Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.: 704666/2018

BEVERLY EVANS,

Plaintiff,

Motion
Date: October 6, 2021

-against-

Motion Cal. No.: **13** and **14**

Motion Sequence Nos.:**5 & 6**

SEA WORLD FISH MARKET INC., SEA WORLD ASSOCIATES, IGLESIA EVANGELICA APOSTOLES Y PROFETAS EN NY,

Defendants.

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SEA WORLD FISH MARKET INC.,

Third-Party Plaintiff,

-against-

L&D HAIR SALON INC.,

Third-Party Defendant.

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The following e-file papers numbered EF 138-157,173-175, 184 and 186-187 submitted and considered on this **motion sequence number 5** by third-party defendant L&D HAIR SALON INC.(hereinafter referred to as "L&D") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment dismissing the first, second, third and fourth causes of action asserted against L&D and the efile papers numbered EF 158-172, 176-183, 185 and 188 submitted and considered on this **motion sequence number 6** by defendant/third-party plaintiff SEA WORLD FISH MARKET INC., (hereinafter referred to as "Sea World") dismissing the Complaint in its entirety or granting Sea World contractual indemnification against L&D and IGLESIA EVANGELICA APOSTOLES Y PROFETAS EN NY (hereinafter referred to as "Iglesia") and the cross-claim against Iglesia for breach of contract together with such other and further relief as this Court deems just and proper.

	Papers Numbered
Motion Sequence #5	
Notice of Motion- Affirmation in Support	EF 138-157
Stipulation.....	EF 173
Opposition- Memo Law-Facts.....	EF 174-175
Stipulation.....	EF 184
Reply.....	EF 186-187
Motion Sequence #6	
Notice of Motion-Affirmation.....	EF 158-167
Aff. In opposition- Facts.....	EF 168-171
Stipulation.....	EF 172
Opposition- Facts-Exhibits.....	EF 176-183
Stipulation.....	EF 185
Aff. In opp.....	EF 188

This is a premises liability action commenced by plaintiff BEVERLY EVANS (hereinafter referred to as "Plaintiff") to recover damages for personal injuries which she allegedly sustained on January 25, 2016 at or around 5:00 PM at the premises known as 1864 Cornage Avenue, Far Rockaway, New York (hereinafter referred to as the "Premises"). Plaintiff claims she slipped on the sidewalk of the Premises due to defendants' alleged failure to shovel/salt the sidewalk.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

Sea World, owner of the Premises at the relevant time, alleges pursuant to the leases the tenants Iglesia and L&D were responsible for snow removal. Alternatively, Sea World argues the Complaint should be dismissed because of the snow-in-progress doctrine. Finally, Sea World argues L&D and Iglesia failed to obtain liability insurance. L&D argues that Plaintiff fell on the sidewalk

adjacent to the portion of the Premises leased by Iglesia.

Responsibility of snow removal

The Administrative Code of the City of New York § 7-210 imposes upon property owners a nondelegable duty to maintain the sidewalk abutting the premises in a reasonably safe condition, regardless of whether they are out-of-possession landlords (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447 [1st Dept 2008]). That duty includes the duty to remove snow and ice from the abutting sidewalk (Administrative Code § 7-210[b]; *see Metzker v City of New York*, 139 AD3d 828 [2d Dept 2016]). While the statutory duty is nondelegable, Administrative Code § 7-210 does not impose strict liability upon the property owner, and the owner may be held liable for injuries arising out of the failure to remove snow and ice on the abutting sidewalk only if the owner created the dangerous condition or had actual or constructive notice of it for a sufficient length of time to discover and remedy it (*see Kabir v Budhu*, 143 AD3d 772 [2d Dept 2016]; *Khaimova v City of New York*, 95 AD3d 1280, 1281 [2d Dept 2012]; *Harakidas v City of New York*, 86 AD3d 624, 627 [2d Dept 2011]). "In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" (*Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660-661 [2d Dept 2014]; *see Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933 [2d Dept 2015]; *Forlenza v Miglio*, 130 AD3d 567 [2d Dept 2015]; *Ferguson v Shu Ham Lam*, 74 AD3d 870 [2d Dept 2010]; *Robles v City of New York*, 56 AD3d 647 [2d Dept 2008]; *Bruzzo v County of Nassau*, 50 AD3d 720 [2d Dept 2008]).

