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

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

---x

LUIS HERRERA,

Plaintiff(s),

-against-

HIGHGATE HOTELS, L.P., APPLE HOSPITALITY REIT, INC. & SOL GOLDMAN INVESTMENTS, LLC,

Defendant(s).

---x

APPLE HOSPITALITY REIT, INC. & SOL GOLDMAN INVESTMENTS, LLC,

Third-Party Plaintiff(s),

-against-

SUBWAY REAL ESTATE CORP.,

Third-Party Defendant(s),

---x

SUBWAY REAL ESTATE CORP.,

Second Third-Party Plaintiff(s),

-against-

BIDHAN BISWAS AND NEXUS BDS, INC.,

Second Third-Party Defendant(s).

---x

INDEX NO.: 151096/2018

MOTION DATE: 8/3/21

MOTION SEQ. NO(s).: 1

DECISION & ORDER ON MOTION

Defendants and third-party plaintiffs move for summary judgment, dismissing plaintiff's complaint, and for summary judgment on their claims for contractual indemnification against third-party defendant and second third-party defendants.

Plaintiff cross-move for leave to amend the complaint to name third-party defendant and second third-party defendants as direct defendants and deeming the claims against them as interposed at the time the claims in the third-party complaints were interposed for purposes of the statute of limitations.

Third-Party Defendant and second third-party plaintiff move for summary judgment against second third-party defendant Bidhan Biswas on the claims for contractual indemnification, breach of contract, and an award of counsel fees.

The following papers filed on NYSCEF were read on the motion:	**Doc. Nos.**
Notice of Motion, Affirmation, Affidavits (2), and Exhibits (19)	70-92
Affirmation in Opposition and Exhibit	102-103
Affirmation in Opposition and Exhibits (2)	111-113
Affirmation in Partial Opposition	120
Affirmation in Reply	130
Affirmation in Reply	131
Notice of Cross-Motion, Affirmation, and Exhibits (6)	94-100
Affirmation in Opposition and Exhibits (4)	106-110
Affirmation in Opposition	121
Affirmation in Reply	122
Affirmation in Reply	125
Notice of Cross-Motion, Affirmation, Exs (3), Statement of Material Facts	114-119
Affirmation in Opposition and Statement of Material Facts	128-129
Affirmation in Reply and Affidavit	132-133

By way of background, on March 3, 2017, plaintiff was making a delivery to a certain premises known as 692 Lexington Avenue, New York, New York when he allegedly slipped and fell down stairs (Stairs) leading from the first floor to the basement. On February 5, 2018, plaintiff commenced this action against defendants Highgate Hotels, L.P. (Highgate), Apple Hospitality Reit, Inc. (Apple), and Sol Goldman Investments, LLC (Goldman). On April 24, 2018, Apple and Goldman commenced a third-party action against third-party defendant Subway Real Estate Corp. (Subway). In the wherefore clause, Apple and Goldman demand judgment against Subway "for the amount of any judgment which may be recovered by plaintiff, together with costs, disbursements and counsels' fees." On January 23, 2019, Subway commenced a second third-party action against Bidhan Biswas (Biswas) and Nexus Bds, Inc. (Nexus). In the wherefore clause, Subway demands judgment against Biswas and Nexus "for any judgment that may be rendered in favor of plaintiff, as against [Subway], or for that portion thereof caused or contributed to by [Biswas and Nexus], for the happening of the subject incident, including attorneys' fees, expenses of investigation/litigation and the costs and disbursements of the underlying action and this second third-party action." Now, Highgate, Apple, and

Goldman move for summary judgment as against plaintiff and Apple and Goldman move for summary judgment as against Subway. Plaintiff cross-moves to, among other things, make Subway, Biswas, and Nexus direct defendants. Subway cross-moves for summary judgment against Biswas.

On a motion for summary judgment, the Court is to determine whether genuine issues of material fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant makes a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any genuine issue of material fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Upon such a showing, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a genuine issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court addresses the motions in order.

The Motion of Highgate, Apple, and Goldman

In support of the motion, defendants proffer, among other things, affidavits of Kathleen Weeks, an employee of Goldman, and Matthew Rash, an employee of Apple. Ms. Weeks avers that Goldman is the owner of certain real property known as 130 East 57th Street, New York, New York, which consists of a 17-story hotel (with an address of 130 East 57th Street) and several ground floor commercial spaces, including the premises known as 692 Lexington Avenue (Premises). Ms. Weeks also avers that the Premises was leased to Apple on the date of the accident. Mr. Rash avers that Highgate managed the hotel and did not have any responsibility for the Premises. Mr. Rash also avers that, on the date of the accident, the Premises was leased to Subway. Mr. Rash further avers that, pursuant to the parties' lease (Lease), Subway had exclusive possession of the Premises and was responsible for the day-to-day maintenance and cleaning. Defendants note that the Lease provides, among other things, that:

> "Tenant will indemnify and save Owner harmless from and against all damages, liabilities, claims, costs and expenses, including reasonable attorney's fees, arising out of the use of the Demised Premises or any work or thing done, or any condition created by Tenant or its employees, agents or contractors whether or not caused by negligence or breach of an obligation by Tenant. The foregoing indemnification shall not include the negligence or wilful misconduct of Owner, its agents, contractors or invitees."

