STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MARY JUDE CRIBBS AND JAMES CLINTON CRIBBS, III,

Plaintiffs,

-against-

CORPORATE WOODS 11 COMPANY, L.P., CORPORATE WOODS 11 CO., L.P., CORPORATE WOODS, LLC, CORPORATE WOODS PARTNERS, PICOTTE REAL ESTATE, INC., PICOTTE MANAGEMENT COMPANY, INC., PICOTTE DEVELOPMENT COMPANY, L.P., PICOTTE ASSOCIATES, LLC, PICOTTE COMPANIES, UNISTRESS CORP., GILBANE, INC., GILBANE BUILDING COMPANY, AND GILBANE DEVELOPMENT COMPANY,

Defendants.

DECISION AND ORDER

Index No. 904481-16

UNISTRESS CORPORATION,

Third Party Plaintiff,

-against-

PRECAST SERVICES, INC.,

Third Party Defendant.

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

LAFAVE, WEIN & FRAMENT
Paul H. Wein, Esq.
Attorneys for Plaintiffs
2400 Western Avenue
Guilderland, New York 12084

MANSON & MCCARTHY
David B. Manson, Esq.
Attorneys for Corporate Woods and Picotte Defendants
90 Crystal Run Road, Suite 405
Middletown, New York 10941

LAW OFFICES OF JOHN WALLACE
Norah M. Murphy, Esq.
Attorneys for Unistress Corp.
1 Park Place, Suite 402
Albany, New York 12205

COZEN O'CONNOR
Vincent P. Pozzuto, Esq.
Attorneys for Gilbane Defendants
3 WTC
175 Greenwich Street, 55th Floor
New York, New York 10007

TRAUB LIEBERMAN STRAUS & SHREWSBERRY
Denis M. Farrell, Esq.
Attorneys for Precast Services Inc.
27 Siemon Company Drive
Watertown, Connecticut 06792

Hartman, J.

This negligence action arises out of an incident that occurred on August 27, 2013 in the parking garage owned by defendant Corporate Woods 11 Co., L.P. Plaintiff Mary Jude Cribbs (hereinafter plaintiff) alleges that she was injured when her foot caught in the expansion joint of the upper deck of the parking garage, causing her to trip and fall.

Defendants Gilbane, Inc., Gilbane Building Company, and Gilbane Development Company (hereinafter referred to collectively as Gilbane) move for summary judgment dismissing plaintiffs' complaint and all cross-claims. Defendant/third-party plaintiff Unistress Corporation (hereinafter Unistress) moves for summary judgment dismissing plaintiffs' complaint and all cross-claims. Third-party defendant Precast Services, Inc. (hereinafter Precast) moves for summary judgment dismissing the third-party complaint. Plaintiffs cross-move for summary judgment against Unistress, Gilbane, and defendants Corporate Woods 11 Company, L.P. and Picotte Management Company, Inc. (hereinafter referred to collectively as Corporate Woods/Picotte).

For the reasons that follow, Gilbane's motion is granted, Unistress' motion is denied, Precast's motion is granted, and plaintiffs' cross motion is denied.

Background

Plaintiff works as a senior investigator for Empire Blue Cross Blue Shield in the commercial office building located at 11 Corporate Woods Boulevard in Albany, New York. The building and its attached parking garage are owned by defendant Corporate Woods 11, L.P. In or about 2011, Corporate Woods 11, L.P. decided for safety reasons to replace the upper deck of the parking garage. Defendant Picotte Management Company, as agent for owner Corporate Woods 11 Co., L.P., entered into a design and build contract with Unistress to, among other things, replace the upper deck of the parking garage (hereinafter the prime contract). In related contracts, Picotte engaged defendant Gilbane Building Company as the construction manager for the project and nonparty Ryan-Biggs Associates, P.C. as project engineer. Unistress subcontracted with third-party defendant Precast for the crane operation, removal, and erection of the precast concrete sections, or "double tees," that comprise the deck of the parking garage. And Unistress subcontracted with nonparty Cast in Place Concrete, Inc. (hereinafter CIP) for the caulking, sealing, and installation of the expansion joints throughout the garage, including replacement of the two main expansion joints which traversed the length of the original upper deck of the garage.

Project engineer Ryan-Biggs approved the specifications for the project. As is relevant, the specifications called for Precast to place the concrete double

tees adjacent to the two main expansion joints so as to leave a "two-inch nominal" gap between them in which CIP could install the expansion joint materials. As designed, the two-inch nominal space would allow CIP to install Watson Bowman ME-300 expansion joints, the price of which was incorporated into the contract pricing. Deviating from the project specifications, Precast's installation of the new deck resulted in a space between the double tees that was, at least in some areas, wider than two inches. Because Precast's work deviated beyond the allowable amount, the contractors were presented with two options: Precast could adjust the width of the gap by essentially redoing its work by moving around the installed double tees throughout the deck, presumably at great time and expense; or CIP could cut the adjacent concrete double tees to create more uniform spacing and install the wider, and more expensive, Watson Bowman ME-400 joints. The minimum and maximum installation width for the ME-300 is between 1.75 inches and 2.75 inches and the ME-400 is between 2.13 inches and 3.75 inches. Presented with these choices, Precast stated its preference to pursue the latter option and agreed to accept a change order decreasing its payment to adjust for the increased price of the ME-400 expansion joints and additional materials and labor required for CIP to make the necessary changes. CIP cut the concrete double tees and ordered the larger ME-400 expansion joints to install where the space exceeded the allowable upper limit for the ME-300 model.