Sea World points to a provision in its leases with Iglesia and L&D which speaks to snow and ice removal at the Premises:

Both leases state, "[t]enant shall arrange with other tenant in the building for removal of snow and ice and the keeping the sidewalks free from debri [sic] and trash. The tenants shall share the cost of said items equally".

Furthermore, Sea World points to the testimony of both L&D and Iglesia.
Dorka Santos testified on behalf of L&D, Dorka testified, in part, as follows:
Q: 1864-B Cornaga Avenue, did you remove snow in or around there?
A: Right in front of the store.
Q: And what about the back of the store?
A: I clean when was necessary in order for me to dump the garbage out.
Q: So is that yes you cleared snow and ice in the back of the property?
A: Yes.
(Pg 26 lines 3-11)

Q:While you were a tenant at the location on Cornaga just to be clear you understood that your obligation was to shovel the front of your property on the sidewalk, from one side to the next side; correct?

A: That is correct.
(Page 59-60 line 21-25 and 2)

Orlando Perez testified on behalf of Iglesia, Orlando testified, in part, as follows:
Q: Okay. Now, in the time that the church was in 1864 Cornaga Avenue, before and including January 25th, 2016, did members of the church regularly shovel the sidewalk, both in front of the church and on the side of the church?
A: Yes.
Q: And, at any time since the church began occupying that space, did anyone else ever clean the sidewalk in front of the church and on the side of the church, other than members of the church?
A: Only us, the members.
(Page 13-14 lines 15-25 and 2-3)

Q: Now, when you say the tenants would contribute toward hiring the snowplow, would that be all five storefronts?
A: Yes, but not always. Usually everyone is responsible for their own area.
Q: And what did you consider the church's own area?
A: Two parking spaces in front of the location.
Q: Anything else, other than the two parking space in front of the church?
A: No
(Page 15 lines 13-25)

Q: And what about the sidewalk on the side of the church?
A: On the side of the church, yes, we also clean that area. Now, I have a question. Is that side also responsible, the other tenants, or the building owners?
Q: I'm not a witness. I can't answer that question.
(Page 16 lines 7-14)

Thus, Sea World contends it delegated the responsibility of snow and ice removal to the tenants at the Premises. That, the tenants were to share the cost of snow and ice removal. Thus, according to Sea World, L&D's argument that the portion of the sidewalk it leased did not abut Beach 19th Street fails.

In its motion, L&D argues the following: that the lease only requires maintenance of the sidewalk that abuts the portion of the Premises it leased; that it did not violate the provision of the lease related to insurance; and that it owed no duty to Plaintiff with respect to this accident and thus, does not need to indemnify Sea World.

The lease between L&D and Sea World states in part:

Paragraph 1:

> In consideration of the Rent hereinafter reserved and the terms, covenants and conditions set forth in this Lease to be observed and performed by Lessee, Lessor hereby demises and leases to Lessee, and Lessee hereby rents and takes from Lessor, the following property (collectively hereinafter referred to as the "Demised Premises"): all of the land (the "Land") described as 1864 B Cornaga Avenue, Far Rockaway, New York (b) all buildings, structure and other improvements (the "Improvements") now or hereafter located on the Land, other than Lessee's Equipment as hereinafter defined; and (c) all rights of way or of use, servitudes, licenses, tenements, appurtenances and easements now or hereafter belonging to or pertaining to any of the foregoing; TO HAVE AND TO HOLD the Demised Premises unto Lessee….

Paragraph 7:

> Lessee, at all times during the Lease Term and at the Lessee's expense, shall keep the Demised Premises, and all Improvements now or hereafter located thereon, and all facilities and equipment located thereon, and the adjoining sidewalks, curbs, vaults, and vault space, if any, streets and ways, and all appurtenances to the Demised Premises, in good and clean order and condition and in such condition as may be required by all Legal Requirements and Insurance Requirements, and promptly shall make all necessary and appropriate repairs, replacements and renewals thereof, whether interior or exterior, structural or nonstructural, ordinary or extraordinary, or foreseen or unforeseen. All repairs, replacements and renewals shall be equal in quality and class to the original work. Lessee waives any right created by any law now or hereafter in force to make repairs to the Demised Premises at the Lessor's expense.

