidewalk. Doc. 113. Additionally, relying on *Xiang Fu He v Troon Mgmt., Inc*. 34 NY3d 167 (2019), it asserts that the motion must be denied since it is entitled to seek indemnification from Pediatrics Real Estate. Doc. 113.

In reply, Pediatrics Real Estate and Pediatrics 2000 (II) acknowledge that paragraph 30 of the pre-printed lease requires a tenant on street level to "make all repairs and replacements to the sidewalks and curbs adjacent [to the premises]" but insists that paragraph 53(C) of the lease rider, which requires Pediatrics Real Estate to "keep the sidewalks and curbs free from dirt, rubbish, snow and ice" takes precedence over the pre-printed provision in accordance with paragraph 59 of the lease rider which, as noted above, provides that, in the event of an inconsistency between the pre-printed form and the rider, the rider will prevail. Doc. 148. They further assert that sidewalk repairs are structural as a matter of law and that the repairs to the subject sidewalk were not their responsibility in light of paragraph 53(C) of the lease rider. Doc. 148. Additionally, Pediatrics Real Estate and Pediatrics 2000 (II) argue that they had no duty to

the plaintiff and that TIA 135's claim for indemnification must be dismissed given that they had no duty to make structural repairs. Doc. 148.

Plaintiff moves (motion sequence 004), pursuant to CPLR 2221(e), for leave to renew his motion for summary judgment on the issue of liability against TIA 135 and, upon granting such leave, awarding him summary judgment. Doc. 128. In support of the motion, plaintiff argues that the application "is based on what is tantamount to a change in the law that was not available at the time [his] [m]otion for [s]ummary [j]udgment was considered by this Court." Doc. 128. The new legal authority relied on by plaintiff is *Tropper v Henry St. Settlement*, 190 AD3d 623 (1st Dept 2021), in which the Appellate Division, First Department reversed the dismissal of a complaint and granted summary judgment on liability to plaintiff based on the fact that the defendant landowner had a duty, pursuant to Administrative Code §7-210, to maintain the sidewalk adjoining its premises. Plaintiff contends that *Tropper* "would in all likelihood have changed the outcome of [his] prior motion." Doc. 128. He also maintains, in effect, that this Court erred in: 1) denying the prior motion despite acknowledging that TIA 135 had notice of the alleged condition; and 2) finding that an issue of fact existed regarding whether the sidewalk was dangerous and whether plaintiff was injured by such danger. Doc. 128.

In opposition, TIA 135 argues that plaintiff's motion must be denied since he has failed to present any new facts which would change the prior determination. Doc. 150. TIA 135 also argues that *Tropper* does not warrant the granting of the motion since the facts therein are distinguishable. Doc. 150. Specifically, asserts plaintiff, the defendant in *Tropper*, unlike TIA 135, was issued a notice of violation by the City of New York to repair the sidewalk adjoining its premises prior to the accident but failed to do so.

In reply, plaintiff argues, inter alia, that its motion for renewal should be granted and that it is entitled to summary judgment based, inter alia, on Aarons' testimony that he was aware of the sidewalk defect prior to the alleged incident. Doc. 151.

LEGAL CONCLUSIONS

Motion for Summary Judgment By Pediatrics Real Estate and Pediatrics 2000 (II) (Motion Sequence 003)

It is well settled that a party moving for 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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]) (internal quotation marks and citation omitted). If the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact (*Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The Appellate Division, First Department has held that repairs to a public sidewalk, such as that herein, are considered structural, and that commercial tenants have no obligation to maintain such sidewalks unless required to do so by a lease (*See Cucinotta v City of New York*, 68 AD3d 682 (1st Dept 2009).

Pediatrics Real Estate

Pediatrics Real Estate has established its prima facie entitlement to summary judgment by submitting the affidavit of Dr. Mendoza, in which he states, inter alia, that the said entity was

that which entered into the lease with TIA 135. It also submits paragraph 4 of the pre-printed lease (requiring it to keep the sidewalk in good condition and to make all non-structural repairs thereto) and paragraph 6 of the pre-printed lease (providing that Pediatrics Real Estate was not required to make structural repairs unless it was in violation of law).