After CIP installed the expansion joints and completed its work, project engineer Ryan-Biggs conducted a final inspection of the project to determine whether the garage deck was built to code. Ryan-Biggs deemed the expansion joints to be substantially compliant with the project specifications. And the Town of Colonie issued a Certificate of Occupancy effective August 1, 2011.

Plaintiff alleges that, on August 27, 2013, she tripped and fell when her right foot stuck in one of the main expansion joints installed on the upper deck of the parking garage. Plaintiff, and her husband James Cribbs III derivatively, commenced this negligence action by filing of a summons and complaint on or about July 28, 2016. Corporate Woods/Picotte, Unistress, and Gilbane answered. On March 21, 2019, Unistress commenced a third-party action against Precast. Precast answered. Discovery is complete and plaintiff has filed note of issue.

Gilbane moves for summary judgment dismissing plaintiffs' complaint and all cross claims. Plaintiffs oppose. Corporate Woods/Picotte opposes and adopts the arguments cited by plaintiffs in opposition to Gilbane's motion. Unistress moves for summary judgment dismissing plaintiffs' complaint and all cross claims. Plaintiffs oppose. Corporate Woods/Picotte opposes and adopts the arguments cited by plaintiffs in opposition to Unistress' motion. Precast moves for summary judgment dismissing the third-party complaint. Unistress opposes. Plaintiffs cross-move for partial summary judgment on the issue of

liability against Unistress, Gilbane, and Corporate Woods/Picotte. Unistress, Gilbane and Corporate Woods/Picotte oppose.

The Parties' Contentions

Gilbane argues that it is entitled to summary judgment because the allegedly defective expansion joint did not violate any applicable standards relating to the construction of parking decks; it did not perform any of the construction of the parking deck or installation of the expansion joint; it owed no duty to plaintiff; and the allegedly dangerous condition was open and obvious.

Unistress argues that it owed no duty to plaintiff as a noncontracting third party; the expansion joint was installed pursuant to acceptable custom and practice in construction and the manufacturer's instructions; and the alleged defective condition of the expansion joint is trivial and did not constitute a danger to pedestrians.

Precast argues that it does not owe Unistress contractual indemnification; it does not owe Unistress common-law indemnification or contribution because it owed no duty to plaintiff as a noncontracting third party; Precast was not negligent; and it is not liable to Unistress for failing to procure insurance.

Plaintiffs argue in their cross motion that they are entitled to summary judgment on the issue of liability as to Gilbane, Unistress and Corporate

Woods/Picotte because Corporate Woods/Picotte owed her a duty of care as owner/agent of the property; Gilbane and Unistress owed her a duty which they breached when they approved the subcontractor's negligent work of installing the wider ME-400 expansion joint with a three-quarter-inch depth below the concrete surface, thereby launching an instrument of harm and creating a dangerous condition that allowed plaintiff's foot to become trapped in the expansion joint and causing her to fall; and Corporate Woods/Picotte had notice of the allegedly dangerous condition and failed to remedy the condition in spite of its ability to do so.

The Parties' Submissions

Defendants submitted, collectively and among other things, plaintiff's deposition testimony; the deposition testimony of individuals employed by Picotte, Gilbane, Unistress, and Precast; the relevant contracts and subcontracts; and the expert affidavit of Bernard P. Lorenz, P.C. Plaintiff submitted the expert affidavit of Frederick G. Bremer, registered architect.

Plaintiff's Deposition Testimony

On August 27, 2013, when plaintiff arrived at work at 11 Corporate Woods Boulevard, she parked as she usually did during nice weather on the upper deck of the attached parking garage. She did not have an assigned or usual parking spot, she just parked in an available spot closest to the building. Plaintiff alleges that as she stepped out of her minivan her shoe caught in the

expansion joint that ran adjacent to her vehicle. The expansion joint was just within the boundary lines of the parking spot. Plaintiff described her shoes as open-toed dress sandals with a thick, 1.5-inch heel. Plaintiff denies ever observing the expansion joint before this incident. Plaintiff claims that she permanently injured her foot in the fall. When she returned to her car at the end of her workday, plaintiff took a picture of the expansion joint and posted it on Facebook (*see* Corporate Woods/Picotte defendants' Exhibit A, NYSCEF Doc. No. 110).

Picotte – Deposition Testimony of Robert Daly

Robert Daly, the Vice President of Picotte Companies, testified as follows. Defendant Corporate Woods 11 Company, LLP owns the property 11 Corporate Woods Boulevard. Mr. Daly is employed by Picotte Management Company, Inc., the property's management company. In or about 2011, Picotte determined that the upper deck of the parking garage at 11 Corporate Woods Boulevard "was not up to standards and was starting to fail prematurely" and needed to be replaced for safety reasons. Picotte Management Company, Inc., on behalf of the owner, contracted with Unistress as prime contractor to rebuild the upper deck. Picotte contracted separately with Ryan-Biggs to provide engineering services, and with Gilbane to provide construction management and general oversight over Unistress and its subcontractors.

Mr. Daly testified that on or about December 22, 2011, Picotte received an accident report from another individual, Betsy Vandenberg, who reported having sprained her right hand when her heel caught in an expansion joint while she was walking into the building from her car parked on the west side of the upper deck. According to Mr. Daly, as a result of Ms. Vandenberg's report, Picotte investigated and "determined that she just tripped." Mr. Daly looked at the expansion joint and observed it to be approximately three inches wide, he did not "see any breaks in the expansion joint." He described it as "fairly flush" and "[a]lmost perfectly flat." He testified that he would not consider an expansion joint recessed an inch below the surface to be "fairly flush." It was Picotte's determination "that is how [the expansion joint] was built and there was nothing we . . . could do about that."

Ryan-Biggs (Project Engineer) – Deposition Testimony of Paul Rouis

According to Paul Rouis, a licensed professional engineer employed by project engineer Ryan-Biggs, Corporate Woods decided to reconstruct the upper deck of its parking garage because it was at the end of its life and repairs were becoming more frequent. The contractors reconstructed the parking deck in a substantially similar manner as the original deck but with upgraded materials. The underlying foundation and columns remained, which necessitated the same layout and configuration of the upper deck.

According to Mr. Rouis, field representatives from Ryan-Biggs periodically visited the site to see how construction was progressing. If the field representative discovered work that did not align with the design documents, the representative would issue a nonconformance report noting that something in the field did not match specifications. The report would be sent to Mr. Rouis as the licensed professional in charge of the job to evaluate.

Ryan-Biggs developed the details for the project, including the specification for "two-inch nominal" spacing between the concrete double tees for installation of the expansion joint materials. Mr. Rouis explained that the "two-inch nominal" notation represented "the desired gap between . . . the two precast elements once it had been erected and aligned." He did not recall ever becoming "aware that the space between the two slabs on the upper parking deck as it was being constructed was different than the two-inch nominal shown" in the specifications. He was not aware of any change orders having been issued regarding the expansion joint system. But, he said, Ryan-Biggs was "not involved in reviewing of payment applications or change orders to the individual contractors' scope of work on this particular project." Mr. Rouis testified that it is not uncommon for the size of expansion joints provided in the specification to be adjusted based upon field conditions. And any such change is not necessarily a violation of code.

Mr. Rouis explained that an increase in the size from two to three inches would in this context be considered a slight deviation because a three-inch joint "would still assert the same function." And while the specifications provided a measurement for the spacing between the double tees, it did not dictate which model expansion joint must be used. Ryan-Biggs, as project engineer, would typically be concerned if an installer selected an expansion joint that is below the minimum size because "we would have [to have] sufficient ability for the joint to work as intended open and closed," but that "typically[,] going larger than the minimum size that was the basis of design would not be a concern." "And again," he said, "the most critical things for the performance of the joint are the minimum size to allow the movement and installing the correct width of joint for the gap between the precast elements such that it falls within the limits indicated for that particular size joint."

According to Mr. Rouis, the recess created by the expansion joint relative to the concrete surface may be affected by the profile of the installed expansion joint. But the width of the expansion joint itself does not affect the depth of the recess. For example, with the Watson Bowman ME series joints, which are "designed to have a flattop profile, . . . making the joint one or two sizes wider, that would typically mean that there's two or three more cells, but the top profile of those cells would still be flat."

In or about July 2011, Ryan-Biggs conducted a final inspection of the site, which would have included inspection of the expansion joints, to see if the parking garage was built to code. The final inspection report would have noted as nonconforming anything that was not built to code. The New York State code "does not have a requirement for the width of the joint." And "at the end of this project, Ryan-Biggs inspected the expansion joint and deemed it to be substantially compliant with the specifications." The Town of Colonie did an inspection on July 29, 2011 as a prerequisite for issuing a certificate of occupancy at the end of construction. Mr. Rouis was unsure whether the expansion joints were installed when the Town performed its inspection, but the Town issued a Certificate of Occupancy effective August 1, 2011.

Gilbane (Construction Manager) - Picotte-Gilbane Contract and Deposition Testimony of Michael Murphy

The Picotte-Gilbane contract provides that Gilbane as construction manager would assist in coordinating the bidding process, essentially serve as the owner's liaison with Unistress, as the prime contractor, and oversee progression of the construction project. If for some reason the construction schedule was not being met, Gilbane would report the problem to the owner and work with Unistress to come up with proposed corrective actions to recommend to the owner and the project engineer. It was Gilbane's responsibility to "determine in general" that the work was being performed in

accordance with the requirements of the prime contract documents, "endeavoring to guard the Owner against defects and deficiencies in the Work." Gilbane had the authority to require additional inspection or testing, but only upon the owner's written consent. And Gilbane had the authority, in consultation with the project engineer, to reject work that did not conform to specifications. But, pursuant to paragraph 2.3.14 of the contract:

> "With respect to [Unistress'] own Work, [Gilbane] shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work of [Unistress], since these are solely [Unistress'] responsibility under the Contract for Construction. [Gilbane] shall not be responsible for [Unistress'] failure to carry out the Work in accordance with the respective Contract Documents. [Gilbane] shall not have control over or charge of acts or omissions of [Unistress], Subcontractors, or their agents or employees, or any other persons performing portions of the Work not directly employed by [Gilbane]."

Michael Murphy, the Senior Project Manager for Gilbane, testified as follows. Any expansion joint Unistress selected would be approved by Ryan-Biggs after submission and review of the manufacturer's product data sheet. The product data sheet provides instructions for how the product should be handled and installed, including placement tolerances regarding height, width, length, and depth.

Although he was not aware of the specifics, Mr. Murphy testified with regard to the expansion joints at issue that Unistress informed Gilbane just

before project completion that there would be a slight delay because the space for the expansion joint was either too wide or too narrow. According to Mr. Murphy, a change order was not required from Gilbane, so Gilbane did not get involved with discussions of how to resolve the issue with the expansion joint, and he left the contractors to settle the issue on their own.

Unistress (Prime Contractor and Manufacturer of Concrete Precast Components) – Deposition Testimony of Joseph Aberdale and Bruce Miller and the Picotte-Unistress Prime Contract

Joseph Aberdale, Senior Project Executive from Unistress, testified as follows. The project at 11 Corporate Woods consisted of replacing the back part of the parking garage structure. Under its design and build contract with Picotte, Unistress was responsible for the replacement of the driving surface and other deteriorated precast product beneath it. According to Mr. Aberdale, "there [were] lighting upgrades . . . and line striping [and] refreshing." Unistress was "constrained by the footprint of the structure and permit of the structure, which remained." And the striping was put back within an inch or so of the original. So, "to the normal eye" the new parking deck looked the same as the original.

It was Mr. Aberdale's understanding that Gilbane was the owner's representative and had responsibility or authority to govern and direct Unistress' work. Any change orders would have to go through Gilbane. Ryan-Biggs was the owner's engineer, developed the documents issued for bidding

purposes, and was responsible for reviewing Unistress' submittals and precast design elements. Unistress had the authority to reject any work that its subcontractors did wrong and any change orders with the subcontractors were required to be agreed-upon in writing.

Mr. Aberdale explained the basic installation procedure for an expansion joint. The purpose of an expansion joint is to accommodate changes in the parking garage structure during thermal expansion. The precast installer leaves a space between the double tees adjacent to the expansion joint, which he referred to as "the throat," in which the joint materials are installed. There are "notch out[s]" on the double tees that accommodate the "wing" of the actual expansion joint. The wings are set into the notches, elastomeric concrete is poured to secure the wings, and the joint itself sits just below the driving surface.

In determining which expansion joint to install, the contractor must consider the size range of the joint, the potential for thermal expansion given the temperature range of the area, and the ambient temperature during installation. Mr. Aberdale testified that the width of the joint changes depending on the temperature, and the depth of the expansion joint does not, unless some external factor damages it by pushing it down. And there is no way to tell whether there was a change in the depth of the expansion joint between its installation in 2011 and plaintiff's fall in 2013.

Unistress subcontracted with Precast to "remove the precast that was being replaced and install the precast elements" that comprise the surface of the parking deck. The precast elements, or double tees, were 60 feet long and 15 feet wide. Unistress subcontracted with CIP to install the expansion joint materials. The original parking deck design had a Watson Bowman ME-300 expansion joint with a two-inch nominal space between the double tees. Accordingly, when Unistress prepared its sections, details and erection drawings to submit to Ryan-Biggs for approval, it utilized a detail showing a two-inch nominal space between the double tees at the precise location where they were originally located. The project specifications outlined various possible expansion joints. Unistress picked the Wabo Crete membrane with a Watson Bowman ME expansion joint, which selection was subject to, and ultimately received, Gilbane's approval.

In or about June 2011, after CIP determined that "there was a deviation" in the space, or "throat," that Precast created for the installation of the expansion joints. Mr. Aberdale met with employees from Precast and CIP at the construction site. The "throat" was not "uniform and was not in accordance with the details [because] it deviated beyond the allowable from the two inch." According to Mr. Aberdale, it was for CIP to determine "exactly what's allowable, since they own[ed] the scope of work, responsibility, and warranty" for the expansion joints. Precast "could have cut a bunch of weld and moved

things around and made the joint correct" or they could have paid CIP to "correct the joint and . . . for an increased size joint." After some discussions, Precast agreed to the latter option and Unistress, CIP, and Precast decided that CIP would install Watson Bowman ME-400 expansion joints instead of the ME-300 to accommodate the larger space. Both ME-300 and ME-400 expansion joints were ordered and delivered to the work site. Mr. Aberdale "was not there to see exactly what was installed where."

Mr. Aberdale testified: "There was no reason for Unistress to share change order values or anything with Gilbane. That was between Unistress and Precast Services and, ultimately, a change order to CIP." But Gilbane was aware of the change, did not take exception to it, and had the authority to reject it. He also noted that the original submittal to Ryan-Briggs stated that the contractors intended to use "the Wabo Crete ME expansion joint" and that "no particular size was identified." So, he said, there is an argument to be made that Ryan-Biggs approved both the ME-300 and ME-400.

Mr. Aberdale explained that the ME-300 and the ME-400 are the same model of expansion joint. They are the same height, the ME-400 is just wider and therefore more expensive. But ME joint systems, including models larger than the ME-400, "are commonly accepted joints in parking structures across the industry [and] are elements . . . that can . . . improve safety." Watson Bowman makes cover plates, but that was not part of their scope of work on

this project or a previously existing condition to be replaced. Mr. Aberdale testified that "the ME-400 system [did not] necessarily deviate from the original specifications." And, when asked if he "ha[d] any concern at all with using the ME-400, as compared to the ME-300" he responded: "No, we do it all the time."

Bruce Miller, another Unistress employee, testified as follows. As field supervisor for the project, he was responsible for tracking and ordering materials and coordinating and overseeing the subcontractors, including Precast and CIP. The project specifications required that Precast create a two-inch nominal spacing for the installation of the expansion joint materials. Mr. Miller testified that he believed the ME-300 expansion joint was originally selected, but he was unsure whether that expansion joint was written into the specifications or if it was selected by default as a function of the two-inch nominal spacing. The contractors installed the expansion joints in the same locations as the existing joints. Mr. Miller did not know the manufacturer, model, or size of the existing expansion joints.

Mr. Miller also described the installation process for expansion joints: "there's a notch in the two double [tees] that the [expansion] joint is going to go in and then your gap. There's an epoxy that goes into the – where the wings are, that sits into the wings – the wings sit into that epoxy and then your joint is in between." The middle portion of the expansion joint, which he described

as the "accordion," is made of high-density rubber. The expansion joint itself is "a one-piece unit." The "wing part . . . sits just below the surface of the double [tees], so a plow can't hit it." And, because the expansion joint is a one-piece unit, the wings' placement determines the depth of accordion portion of the joint, which is maybe "half an inch, three quarters of an inch." He said, "I don't remember what the depth is, but it's – it can only be one size, because that's – it's a one-piece unit."

According to Mr. Miller, after the contractors learned that the space Precast created for the installation of the expansion joint materials was irregular and larger in places than the two-inch nominal specification, Precast, Unistress, and CIP collaborated to make a submittal to Gilbane proposing that CIP install a larger expansion joint, which proposal Gilbane approved. The contractors did not discuss installing covers for the expansion joints. According to Mr. Miller, Unistress could have rejected Precast's work and forced them to do it over, but that would not have been cost effective. So the contractors decided to have CIP cut the concrete and install the larger ME-400 expansion joint where necessary. But, he said, the ME-300 and ME-400 are "the same joint, it's just a different width." And both are typical expansion joints used in the construction of parking garages.

Under the terms of the Picotte-Unistress prime contract, Unistress agreed to indemnify and hold harmless the owner, Picotte, Gilbane, and Ryan-

Biggs, and all of their agents and employees, from any claims for bodily injury caused in whole or in part by any negligent act or omission of Unistress, or anyone directly or indirectly employed by Unistress, or anyone for whose acts Unistress may be liable (*see Picotte-Unistress Contract*, NYSCEF Doc No 52, paragraphs 5.2, 9.16).

Precast (Crane Operator and Installer of the Concrete Precast Components) – Deposition Testimony of Bohdan Kusznir and the Unistress-Precast Subcontract

According to Bohdan Kusznir, President and CEO of Precast, Precast is an installer of precast concrete components. Unistress subcontracted with Precast for the replacement of the inverted tee beams throughout the garage and the precast concrete double tees that make up the floor of the upper level of the garage. Precast installs concrete double tees; it does not install the actual expansion joint materials. During installation of the double tees, Precast leaves a space between the concrete components adjacent to the expansion joint so that another contractor, in this case CIP, can install the expansion joint materials.

Mr. Kusznir explained that a parking garage that is more than 300 feet in length typically requires an expansion joint. The width of the expansion joint, which is determined by the design engineer, generally depends on the size of the overall structure of the garage. Larger parking garages require

wider expansion joints to compensate for changes in the concrete structures during warming and cooling.

The project specifications for the 11 Corporate Woods parking garage called for Precast to leave a "two-inch nominal" space between the double tees to allow CIP to install the two main expansion joints in the same locations as the existing expansion joints, which ran perpendicular to the building and traversed the width of the parking garage. After Precast completed its work, but before CIP installed the expansion joints, Unistress brought to Mr. Kusznir's attention that "[t]he width of the expansion joint was not per the detail."

Mr. Kusznir visited the site to investigate. His employees reported that someone from CIP asked them to create a larger spacing and, as a result of this miscommunication, Precast deviated from the specifications and created a space larger than two inches for placement of the expansion joints. CIP denied making such request. Rather than opting to move the surrounding double tees to adjust the spacing, Precast "accepted a deductive change order for the difference in price for the new material that CIP concrete was going to use to create the expansion joint." According to Mr. Kusznir, Unistress, Precast, and CIP handled all discussions regarding the spacing issue; Gilbane was not involved.

Under the terms of the Unistress-Precast subcontract, Precast agreed to defend, indemnify, and hold harmless Unistress, Corporate Woods, Picotte, Gilbane, and Ryan-Biggs, and all of their agents and employees, from any claims for bodily injury alleged to have been caused, in whole or in part, by Precast's work on the project (*see Unistress-Precast Subcontract*, NYSCEF Doc No 83, paragraph 6.1).

Defendants' Expert – Affidavit of Bernard Lorenz, P.E.

Defendants' expert Bernard Lorenz, P.E. opined that the "approval for the use of the ME-400 expansion joint from the originally specified ME-300 expansion joint was not a deviation from any standard of care in the construction industry." And both systems "provide safe vehicular driving surfaces and pedestrian walking surfaces regardless of the expansion joint width" because "all model numbers provide an elastomeric seal across the expansion joint width, therefore filling said expansion joint and providing a safe vehicular and walking surface." Further, "the Wabo Crete Membrane System is designed per ADA guidelines, clearly demonstrating that its use does not violate any applicable written standards or custom and practice."

Plaintiffs' Expert – Frederick G. Bremer, Registered Architect

Plaintiffs submitted the expert affidavit of Frederick Bremer, Registered Architect. According to Mr. Bremer, he has been qualified as an expert in the field of architecture and human factors in the built environment and he has

testified as an expert on numerous occasions. Mr. Bremer opined "to a reasonable degree of architectural and technical certainty" that the expansion joint was adjacent to where plaintiff exited her vehicle and, "[b]ased on Human Factors analysis, the hazardous condition was not within her field of view (cone of vision) as she exited her car and began to walk." Plaintiff, "who was acting reasonably with the expectation of a safe walking surface," did not therefore perceive the expansion joint as open and obvious.

Mr. Bremer opined that the 3.25 inch by three-quarter-inch expansion joint that "allowed [plaintiff's] foot to become caught did not meet acceptable nationally recognized industry standards for safe walking surfaces and did not meet the requirements of the Property Maintenance Code of New York State." Mr. Bremer, "to a reasonable degree of architectural and technical certainty," opined:

> "[T]he hazardous expansion joint condition that existed at the time of [plaintiff's] incident, existed at the time of its construction in August 2011. The hazardous expansion joint condition existed for an extended period of time. There was no evidence of damage to the expansion joint that would have altered its depth. The width of the expansion joint would vary [due to] the expansion and contraction of the precast concrete floor structure."

Analysis

"In order to establish a prima facie case of negligence, [a] plaintiff must show that [the defendant] owed a duty to the plaintiff, that the duty was breached, and that the breach proximately caused his [or her] injury" (*Guzman v Jamaica Hosp. Med. Ctr.*, 190 AD3d 705, 706 [2d Dept 2021]; *see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

"[O]rdinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to noncontracting third parties upon the promisor" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]). Because "[a] contracting party generally does not owe a duty of care to a noncontracting third party" (*Morales v Digesare Mech., Inc.*, 176 AD3d 1442, 1442 [3d Dept 2019]; *see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]).

The Court of Appeals has recognized three exceptions to this general rule: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely

displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d at 140 [internal quotation marks, brackets and citations omitted]; *see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d at 257; *Innovation Assoc., Inc. v Filbin Painting, Inc.*, 167 AD3d 1291, 1292 [3d Dept 2018]).

Any duty of care that the construction defendants owed to plaintiff with respect to the installation of the expansion joint arose out of their respective contracts and subcontracts relating to the renovation project. The facts of this case fit most squarely within the first *Espinal* exception. Thus, the dispositive question is whether the construction defendants "launched a force or instrument of harm, [thereby] negligently creat[ing] or exacerbate[ing] a dangerous condition" (*Espinal v Melville Snow Contrs.*, 98 NY2d at 141-142 [internal quotation marks and citations omitted]).

Plaintiffs allege that the construction defendants launched an instrument of harm by negligently installing the wider ME-400 expansion joint three quarters of an inch beneath the driving surface, thereby creating a dangerous condition that allowed plaintiff's foot to become trapped in the expansion joint and caused her to fall. Plaintiffs "do[] not dispute that the use of Watson Bowman ME-400, if properly installed, would be a completely legitimate use of the product and not in violation of any engineering standards." Plaintiffs instead argue that "CIP's placement of the expansion

joint so deeply below the walking surface created the tripping and trapping hazard that resulted in [plaintiff's] injury." They argue that Unistress was responsible for the work CIP performed, and Gilbane was responsible for ensuring that the "construction [was in] compliance with good and acceptable engineering practices."

Gilbane Owed Plaintiff No Duty of Care Arising Out of the Picotte-Gilbane Contract and Gilbane's Motion Is Therefore Granted.

Gilbane's general supervisory role over the construction project did not give rise to a duty to plaintiff as a noncontracting third party (*see Guzman v Jamaica Hosp. Med. Ctr.*, 190 AD3d at 706). Under the terms of the Picotte-Gilbane contract, Gilbane essentially served as liaison to the owner and provided general oversight of the timeliness and progression of the project. While Gilbane was delegated some authority to reject nonconforming work, such authority was subject to the owner or project engineer's consultation and authorization. Gilbane did not directly supervise the contractors and subcontractors, nor was it individually responsible for the workmanship of Unistress and its subcontractors. The Picotte-Gilbane contract specifically stated that Gilbane had no control over Unistress's means of construction and that Gilbane shall not be responsible for Unistress' or its subcontractors' failure to carry out their work in accordance with specifications. The Court does not find that under these circumstances Gilbane's supervisory

involvement with the project can be seen as launching an instrument of harm that would give rise to a duty of care to plaintiff as a noncontracting third party. Accordingly, Gilbane's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed as against the Gilbane defendants.

Unistress' Motion for Summary Judgment Is Denied.

Unistress arguably owed a duty to plaintiff arising out of the prime contract. Unistress directly supervised all construction relating to the parking garage rehabilitation project. Unistress had the authority to reject, and was ultimately responsible for, its subcontractors' work. And, viewing the evidence in the light most favorable to plaintiff as the nonmoving party, CIP's allegedly negligent installation of the ME-400 expansion joint at a depth of three-quarters inch, in a location where the dangerous condition would not be open and obvious to plaintiff, arguably "made the premises more dangerous, thereby increasing the risk of harm" to plaintiff (*Kelley v Schneck*, 106 AD3d 1175, 1179 [3d Dept 2013]).

The parties do not dispute that a correctly installed Watson Bowman ME expansion joint of any model is accepted in the construction industry and would, by design, sit just below the adjoining driving surfaces in order to avoid being damaged by snowplows. But it is plaintiff's assertion that CIP deviated from the manufacturer's product data sheet by installing the expansion joint

too far below the concrete surface of the adjacent double tees, thereby creating a depression measuring 3.25 inches wide by three-quarters of an inch deep, which allowed plaintiff's foot to become momentarily trapped as she exited her vehicle and caused her to fall (*compare Luby v Rotterdam Sq., L.P.*, 47 AD3d 1053, 1055 [3d Dept 2008] [holding defendant owed no duty to plaintiff as noncontracting third party where it was undisputed that defendant's construction of sidewalks and ramps conformed to architectural plans]).

Unistress submitted proof establishing prima facie that CIP installed the expansion joint in accordance with industry practice and the manufacturer's instruction. And Unistress argues that the record is void of proof demonstrating that the alleged three-quarter-inch "depressed" condition existed at the time of installation in 2011, or even at the time of plaintiff's fall in 2013.

But plaintiffs' submissions raise issues of fact in that regard. Plaintiffs' expert Mr. Bremer opined that "the hazardous expansion joint condition" existed since its construction in 2011 and "for an extended period of time." Mr. Bremer apparently based his conclusion on his personal observation that "[t]here was no evidence of damage to the expansion joint that would have altered its depth." The Court has some concern regarding Mr. Bremer's credentials and bases for offering these opinions, but it does not find that his affidavit is entirely conclusory or should be disregarded as a matter of law.

Thus, plaintiff has raised questions of fact with regard to whether Unistress and its subcontractor launched an instrument of harm by creating an allegedly dangerous condition.

The Court does not find the depression in the expansion joint to be trivial as a matter of law. "Whether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks and citations omitted]). "There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.*). Rather, the Court must consider "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury" (*id.* at 978).

According to plaintiffs' submissions, the depression in the expansion joint is 3.25 inch wide by three-quarters of an inch deep. The expansion joint runs just inside the boundary of the parking spot, in a location where an individual would step upon exiting a vehicle. Plaintiffs' expert Mr. Bremer opined that, based upon his "Human Factors" analysis, "as [plaintiff] exited the vehicle, [she] may have observed peripherally the presence of the adjacent expansion joint in general, but [she] would not have detected [the] hazardous low and flexible surface condition within the expansion joint." Given its size

and location, the Court does not find that the allegedly dangerous condition created by the depression in the expansion joint to be trivial as a matter of law (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 82-83 [2015] [holding step tread with missing piece of irregular shape of 3.25 inches in width and a least one-half inch in depth on the nose of a step where a person might step is not trivial as a matter of law]).

Because Plaintiff's Accident Was Not Caused by Precast's Acts or Omissions, Precast's Motion is Granted.

While Precast's failure to create a two-inch nominal space for CIP's installation of the ME-300 expansion joint required that CIP install the ME-400 expansion joint, plaintiffs "do[] not dispute that the use of Watson Bowman ME-400, if properly installed, would be a completely legitimate use of the product and not in violation of any engineering standards." Thus, Precast's purported error did not, in and of itself, launch a force or instrument of harm and negligently create a dangerous condition. Precast therefore owed no duty to plaintiff arising out of its contract with Unistress, and Precast does not owe Unistress common-law indemnification or contribution (*see Dennebaum v Rotterdam Sq*, 6 AD3d 1045, 1047 [3d Dept 2004]). And because plaintiff's injury was not "caused in whole or in part" by Precast's "[a]ct or omission," Precast does not owe Unistress contractual indemnification (*see Luby v*

Rotterdam Sq., L.P., 47 AD3d at 1055-1056). Accordingly, Precast's motion for summary judgment is granted, and the third-party complaint is dismissed.

Plaintiffs' Cross Motion for Partial Summary Judgment Is Denied.

The Court cannot determine as a matter of law that a depression measuring 3.25 inches wide by three-quarters of an inch deep constitutes a dangerous condition. And regardless, issues of fact preclude granting plaintiffs' motion for partial summary judgment against Corporate Woods/Picotte and Unistress. Specifically, there are issues of fact regarding whether the expansion joint as installed by CIP constituted a dangerous condition, and therefore whether Unistress owed plaintiff a duty of care regarding any changes to the condition of the expansion joint between installation and plaintiff's accident, and regarding the condition of the expansion joint at the time plaintiff fell.

"As a general rule, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury" (*Speredowich v Long Is. R.R. Co.*, 164 AD3d 855, 855 [2d Dept 2018], *lv denied* 34 NY3d 913 [2020] [internal quotation marks and citations omitted]; *see Alexander v State of New York*, 193 AD3d 1328, 1328 [4th Dept 2021]). Thus, even if the Court were to assume plaintiffs' claims to be true, that the depression caused by the expansion joint measured 3.25 inches wide by three-quarters of an inch deep on the date plaintiff fell, the Court could still not

determine as a matter of law that such depression constituted a dangerous condition.

And in any event, there are questions of fact regarding whether CIP installed the expansion joint incorrectly in 2011, thereby creating the allegedly dangerous condition, and regarding the condition of the expansion joint in 2013 when plaintiff fell. Plaintiffs' expert's opinion established prima facie that "the hazardous expansion joint condition that existed at the time of [plaintiff's] incident, existed at the time of its construction in August 2011."

But defendants' submissions raise questions of fact: defendants' witnesses testified that the ME-400 expansion joint is commonly used and accepted as safe in the construction industry; Ryan-Biggs, as project engineer, inspected the completed project and found the installation of the expansion joint to be substantially in compliance with the specifications and applicable codes; and the Town issued a certificate of occupancy. Furthermore, Mr. Daly, Picotte's Vice President, testified that after receiving an incident report from Ms. Vandenberg in December 2011, he observed the expansion joint to be approximately three inches wide, he did not "see any breaks in the expansion joint," and he described it as "fairly flush" and "[a]lmost perfectly flat." And he testified that he would not consider an expansion joint recessed an inch below the surface to be "fairly flush." And plaintiff's picture of the expansion joint, taken the day she fell, and the pictures that plaintiffs disclosed during

discovery, apparently taken in 2016 and which show the measurement of the joint, appear markedly different.

In light of the foregoing, there are issues of fact regarding whether Unistress launched a force of harm or created the allegedly dangerous condition that caused plaintiff to trip and fall and regarding the condition of the expansion joint when plaintiff fell in 2013. Accordingly, plaintiffs' cross motion for partial summary judgment is denied.

Accordingly, it is

ORDERED AND ADJUDGED that Gilbane's motion for summary judgment is granted and the complaint and all cross-claims are dismissed as against them (Motion #6); and it is

ORDERED that Unistress' motion for summary judgment dismissing the complaint and all cross-claims is denied (Motion #5); and it is

ORDERED AND ADJUDGED that Precast's motion for summary judgment is granted and the third-party complaint is dismissed (Motion #4); and it is

ORDERED that plaintiffs' cross motion for partial summary judgment is denied (Motion #7).

This constitutes the Decision and Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for Gilbane and Precast shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York
September 2, 2021

Denise A. Hartman
HON. DENISE A. HARTMAN
Acting Justice of the Supreme Court

Papers Considered
NYSEF Index No. 904481-16 Doc. No 3-115

09/02/2021