L&D argues pursuant to the lease which defines the demised premises in part as 1864B Cornaga Avenue, Far Rockaway, L&D was only responsible for "adjoining sidewalks" to the demised premises. Furthermore, L&D points to the testimony of Sea World which supports L&D's position.

Michael Novik testified on behalf of Sea World, Michael testified, in part, as follows:

Q: Is it your understanding that the beauty salon is responsible for the snow removal along the sidewalk of Beach 19th Street?
A: Could you repeat the question?
MR. HIRSCHEL: Can I have the question read back. (Whereupon, the requested section was read back by this Reporter.)
MS. KIRIDLY: Just note my objection.
A: I don't believe so.

Q: Okay. Is it your understanding whether or not the beauty salon is partially responsible for any of the snow removal?
A: No.
MS KIRIDLY: Just note my objection. You can answer.
A: No.
Q: Is it your understanding that Iglesia Evangelica is responsible for the snow removal along Beach 19th Street?
A: Yes.
Q: On what basis are they responsible?
A: It's according to the lease.
Q: So you're saying that this language here; and I'm pointing to it on page 24, this second paragraph; this makes them responsible for the snow removal?
MS. KIRIDLY: Just note my objection.
A: Yes.
(Pages 72-73 lines 4-25 and 2-13).

Sea World has failed to establish entitlement to a judgment as a matter of law finding that L&D was negligent. Specifically, Sea World has failed to establish that L&D owed a duty to Plaintiff. Sea World testified that Iglesia was responsible for snow and ice removal on Beach 19th Street. While Sea World presents evidence that a portion of the lease states the tenants shall share the cost of snow and ice removal at the Premises, other portions of the lease, specifically paragraphs 1 and 7, illustrate that L&D was responsible for only the adjoining portion of the sidewalk.

A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (*Bishop v Pennsylvania Ave. Mgt., LLC*, 183 AD3d 685 [2020], quoting *Chang v Marmon Enters., Inc.,* 172 AD3d 678, 678 [2019]). Thus, a defendant moving for summary judgment in a premises liability action has the burden of making a prime facie showing that it neither created the alleged hazardous or defective condition nor had actual or constructive notice of its existence (*see Johnson v NBO Realty, Inc.*, 147 AD3d 743 [2017]; *Beri v Chung Fat Supermarket, Inc*., 125 AD3d 587 [2015]).

In *Peggy Warren v Wilmorite, Inc.* (211 AD2d 904 [3d Dept 1995]) plaintiff instituted the premises liability action to recover for injuries sustained when plaintiff tripped and fell on a piece of plywood while walking on the sidewalk at a shopping center. The sublease between defendant and co-defendant stated that defendant was responsible to pay 26 percent of all costs incurred in policing and maintenance of the parking area, sidewalks or walkways. The court held the defendant did not have a duty to maintain nor exclusive possessory rights to the sidewalks that, the control and possession remained with co-defendant. The court reasoned "the premises subleased by [defendant] included only that 'part of the store building for retail space' located inside the mall structure, not outdoor sidewalks or walkways as evidence by the sublease description and its accompanying exhibit." The court further found as a matter of law defendant did not possess or control the sidewalk at issue (*id* at 906).

Here, the evidence presented does not establish that L&D had possession or control (*Bishop* at 678) of the portion of the sidewalk at issue. Thus, L&D had no duty to Plaintiff.

Sea World has established prima facie entitlement to a judgment as a matter of law finding that Iglesia was negligent. The burden now shifts to opposing parties to raise a triable issue of fact.

Iglesia argues that it was only responsible for the sidewalk in front of the store. The argument fails. It is clear that the portion of Beach 19th Street where Plaintiff's accident allegedly took place abuts the portion of the Premises leased by Iglesia. In fact, Iglesia testified that its members perform snow removal on Beach 19th Street.