Defendants also proffer the deposition testimony of Jennifer Jaekle, who testified on behalf of Subway. Ms. Jaekle testified that Subway had sublet (Sublease) the Premises

to Biswas and that the Sublease provides, among other things, that Biswas agreed to perform and observe all of Subway's obligations under the Lease, including the indemnity and insurance procurement obligations. Defendants further proffer the deposition testimony of Shyamol Kar, who testified on behalf Biswas and Nexus. Mr. Kar testified that he is employed as a manager of Nexus, which is the owner of a Subway franchise, operating out of the Premises. Mr. Kar testified that there was no set schedule for cleaning the Stairs and that it was simply done on an as-needed basis. Mr. Kar also testified that he had never received any complaints about the Stairs.

First, defendants contend that Highgate did not have any interest in the Premises and, as such, is entitled to summary judgment as to the complaint and all crossclaims. Second, defendants contend that Apple and Goldman, as out-of-possession landlords, did not owe any duty to plaintiff and, as such, are entitled to summary judgment as to the complaint and all crossclaims. Third, regardless of the foregoing, defendants contend that they did not have any notice of the subject condition on the Stairs, which plaintiff testified was an oily substance. Fourth, defendants contend that, based on the plain language of the Lease and the Sublease, they are entitled to summary judgment on their claims for contractual indemnification, including attorney's fees.

Initially, the Court addresses defendants' motion for summary judgment as to plaintiff's claim. Defendants have made a *prima facie* showing vis-à-vis plaintiff's claim against them by proffering sufficient evidence to demonstrate that they had no contractual or statutory obligation to address any transitory conditions on the stairs in the Premises (*see Johnson v Urena Serv. Ctr.*, 227 AD2d 325 [1st Dept 1996]). Specifically, the Lease establishes that, on the date of plaintiff's alleged accident, defendants were out-of-possession and bore no responsibility for the day-to-day maintenance and cleaning of the Premises. As such, whether defendants had notice of the subject condition is immaterial (*see Ortiz v CEMD El. Corp.*, 123 AD3d 463, 463 [1st Dept 2014]). As such, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a genuine issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, plaintiff notes that the lease between Goldman and Apple provides that Apple shall take good care of the building, inside and outside. Plaintiff also notes that the Lease provides that Apple has the right to reenter the Premises to make repairs, replacements, and improvements. Plaintiff asserts that this contractual language raises a material issue of fact as to whether Goldman and Apple were completely out of possession landlords/owners and did not have an ongoing duty to maintain the Premises. Plaintiff notes that Mr. Kar, the manager of the Subway store, testified that a ceiling leak into the Subway store resulted in a hotel supervisor coming to the store to take care of the damage. Based hereon, plaintiff contends that material issues of fact remain.

Plaintiff has failed to raise a material issue of fact. Apple and Goldman sufficiently demonstrated their status of out-of-possession landlord/owner. That Apple was obligated to take good care of the building in its lease with Goldman and that Apple had a limited right to reenter the Premises under the Lease does not raise a material issue of fact as to whether Apple and Goldman had a duty to perform the day-to-day maintenance and cleaning.

Next, the Court addresses the motion of Apple and Goldman for summary judgment on their claims for contractual indemnification. As noted above, Apple and Goldman commenced the third-party action on April 24, 2018 with the filing of a third-party summons and complaint. In that pleading, Apple and Goldman set forth various claims against Subway. As evidenced by the wherefore clause, each claim is contingent upon plaintiff receiving some recovery or obtaining a judgment. With the dismissal of plaintiff's claims, each of the claims of Apple and Goldman against Subway would thus be rendered moot.

Plaintiff's Cross-Motion

CPLR 3025 (b) provides in relevant part that "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Here, plaintiff's proposed amended pleading does not clearly show the changes or additions to be made.

Subway's Cross-Motion

In support of its motion, Subway proffers, among other things, the Lease, the Sublease, and the Franchise Agreement under which, Subway contends, it is entitled to contractual indemnification and breach of contract due to second third-party defendants' failure to procure insurance.

As noted above, Subway commenced the second third-party action on January 23, 2019 with the filing of a third-party summons and complaint. In that pleading, Subway set forth various claims against Biswas and Nexus. As evidenced by the wherefore clause, each claim is contingent upon plaintiff receiving some recovery or obtaining a judgment. With the dismissal of plaintiff's claims, each of Subway's claims against Biswas and Nexus would thus be rendered moot.

Conclusion

To the extent not specifically addressed herein, the Court finds the remaining arguments to be without merit. Based on the foregoing, it is hereby

ORDERED that the motion of Highgate, Apple, and Goldman is GRANTED TO THE EXTENT as set forth above; and it is further

ORDERED that the cross-motion of plaintiff is DENIED; and it is further

ORDERED that the cross-motion of Subway is DENIED.

Dated: New York, New York
April 4, 2021

HON. LEWIS J. LUBELL, J.S.C.

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