In opposition, TIA 135 raises an issue of fact by submitting paragraph 30 of the pre-printed lease, which was conspicuously, and perhaps disingenuously, disregarded by Pediatrics Real Estate in its motion papers. As noted above, paragraph 30 clearly requires Pediatrics Real Estate, as a ground floor tenant,[5] to "make all repairs and replacements to the sidewalks and curbs adjacent thereto." Although Pediatrics Real Estate maintains that paragraph 53(C) of the lease rider, which required it to "keep the sidewalks and curbs free from dirt, rubbish, snow and ice", conflicts with paragraph 30, and therefore controls over paragraphs 4 and 6, this contention is without merit (*cf. Negron v Marco Realty Assoc., L.P.*, 197 AD3d 511 [1st Dept 2020]). Since it is evident that an obligation to repair and replace a sidewalk is distinct from an obligation to keep a sidewalk clean and clear of slipping hazards, the lease rider does not vitiate the obligation of Pediatrics Real Estate to maintain the sidewalk. Given the conflicting lease provisions, extrinsic evidence will need to be introduced at trial to determine whether Pediatrics Real Estate was in fact obligated to maintain the sidewalk (*See Burger King Corp. v 111 Cedar St. Co.*, 188 AD2d 379 [1st Dept 1992]).

Nor is there merit to Pediatrics Real Estate's contention that it is entitled to summary judgment because TIA 135 had a nondelegable duty to maintain the sidewalk. Pediatrics Real Estate correctly states that Administrative Code §7-210 imposes a nondelegable duty on a landowner to maintain adjoining sidewalks (*See Xiang Fu He v Troon Mgmt., Inc.*, 34 NY3d

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[5] There is no dispute that Pediatrics Real Estate was a ground floor tenant. Indeed, a photograph of the premises annexed to the lease as Exhibit B confirms this fact. Doc. 97.

167, 176 [2019]) and that it had no duty to plaintiff (*See Collado v Cruz*, 81 AD3d 542 [1st Dept 2011] [citation omitted] [lease provision requiring tenant to repair sidewalk does not render tenant liable to a third-party such as plaintiff]).[6] Thus, the plaintiff's direct claims against Pediatrics Real Estate are dismissed. However, since Pediatrics Real Estate "may be held liable to [TIA 135] for damages resulting from a violation of paragraph 30 of the lease" (*Collado*, 81 AD3d at 542), it is not entitled to summary judgment dismissing the third-party claims by TIA 135 (*see also Wahl v JCNYC, LLC*, 133 AD3d 552, 553 [1st Dept 2015]).[7]

Moreover, Pediatric Real Estate's motion must be denied since, if it is deemed to have breached the lease by failing to repair the sidewalk, it may be required to indemnify TIA 135 pursuant to paragraph 47(B)(5) of the lease rider for any damages it is obligated to pay plaintiff.

Pediatrics 2000(II)

Pediatrics 2000(II) established its prima facie entitlement to summary judgment by submitting, inter alia, the lease and the affidavit of Dr. Mendoza, who represents, inter alia, that it: operated a medical office at the premises, was not a party to the lease, did not own or manage the premises, and had no control over the structural condition of the sidewalk. Doc. 98. In opposition, neither the plaintiff nor TIA 135 raise an issue of material fact sufficient to deny the motion. Although TIA 135 maintains that the motion is premature because Dr. Mendoza and Hugo Martinez, who allegedly operated a gallery at the premises, "were involved in the subject location at the time of plaintiff's accident" (Doc. 113 at par. 29) and have not been deposed, it does not argue that those individuals were in any way responsible for, and/or had any knowledge

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[6] This Court notes, however, that plaintiff has not asserted any direct claims against the movants.

[7] As noted previously, paragraph 47(B)(5) of the lease rider required Pediatrics Real Estate to indemnify TIA 135 for any claims arising from any breach of the lease.

regarding, the maintenance and/or repair of the sidewalk and, thus, this argument fails to defeat Pediatrics 2000(II)'s motion (See CPLR 3212[f]).