Snow-in-progress

Under the snow-in-progress rule, "a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*see Bradshaw v Pel 300 Assocs.,* 152 AD3d 635 [2d Dept 2017]; *Scarlato v Town of Islip*, 135 AD3d 738 [2d Dept 2016]). However, snow and ice removal undertaken during the storm is actionable if performed negligently (*Grau v Park*, 283 AD2d 551 [2d Dept 2001], *lv denied* 96 NY2d 721 [2001]). A landowner or tenant is charged with the duty at that juncture to exercise "reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" (*Fernandez v City of New York*, 125 AD3d 800 [2d Dept 2015], *quoting Yassa v Awad*, 117 AD3d 1037 [2d Dept 2014]).

The climatological data submitted by Sea World established snow fell in the area on January 22nd, 23rd and 24th. Along with freezing rain and a blizzard on the 23rd. According to the data, precipitation in the area stopped at around 10 PM on January 23, 2016 with trace precipitation ending around 3:00 AM on January 24, 2016. Plaintiff testified that her fall occurred on January 25, 2016 at or around 5:00 PM. According to the data, there was no trace of precipitation in the area for approximately 38 hours prior to Plaintiff's fall.

The snow-in-progress doctrine is not applicable in this case.

Indemnification

The right to contractual indemnification depends upon the specific language of the contract (*see e.g. Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2008]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Goodlow v 724 Fifth Ave. Realty, LLC,* 127 AD3d 1138, 1140 [2015]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*De Souza v Empire Tr. Mix, Inc*., 155 AD3d 605, 606 [2d Dept 2017]; quoting *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009]).

> 15. Indemnification by Lessee
> Lessee shall indemnify and hold Lessor harmless from and against all liabilities, obligations, claims, damages, fines, penalties, interest, causes of action, costs and expenses, including attorneys' fees…imposed upon or incurred by or asserted against Lessor or the Demised Premises by reason of the occurrence or existence of any of the following, whether or not resulting from any negligent act or omission of Lessor: ownership of the Demised Premises or any interest therein, or receipt of any rent or other sum therefrom; any accident, injury to or death of persons…claimed to have occurred, on or about the Demised Premises…or the adjoining sidewalks…any failure on the part of Lessee promptly and fully to comply with or perform any of the terms, covenants or conditions of this Lease…

Orlando Perez testified on behalf of Iglesia, Orlando testified, in part, as follows:

Q: So, at your last deposition you stated that, on or around January 25th, 2016 you put salt on the sidewalk both in front of the church and on the side of the church before it snowed; is that correct?
A: Yes.
Q: And then, after it snowed or while the snow was subsiding or ending, you an Caleb shoveled the sidewalk in front of the church, as well as a three-foot wide path on the sidewalk, on the side of the church; is that correct?
MS KIRDLY: Note my objection.
MR. HIRSCHEL: Note my objection. You can answer.
A: Yes.
(Page 16-17 lines 24-25 and 2-17)

Iglesia could not establish when specifically they cleared the snow. Iglesia failed to raise a triable issue of fact.

Insurance

Orlando Perez testified on behalf of Iglesia, Orlando testified, in part, as follows:

Q: And do you currently have any insurance, any liability insurance, for the church?
A: Yes, I do at this time, but when the accident occurred, I did not.
(Pages 10-11 lines 22-25 and 2)

Iglesia has failed to raise a triable issue of fact surrounding whether they failed to obtain liability insurance in compliance with the lease. Therefore it is,

ORDERED, that motion sequence number 5 is granted. The Third-Party Complaint is dismissed; and it is further

ORDERED, that the branches of motion sequence number 6 seeking contractual

indemnification and breach of contract against Iglesia are granted; and it is further

ORDERED, that the remaining branches of motion sequence number 6 are denied; and it is further

ORDERED, that this action shall proceed to a trial on damages.

The foregoing constitutes the decision and Order of this Court.

Dated: October 18, 2021

Hon. Cheréé A. Buggs, JSC