Plaintiff's Motion To Renew (Motion Sequence 004)

CPLR 2221(e) provides that a motion for leave to renew:

> 1. shall be identified specifically as such;
>
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

The decision whether to grant a motion for leave to renew is one to be made in the discretion of the court (*See Wang v LaFrieda*, 189 AD3d 732 [1st Dept 2020]). Here, by asserting that his motion is based on "what is tantamount to a change in the law", he effectively concedes his failure to demonstrate that there "*has been*" a change in the law, as required by CPLR 2221(e)(2). Similarly, although plaintiff maintains that *Tropper* "would in all likelihood have changed the outcome of [his] prior motion", this also fails to meet the requirement that he establish that there was a change in the law which "*would change*" the prior outcome, as required by paragraph (e)(2).

Moreover, in *Tropper*, the First Department relied on the Administrative Code in determining that defendant was obligated to repair a sidewalk, as well as on case law in rejecting defendant's claims that the defect which injured defendant was trivial and open and obvious. However, since neither the Administrative Code nor the cases cited represent changes in the law, this Court is constrained to deny the motion (*See Philips Intl. Invs., LLC v Pektor*, 117 A.D.3d 1 [1st Dep't 2014] [where appellate decision merely restated and added clarity to existing law, rather than changing the law, it was not a sufficient basis for renewal]).

The parties' remaining contentions are either without merit or need not be considered in light of the findings above.

Accordingly, it is hereby:

ORDERED that the branch of the motion for summary judgment by third-party defendant Pediatrics 2000 Real Estate at 135 LLC f/k/a Pediatrics Real Estate at 185 LLC and defendant Pediatrics 2000 (II), P.C. (motion sequence 003) is granted to the extent of dismissing all claims against Pediatrics 2000 (II), P.C., and is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion for renewal (motion sequence 004) is denied in all respects; and it is further

ORDERED that the above-captioned action is consolidated in this Court with *Lara Duval v Tuck-It-Away of Manhattan, Inc., All City Group, Ltd., Martinez Gallery, Inc., Pediatrics 2000 (II), P.C., Pediatrics 2000 @ 135 Street, PLLC, Pediatrics 2000 Foundation, Inc., Pediatrics 2000 III PLLC, Pediatrics 2000 PM PLLC, Pediatrics 2000 Real Estate@135 LLC, and Pediatrics 2000 Real Estate LLC*, pending in this Court under Index Number 154560/19, pursuant to the so-ordered stipulations filed in the above-captioned action on May 20, 2021 (Docs. 154-155) and pursuant to the stipulations filed as Documents 79-80 under Index Number 154560/19 on May 20, 2021; and it is further

ORDERED that the consolidation shall take place under Index No. 156050/16 and the consolidated action shall bear the following caption:

DUVAL LARA,

Plaintiff,

-against-

TUCK-IT-AWAY AT 135th STREET, INC., TUCK-IT-AWAY OF MANHATTAN, INC., ALL CITY GROUP, LTD., MARTINEZ GALLERY, INC., PEDIATRICS 2000(II), P.C., PEDIATRICS 2000 @ 135 STREET PLLC, PEDIATRICS 2000 FOUNDATION, INC., PEDIATRICS 2000 PM PLLC, and PEDIATRICS 2000 REAL ESTATE @ 135 LLC,

Defendants.

TUCK-IT AWAY AT 135th STREET, INC.,

Third-Party Plaintiff,

-against-

PEDIATRICS 2000 REAL ESTATE AT 135 LLC f/k/a PEDIATRICS 2000 REAL ESTATE AT 185 LLC,

Third-Party Defendant.

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and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark its records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

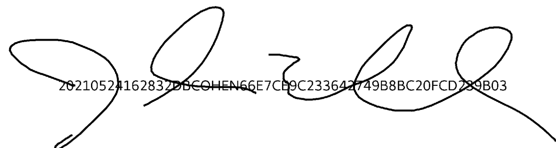
ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in

accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol.*



5/24/2021		DAVID BENJAMIN COHEN, J.S.C.					
DATE							
CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE