

Carson v JAD Realty LLC
2022 NY Slip Op 30060(U)
January 10, 2022
Supreme Court, New York County
Docket Number: 155999/2017
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHLOMO HAGLER PART 17

Justice

-----X INDEX NO. 155999/2017

JAIME CARSON,

Plaintiff,

MOTION DATE 05/29/2020,
07/23/2020

- v -

MOTION SEQ. NO. 006 007

JAD REALTY LLC,CASA PIZZA, INC.

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 216, 217, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 261, 265, 287, 288, 289, 290, 291, 292, 293, 294, 298

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 007) 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 262, 266, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 295, 299

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Motion sequence numbers 006 and 007 are consolidated for disposition.

Plaintiff Jamie Carson brings this personal injury action following a slip and fall on the sidewalk abutting 1427 3rd Avenue, New York, NY (the "Premises"), which is owned by defendant JAD Realty LLC ("JAD" or "Owner" or "Landlord"). Defendant Casa Pizza, Inc. ("Casa Pizza" or "Tenant") operates a pizza shop on the on the ground floor of the Premises.

In its answer, JAD cross-claims against Casa Pizza for breach of contract, contribution and common law and contractual indemnification. In its answer, Casa Pizza cross-claims against JAD for contribution and indemnification.

JAD now moves (in motion sequence number 006) for summary judgment dismissing plaintiff's complaint and Casa Pizza's cross claims as against it and judgment on its cross claims for breach of contract and common law and contractual indemnification against Casa Pizza.

Casa Pizza also moves (in motions sequence number 007) for summary judgment dismissing the complaint and JAD's cross claims as against it.

I. Background

JAD had a commercial lease with third-parties for the ground floor unit of the Premises ("Lease"), which was assigned to Casa Pizza on April 12, 2016 (NYSCEF Doc No. 191). In pertinent part, the lease provides that "Owner shall maintain and repair the public portions of the building, both exterior and interior," while "Tenant shall, throughout the term of this lease, take good care of the demised premises . . . and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition" (NYSCEF Doc No. 190, Lease, ¶ 4). Additionally, it provides that "Tenant shall, at Tenant's 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" (*id.*, ¶ 30). The Lease also contains the following indemnification provision:

"Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant . . . of any covenant on [sic] condition of this lease, or the carelessness, negligence or improper conduct of the Tenant" (*id.*, ¶ 8).

Annexed to, and made part of, the Lease, is a rider ("Rider"). In pertinent part, the Rider provides that "[i]n the event of a conflict between the terms of the printed portion of this Lease

and terms of this Rider, the terms of the Rider shall prevail” (NYSCEF Doc No. 190, Rider, ¶ 82 [a]).¹

The Rider contains an insurance procurement provision, requiring Casa Pizza to obtain comprehensive insurance coverage and to name JAD as an additional insured (*id.*, ¶ 51). The Rider also contains the following indemnification provisions:

“The Tenant hereby assumes liability for, and agrees to indemnify and hold harmless the Landlord from and against any and all suits, actions, demands, claims for damages and against any and all liability, loss and expenses arising from injury and/or damage (including, but not limited to, the property of the Landlord) caused by the acts or omissions of the Tenant, its agents, servants, employees, subcontractors, licensees, invitees, or occurring by reason of or in connection with the use or operation of the demised premises or any of the appurtenances, facilities, or equipment used in connection therewith by anyone including the public, the Tenant, the Tenants' agents, servants, employees, subcontractors, Licensees, or invitees while in, on, or about the demised premises, or while acting in the course of or in the scope of their employment, it being the intent of the provisions of this Article that the Tenant shall assume all the risks of liability for and indemnify, defend, and hold harmless, the Landlord against all claims, losses, costs, damages, and expenses which may occur or be paid out by reason of any accidents, damages or injuries to person(s) or Property occurring in, on or about the leased premises, and/or any breach, violation(s), or non-performance of any covenant, condition or agreement in this Lease herein set forth and contained, on the part of the Tenant to be fulfilled, kept, observed and performed, and/or any damage(s) to person(s) or property, occasioned by Tenants' use and occupancy which tenant may permit or suffer to be made of the demised premises, and in effect for any and all liabilities arising out of or in any manner, directly or indirectly, in connection with the conduct of Tenants' business or the use of the premises when operated by or on behalf of the Tenant. The Tenant agrees that the liability insurance of the Tenant

¹ The Rider contain two paragraphs that are labeled “82.” One appears in chronological order and the other at end of the Rider. While the two use different wording, both provide that the Rider and the Lease form a single agreement between the parties and that, to the extent the Rider’s terms conflict with those of the Lease, the Rider shall prevail.

against loss or liability under this Article shall not relieve Tenant from its' obligation under this Article.

“Tenant shall further indemnify and hold harmless the Landlord from any and all liability costs and expenses, of any nature or description including Landlords' reasonable attorneys' fees” (*id.*, ¶¶ 48, 66).

According to plaintiff, on January 7, 2017, she left her apartment, which was in the building adjacent to the Premises, around 6 p.m. (NYSCEF Doc No. 225, Carson tr at 108:11-20; 32:2-4). There was snow on the ground, but she could not recall how much it had snowed that day (*id.* at 32:2-20), or if it was snowing at the time of her accident (*id.* at 34:17-18; 130:15-18). Nor could plaintiff remember whether the sidewalk appeared to have been shoveled or salted (*id.* at 34:13-16). Plaintiff remembered only that she was walking on “packed down snow” (*id.* at 34:4-8). Plaintiff stated that she slipped on “a slippery slope” and that “the ground was like a slide” (*id.* at 41:10-12). Plaintiff described the ground at the time of her accident as “packed down snow on steep slope” (*id.* at 41:17-18), with “gray footprints all over,” and as “slushy, icy, packed snow. Dirty” (*id.* at 41:24-42:3). Plaintiff could not recall how much snow was on the ground in the location of the accident (*id.* at 58:11-14). “[She] did not see salt chunks” (*id.* at 42:11).

In her affidavit, plaintiff further explains that she “was walking close to the building line” (NYSCEF Doc No. 238, Carson aff, ¶ 5), on “[t]he concrete mound or layer made part of the sidewalk in front of Casa Pizza,” when she slipped and fell (*id.*, ¶ 10). She avers that “[t]he grade/slope of the sidewalk in front of Casa Pizza” (*id.*, ¶ 12), as well as “[t]he packed snow and icy slippery condition,” caused her to slip and fall (*id.*, ¶ 13). Attached to her affidavit are photographs of the sidewalk outside Casa Pizza, which plaintiff affirms accurately depict this

concrete mound as it existed at the time of her accident (*id.*, ¶¶ 9, 10; *see also* NYSCEF Doc No. 237).

At the time of the accident, plaintiff had been residing next-door to the Premises for five years (Carson tr at 109: 13-22). During her deposition, plaintiff stated that she passed the location of the accident daily (*id.* at 109:23–110:4) and had not thought that the area presented a danger, had never complained to anyone about it and had no knowledge of anyone becoming injured at that location prior to her fall (*id.* at 32:25-33:19).

In her bills of particulars and supplemental bills of particulars, plaintiff claims that defendants were negligent in: (1) their snow and ice removal efforts, which created a more dangerous condition than had they done nothing; (2) placing salt on the sidewalk, which caused the snow to melt and then freeze, making the sidewalk icy and/or slippery; (3) failing to timely inspect the sidewalk; and (4) allowing and/or creating an unreasonable slope of the sidewalk, in violation of New York City Department of Transportation Highway Rules and Regulations 2-09 (f) (1) and (f) (4) (xi) and New York City Administrative Code §7-210 (*see* NYSCEF Doc Nos. 221-224).²

Mohamad Chalan (“Chalan”), who is the manager and part-owner of Casa Pizza (NYSCEF Doc No. 228, Chalan tr at 8:22-24), testified that he was working on the day of the accident, but that he did not see the plaintiff fall (*id.* at 53:2-6; 77:20-22). According to Chalan, it was snowing that day—before, during and after plaintiff’s fall—and that he and his employees shoveled approximately three or four times before the accident. Chalan testified that the last

² Notably, plaintiff’s submissions, including her expert’s affidavit, mistakenly cite to 34 RCNY 2-09 (f) (1) (xi), whereas the pertinent provision is 34 RCNY 2-09 (f) (4) (xi). As plaintiff’s expert paraphrases the correct provision (*see* NYSCEF Doc No. 240 at 5-6), there can be no prejudice to defendants. For clarity and consistency, this decision will reference the correct portion of the NYC Highway Rules and Regulations.

time he shoveled before the accident was between 3 and 4 p.m., that he did it himself and that it was still snowing at that time. (*id.* 71:12-72:12; 74:15-19; 75:16-21; 77:14-19; 105.) Chalan stated that the sidewalk was still wet after he finished (*id.* at 78:16-21). Chalan also stated that there was no ice, but that, because it was still snowing, there was a thin film of snow on the ground after he was done shoveling (*id.* at 106:5-107:8). Chalan testified that he threw salt down each time he shoveled to melt the snow as it came down (*id.* at 72:15-25; 78:9-11). Chalan stated that he did not find the sidewalk to be slippery while he was shoveling (*id.* at 107:9-15). According to Chalan, approximately 15 minutes after the accident, he went outside to check the sidewalk and saw a very light layer of snow, but no ice, on the sidewalk (*id.* at 112:11-113:11; 137:9-12). As concerns the slope of the sidewalk in front of the pizzeria, Chalan stated that he never received any complaints about it (*id.* 102:20-23; 109:8-13) and that he never complained to JAD about the grade of the sidewalk (*id.* at 107:16-19). Chalan also testified that he never did any work or repairs on the sidewalk (*id.* at 121:19-122:16).

In his affidavit, James Daniels, JAD's president and managing member, states that he "visited the premises on a weekly to monthly basis over the course of the past two (2) decades" and that he was responsible for handling all complaints (NYSCEF Doc No. 193, Daniels aff, ¶¶ 4, 5). He states that the grade or pitch of subject sidewalk, as depicted in plaintiff's photographs, remained "unchanged from the time when JAD [] first purchased the premises in 1985" and that JAD had done no work on it prior to the accident (*id.*, ¶ 6). He further avers that, prior to the accident, JAD had not received any complaints and had no sidewalk violations issued by the City of New York (*id.*, ¶ 7). Additionally, he states that, prior to plaintiff's fall, "there had never been an accident . . . as a result of a dangerous condition with respect to the grade or pitch of the sidewalk adjacent to the premises" (*id.*).

In support of its motion for summary judgment, JAD submits an expert affidavit of George Wright, a professional meteorologist, dated May 28, 2020 (NYSCEF Doc No. 194, Wright aff). According to Wright, on January 7, 2017 at 6 p.m., snow was falling and the temperature was 20 degrees at the Premises (*id.*, ¶ 13). The temperature highs that day were “in the mid 20s” (*id.*, ¶ 12). Based on his review of the meteorological records for the days leading up to and including January 7, 2017, as well as his review of the deposition transcripts in this action, particularly plaintiff’s testimony that she did not see salt chunks on the sidewalk, Wright concludes, in pertinent part, as follows:

“To the extent that there was any slippery condition on the sidewalk at the time of the alleged accident, this condition was produced by the ongoing winter storm and/or Mr. Chalan's failure to put down salt which resulted in a thin, slippery layer of snow and/or ice being left on the sidewalk following each time Mr. Chalan shoveled on the date of incident which was then camouflaged by the accumulation of new snow on top of it. Thus, Mr. Chalan's frequent snow removal efforts led to a more dangerous and slippery condition than would have existed had he not shoveled at all” (*id.*, ¶ 15 [e]).

Wright further explains that if Chalan had salted the sidewalk after he shoveled, “the snow that fell from the time he last shoveled until the time of plaintiff’s accident (approximately 2-3 hours between 3-4:00 p.m. and 6:00 p.m.) would have melted since only approximately one-half inch (0.5-in.) of snow fell during this period of time” and so “the snow/ice condition Plaintiff testified that she slipped and fell upon would not have been present” (*id.*). Wright also states that a Winter Weather Advisory was in effect and “snow was falling and accumulating as a result of the winter storm that was in progress at the time [plaintiff] allegedly fell” (*id.*, ¶ 15 [i]).

Plaintiff submits the affidavit of her expert, Stanley Fein, a professional engineer. On May 10, 2017, plaintiff visited the accident site with Fein (Carson aff, ¶¶ 14-16; NYSCEF Doc No. 240, Fein aff at 4). Fein states that his inspection “revealed that there was an additional

permanent layer or mound of concrete on top of and made part of the concrete sidewalk directly in front of the sidewalk in front of Casa Pizza” (*id.* at 5), which “could . . . be easily seen by anyone taking a cursory view of the sidewalk” (*id.* at 6). Fein states that he “took measurements of the sidewalk running from the building line of [the Premises] towards the curb” (*id.* at 5). He explains that under 34 RCNY 2-09 (f) (4) (xi), “the permissible grade/slope/pitch of the sidewalk running from the building line to the curb is to be minimum of one (1) inch in five (5) feet and a maximum of three (3) inches in five (5) feet” (*id.* at 5-6), whereas the “sidewalk running from the building line to the curb . . . was 10 inches in five feet[,] . . . more than three (3) times the amount permissible by law” (*id.* at 6). He concludes that the mound of concrete was in violation of NYC Highway Rules and Regulations (*id.* at 6) and that it “created a dangerous condition” (*id.* at 7).

Fein also opines that Chalan’s actions “made the condition of the sidewalk even more dangerous [than] had he not opened the restaurant and or attempted to remove snow from the sidewalk and put down salt on the sidewalk” (*id.* at 7). He draws this conclusion based on Chalan’s testimony that he last shoveled between 3 and 4 p.m. and that there was a thin layer of precipitation left on the ground when he was done (*id.* at 8-9). Based on this testimony, and Wright’s affidavit—stating that it was still snowing and 20 degrees at the time of plaintiff’s fall—Fein opines that “Mr. Chalan shoveling the snow and leaving a wet condition or moisture residue on the sidewalk permitted the sidewalk to become icy and more of a slipping hazard than had Mr. Chalan did not shovel snow from the sidewalk” (*id.* at 9). Fein also states that putting salt down around 3 p.m. or 4 p.m., as Chalan testified he did, would have melted any remaining snow as well as any new snowfall, “but said melted snow would have frozen prior to the time

plaintiff fell (approximately 6 p.m.) at a temperature of 20 degrees,” thus “creating an icy and more slippery condition [than] had he not placed salt on the sidewalk” (*id.* at 9).

In addition, Fein posits that by opening the pizzeria, Casa Pizza caused a more icy and slippery condition to exist, because “delivery men and customers could enter and exit the restaurant from the front entrance,” thereby “packing snow down on the sidewalk” (*id.* at 9-10). Finally, Fein opines that “Chalan last shoveled the snow from the sidewalk at 3 P.M. or 4 P.M. knowing that wet condition or moisture residue would be left behind and then failing to tend to sidewalk thereafter was unreasonably dangerous” (*id.* at 10).

In July 2017, JAD retained a contractor and replaced the sidewalk in front of the Premises (*see* NYSCEF Doc No. 245).

II. Analysis

Pursuant to CPLR 3212 (b), “[t]o obtain summary judgment, the movant ‘must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Madeline D’Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant satisfies its burden, the opposing party must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*, quoting *Alvarez*, 68 NY2d at 324). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . on a motion for summary judgment” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004] [internal quotation marks and citation omitted]).

A. JAD's Motion for Summary Judgment Dismissing the Complaint

JAD contends that it is entitled to summary judgment dismissing the complaint as against it, because it did not create and was not actually or constructively on notice of any defect to the grade of the subject sidewalk. In addition, JAD argues that it had no duty of care to plaintiff at the time of the accident, because there was a storm in progress.

Plaintiff counters that her claim against JAD is not concerned with the slippery conditions created by negligent snow removal, but rather JAD's violation of the nondelegable duty owed under New York City Administrative Code §7-210. Plaintiff argues that the sidewalk abutting the Premises failed to comply with 34 RCNY 2-09 (f) (1) and (4) (xi), which require landlords to repair the sidewalk abutting their property and specify the permissible slope/pitch from the building line to the curb. Plaintiff also points out that the subject mound of concrete was in plain view.

Casa Pizza also opposes JAD's motion. It argues that JAD's motion for summary judgment must be denied, because JAD's replacement of the sidewalk will subject it to a spoliation charge at trial, permitting the jury to draw the negative inference that the slope of the sidewalk was the proximate cause of plaintiff's injury.

Pursuant to section 7-210 of the Administrative Code of the City of New York "[t]he owner of premises abutting the public sidewalk has a nondelegable duty to maintain and repair the sidewalk abutting the premises" (*Brown v New York City Dept. of Transp.*, 187 AD3d 535, 536 [1st Dept 2020]). However, "landowners are not strictly liable for personal injuries resulting from incidents on abutting sidewalks because section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 171 [2019]).

“A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 [1st Dept 2013], quoting *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant[] . . . to discover and remedy it” (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Under the storm in progress doctrine, “[t]he duty of a landowner to take reasonable measures to remedy a dangerous condition caused by a storm is suspended while the storm is in progress, and does not commence until a reasonable time after the storm has ended” (*Kinberg v New York City Tr. Auth.*, 99 AD3d 583, 583-584 [1st Dept 2012] [internal citation omitted]).

“Upon a defendant's showing that the doctrine applies, the plaintiff may defeat summary judgment by raising a triable issue of fact as to whether [the defendant] had undertaken snow removal activities that created or exacerbated a hazardous condition” (*Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017] [internal citation omitted]).

Here, JAD demonstrates prima facie, through the affidavit of its meteorologist, George Wright, that there was a storm in progress at the time of plaintiff's accident (Wright aff, ¶¶ 13, 15 [i]) and, therefore, it did not owe a duty to plaintiff to keep the sidewalk clear of snow (*see Filius v New York City Hous. Auth.*, 156 AD3d 434, 434-435 [1st Dept 2017]).

In addition, JAD demonstrates prima facie that it did not create or have actual or constructive notice of the allegedly defective condition of the sidewalk where plaintiff fell. JAD's managing member states that: JAD had not made any alterations to the sidewalk prior to the date of the accident and JAD had never received any complaints or violations regarding it

(Daniels aff, ¶¶ 5-8). In addition, JAD points to plaintiff’s own testimony, that despite walking past the alleged defect daily for five years, she never took note of it (Carson tr at 109:23-110:4; 32:25-33:19). As such, JAD demonstrates its prima facie entitlement to summary judgment dismissal of plaintiff’s claim (*see Schulman v City of New York*, 157 AD3d 548, 548-549 [1st Dept 2018] [finding that “defendant established that its employees did not create the alleged defect by submitting the deposition testimony of its part-owner that defendant performed no work to the subject section of the sidewalk before the accident” and “that defendant lacked actual or constructive notice of the alleged condition, because [its part-owner] testified that prior to plaintiff’s accident, he was unaware of any complaints or accidents on the sidewalk, and had received no violations concerning the sidewalk”]; *see also Parra v City of New York*, 137 AD3d 532, 532-533 [1st Dept 2016] [finding that “defendants demonstrated that they lacked actual and constructive notice of the defective condition,” where they “submitted plaintiff’s testimony that she had never seen the defect before, and had no knowledge of prior accidents or complaints and the testimony of [the] assistant store manager that the sidewalk was cleaned every morning, no defects were noted, and there were no complaints or prior accidents”]).

In opposition, plaintiff does not raise any issues of fact regarding the storm in progress. However, plaintiff demonstrates that: (1) the alleged defect existed for decades (*see Daniels aff*, ¶ 6 [“confirm[ing] that the grade or pitch of the sidewalk adjacent to [the Premises] as seen in the [plaintiff’s] photographs [remained] unchanged from the time when JAD . . . first purchased the premises in 1985”]); (2) it was plainly visible (*see NYSCEF Doc No. 237*; *Fein aff* at 6 [stating that the “mound . . . could also be easily seen by anyone taking a cursory view of the sidewalk”]); and (3) that the slope of the subject sidewalk was more than three times the permissible pitch under 34 RCNY 2-09 (f) (4) (xi) (*see Fein aff* at 5-6). As such, plaintiff

successfully raises an issue as to whether JAD had constructive notice of the sidewalk’s condition, requiring denial of JAD’s motion (*see King v City Bay Plaza, LLC*, 118 AD3d 476, 476 [1st Dept 2014] [finding that photographs of the subject condition “raise[d] a triable issue of fact as to constructive notice of the condition”]; *see also Gomez v Congregation K’Hal Adath Jeshurun, Inc.*, 104 AD3d 456, 456-457 [1st Dept 2013]).

To the extent that JAD argues that a slippery condition was the sole proximate cause of plaintiff’s accident, the issue is one for the trier of fact. Plaintiff testified that she slipped on “a slippery slope” and that “the ground was like a slide” (Carson tr at 41:10-12). In addition, Fein identified the slope of the sidewalk as a dangerous condition in violation of the NYC Highway Rules and Regulations (Fein aff at 7). This is enough to raise an issue of fact as to whether the sidewalk’s slope was a proximate cause of her injury. Whether a slippery condition “contributed to or exacerbated the hazardous condition” of the sidewalk merely presents another issue of fact (*Vosper v Fives 160th, LLC*, 110 AD3d 544, 545 [1st Dept 2013]; *see also Sussman v MK LCP Rye LLC*, 164 AD3d 1139, 1140 [1st Dept 2018] [“there can be more than one proximate cause of an accident”]).

Turning to Casa Pizza’s spoliation argument, it is unclear what Casa Pizza seeks to accomplish, as it has made no motion for sanctions. Instead, it argues that, because such sanctions are likely at trial, JAD should be denied summary judgment at this time. Setting aside the circuitry of this argument, Casa Pizza fails to demonstrate spoliation. Plaintiff was able to have her expert examine the sidewalk, photograph it and measure its slope before it was replaced. Casa Pizza makes no showing as to why its expert failed to do so. Moreover, Casa Pizza fails to show “that [JAD] had an obligation to preserve the sidewalk in its alleged

dangerous condition and that [it] destroyed the evidence with a culpable state of mind” (*Parra*, 137 AD3d at 533).

On reply, JAD for the first time submits the expert affidavits of Peter Chen, a professional engineer (*see* NYSCEF Doc No. 290, Chen aff). Based on a three dimensional laser scan of the subject sidewalk taken on November 23, 2020, after JAD had the sidewalk replaced, and plaintiff’s photographs of the site, Chen created a 3-D image that purportedly corresponded to the rise and run of the subject sidewalk in existence at the time of the subject accident (*id.*, ¶ 6). Based on this analysis, Chen concludes that: (1) “the slope of the original ramp . . . [was] well within the acceptable bounds as set forth by all applicable code sections” (*id.*); (2) the incline at the specific spot identified by plaintiff as the location of her fall “[was] de minimis or trivial in nature and was not a substantial factor in bringing about the plaintiff’s accident” (*id.*, ¶ 7); and (3) Fein’s methodology was flawed and his findings inaccurate (*see id.*, ¶¶ 6, 8, 13).

Chen’s affidavit does not change the outcome in JAD’s favor. JAD knew that plaintiff’s theory of liability as against it was that the subject sidewalk was too steep, but it offered no evidence on the issue in its moving papers. “Having failed to adequately and timely resolve the issue upon its motion for summary judgment, defendant must await its resolution by the trier of fact” (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1st Dept 1992]; *see also Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013] [finding no abuse of discretion where the court “declin[ed] to consider the affidavit of defendants’ expert, which was submitted for the first time in reply” and “sought to assert new grounds for the motion”]). To the extent Chen disagrees with Fein’s “methodology and conclusions, [this] present[s] a battle of the experts for the jury to resolve” (*Shillingford v New York City Tr. Auth.*, 147 AD3d 465, 465 [1st Dept 2017]; *see*

Vosper, 110 AD3d at 545 [stating that experts' disagreements over findings or methodology present issues of fact and credibility for a jury to resolve]).

For the foregoing reasons, JAD's motion to dismiss the complaint as against it is denied.

B. Casa Pizza's Motion for Summary Judgment Dismissing the Complaint

Casa Pizza contends that it is entitled to summary judgment dismissing the complaint, because: (1) it had no legal duty to plaintiff to repair the sidewalk's structural defects; and (2) it made reasonable efforts to keep the sidewalk free and clear of snow and ice during an ongoing snowstorm, without making the hazard worse. Moreover, it argues, it had no notice of any dangerous condition allegedly created by its snow removal.

In opposition, plaintiff and JAD both contend that issues of fact exist as to whether Casa Pizza created a slipping hazard that would not have otherwise existed. However, whereas plaintiff posits that Casa Pizza's use of salt on the sidewalk contributed to the dangerous condition, JAD theorizes that Casa Pizza's fault lies with its failure to use salt.

Here, Casa Pizza owed no duty to plaintiff as concerns the alleged structural defect of the sidewalk. Whatever its contractual obligations under the Lease, "[p]rovisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff" (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *see also Bi Fang Zhou v 131 Chrystie St. Realty Corp.*, 125 AD3d 429, 430 [1st Dept 2015]).

In addition, with respect to plaintiff's claim that she slipped on packed snow, Casa Pizza demonstrates its prima facie entitlement to summary judgment by offering the testimony of its manager (*see* Chalan tr at 71-72) and the findings of a licensed meteorologist (*see* Wright aff, ¶¶ 11, 13, 15 [i]), demonstrating that there was a storm in progress at the time of plaintiff's accident (*see* New York City Administrative Code § 16-123[requiring "[e]very owner, lessee, tenant" of a

building abutting a sidewalk, “within four hours after the snow ceases to fall, . . . [to] remove the snow or ice”]; *Kinberg v New York City Tr. Auth.*, 99 AD3d 583, 583 [1st Dept 2012] [finding defendant demonstrated entitlement to summary judgment through the “testimony of its employees and certified climatological data, showing that a snowstorm was in progress at the time of plaintiff’s fall”]; *Powell v MLG Hillside Assoc.*, 290 AD2d 345, 345 [1st Dept 2002] [“evidence of a storm in progress presents a prima facie case for dismissal . . . especially . . . when based upon the analysis of a licensed meteorologist”]).

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff argues that Casa Pizza made the condition of the sidewalk more dangerous by: (1) its snow removal efforts and (2) by opening for business and permitting deliverymen and customers to enter and exit the restaurant.

As to the first theory, plaintiff points to Chalan’s testimony that he last shoveled between 3 and 4 p.m. (Chalan tr at 105:23-106:1), that there was still a “thin film of snow on the ground” when he was done (*id.* at 106:21-107:8) and that he placed salt on the ground (*id.* at 72:15-18).

Based on the foregoing, plaintiff’s expert concludes that:

“Mr. Chalan putting salt on the sidewalk at 3 P.M. or 4 P.M. would simply melt any snow that he left on the sidewalk and . . . any snow that fell thereafter but said melted snow would have frozen prior to the time plaintiff fell (approximately 6 P.M.) at a temperature of 20 degrees which existed at the time creating an icy and slippery condition” (Fein aff at 9).

However, Fein does not provide any basis for his conclusion that the salt would melt any snow remaining after Chalan finished shoveling as well as snow that fell immediately after, but that it would cease to melt additional snow that fell in the two to three hours before plaintiff’s accident. “Accordingly, plaintiff’s argument[] as to the origination of the allegedly dangerous condition [is] speculative and conclusory, and insufficient to defeat the motion” (*Rivas v New York City Hous. Auth.*, 140 AD3d 580, 581 [1st Dept 2016] [finding that the expert’s affidavit

failed to raise issues of fact as to the origin of the ice, where the meteorologist “concluded that ice could only have been present due to an inadequate salting of the snow that caused the snow to melt, but did not prevent it from refreezing,” without “explain[ing] how the application of salt lower[ed] the freezing temperature for water [or] what amount of salt would have been sufficient, given the temperature that day, to keep melted snow from refreezing”).

As for plaintiff’s second theory, it is equally speculative. Fein opines that “opening the restaurant so that delivery men and customers could enter and exit the restaurant . . . would then caus[e] an icy and more slippery condition to exist [than] had the restaurant not opened” (Fein tr at 9-10). However, he offers no support for the conclusion that the foot traffic related to the pizzeria’s business created a more dangerous condition than that created by the public’ general use of the sidewalk. As such, plaintiff fails to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562).

Wright’s affidavit, on which both JAD and plaintiff rely, also fails to create an issue of fact. Wright points to plaintiff’s testimony that she “did not see salt chunks” (Carson tr at 42:11) and concludes, contrary to Chalan’s testimony, that Chalan did not use salt after he shoveled the snow (*see* Wright aff, ¶¶ 6, 15). Wright reasons that had Chalan done so, then the snow that fell during the three-hour period between when Chalan last shoveled and plaintiff fell would have melted (*id.*, ¶ 15 [e]). Wright opines that the failure to put down salt “resulted in a thin, slippery layer of snow and/or ice being left on the sidewalk following each time Mr. Chalan shoveled on the date of incident which was then camouflaged by the accumulation of new snow on top of it” (*id.*).

However, “one who attempts to remove snow from a sidewalk is not subject to liability simply because he or she failed to remove all of the snow,” unless “his or her snow removal

efforts made the sidewalk more dangerous, i.e., increased the hazard posed by the snow” (*Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [1st Dept 2007]). Here, Wright fails to explain how leaving a small amount of snow behind created a more slippery condition than would have been the case had Chalan simply done nothing during the storm. For example, Wright does not point to a thaw/freeze cycle reflected in the meteorological data to explain how a thin layer of snow would have melted and refrozen in the hours before plaintiff’s fall (*see e.g. Kasem v Price-Rite Off. & Home Furniture*, 21 AD3d 799, 801-802 [1st Dept 2005]). Moreover, “a failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from improving” (*Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 678 [2d Dept 2018] [internal quotation marks and citations omitted]). Nor does Wright point to anything in the record to support his statement that there was a “slippery layer of snow and/or ice” that was created by Chalan’s efforts and then “camouflaged” (Wright aff, ¶ 15 [e]) by subsequent snowfall. That is not how plaintiff described the snow in the area she fell. Plaintiff described it as “slushy, icy, packed snow,” “[d]irty” and with “gray footprints all over” (Carson tr at 41:24-42:3). Accordingly, Wright’s opinion is speculative and insufficient to defeat the motion for summary judgment (*see Moreno v Trustees of Columbia Univ. in City of N.Y.*, 161 AD3d 501, 501-502 [1st Dept 2018] [finding that “[t]he opinion of plaintiff’s expert’s was too speculative to raise an issue of fact as to whether defendant’s snow removal efforts involved insufficient salt or ice melt materials, resulting in the creation of new ice that was covered by the snow”]; *see also Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 566 [1st Dept 2011] [finding that the “defendant’s expert opinion was arguably speculative insofar as it failed to take into account plaintiff’s testimony concerning the nature of the ice”]).

For the foregoing reasons, Casa Pizza’s motion for summary judgment is granted to the extent of dismissing the complaint as against it.³ Accordingly, JAD’s motion for summary judgment, to the extent it seeks dismissal of Casa Pizza’s cross claims—which seek contribution and indemnification should it be held liable to plaintiff—is likewise granted.

C. Defendants’ Motions for Summary Judgment on JAD’s Cross Claims

i. Breach of Contract

JAD contends that it is entitled to summary judgment on its breach of contract cross claim, because paragraph 51 of the Rider requires the tenant to name the landlord as an additional insured and Casa Pizza failed to do so. In opposition, Casa Pizza contends that JAD’s damages, if any, are limited to the out-of-pocket costs caused by the breach and that JAD may not recover the costs and fees incurred by its insurer in defending this action.

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] [internal quotation marks and citations omitted]; *see also Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519, 520 [1st Dept 2013] [finding that,

³ Notably, much like JAD, Casa Pizza offers expert opinions for the first time on reply. Michael C. Simon, an engineer, opines that the excessive slope of the subject sidewalk constituted a code violation and proximately caused plaintiff’s fall (*see* NYSCEF Doc No. 283). James Bria, III, a meteorologist, opines that the wet condition on the sidewalk was consistent with the use of salt and that the weather conditions that day were not conducive for the development of solid ice (*see* NYSCEF Doc No. 286). Having determined that Casa Pizza is entitled to summary judgment, there is no need to consider these submissions. In any event, “[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion” (*Rhodes v City of New York*, 88 AD3d 614, 615 [1st Dept 2011] [internal quotation marks and citation omitted]).

“in the absence of evidence that third-party defendant procured the required insurance, summary judgment should have been granted on the breach of contract claim”). Where the tenant has breached its obligation to procure coverage, but the landlord has obtained its own insurance covering the loss, the landlord’s damages are limited to “to its out-of-pocket expenses (notably, the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums)” (*Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *see McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013]).

Here, JAD demonstrates its entitlement to summary judgment. First, the Rider unambiguously requires Casa Pizza to procure comprehensive liability insurance and to name Landlord (i.e. JAD) as an additional insured (Rider, ¶ 51). Second, JAD submits the declaration page for Casa Pizza’s policy, which names “James Daniels Consulting LLC,” rather than JAD, as an additional insured (NYSCEF Doc No. 195 at 2). In opposition, Casa Pizza disputes neither that it was obligated to procure additional insured coverage nor that it failed to do. Accordingly, JAD’s motion for summary judgment on its cross claim for breach of contract is granted and JAD is entitled to recover its out-of-pocket expense (*see Eagle v Chelsea Piers, L.P.*, 46 AD3d 367, 368 [1st Dept 2007]; *McLaughlin*, 107 AD3d at 470).

ii. Common Law Indemnification

JAD contends that it is entitled to summary judgment on its common law indemnification cross claim, because Casa Pizza’s negligent snow and ice removal caused plaintiff’s accident and JAD’s liability is based solely on its status as the owner of the Premises. Casa Pizza counters that the record does not contain any evidence of its negligence and that, in any event, JAD owed a nondelegable duty to maintain the sidewalk under the New York City Administrative Code.

“[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, [therefore,] it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

Here, JAD was under a nondelegable duty to maintain and repair the sidewalk (*see* Administrative Code of the City of New York § 7-210; *Brown*, 187 AD3d at 536). If JAD is found to be liable to plaintiff, it will be because it failed in this duty. Therefore, JAD is not entitled to common law indemnification and the cross claim is dismissed (*see Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [finding that where the lessor had a duty to maintain the premises in good repair, it was barred from obtaining common law indemnification, as any liability would be premised on the breach of this duty]; *see also Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 569 [1987] [finding no entitlement to common law indemnification, where the building owner’s liability was not derivative, but based on its own failure to remedy a defect, “something it was permitted to do under the lease and obliged to do under the Administrative Code”]).

iii. Contractual Indemnification

JAD contends that it is entitled to contractual indemnification pursuant to paragraph 48 of the Rider, as it provides for indemnification for all claims arising in, on or about the Premises. JAD argues that paragraph 48 is also triggered because the accident was caused by Casa Pizza’s negligent removal of snow and/or its failure to replace the defective sidewalk, as required by paragraph 30 of the Lease. In addition, JAD contends that it is entitled to indemnification under paragraph 66 of the Rider, which contains a broad indemnification clause, requiring Tenant to indemnify Landlord from all liability, costs and expenses, of any nature or description. JAD

argues that it is entitled to summary judgment even if issues of fact exist as to its negligence, because paragraphs 48 and 66 apply regardless of Landlord’s fault. Lastly, JAD claims that these provisions are not void under General Obligations Law § 5-321, because the Lease includes an insurance procurement clause.

Casa Pizza counters that, pursuant to paragraph 8 of the Lease, JAD is not entitled to indemnification, because JAD has not established that Casa Pizza was negligent, that JAD was not negligent and that JAD will not be reimbursed by insurance. Casa Pizza also argues that, under the Lease, JAD was responsible for structural repairs to the sidewalk or that, at a minimum, the Lease is ambiguous on the issue and the ambiguity should be resolved by extrinsic evidence (i.e. testimony and the fact that JAD replaced the sidewalk at its own expense). Additionally, it argues that because JAD may be held liable to plaintiff, it is premature to reach the issue of contractual indemnification. Lastly, Casa Pizza argues that, because JAD has coverage through its own insurer, any damages are limited to out-of-pocket costs.

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). “To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability” (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020] [internal quotation marks and citations omitted]).

General Obligations Law § 5-321 will render unenforceable an indemnification provision “exempting the lessor from liability for damages for injuries to person or property caused by or

resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises” (General Obligations Law § 5-321). However, as explained by the Court of Appeals in *Great N. Ins. Co. v Interior Constr. Corp.*, where the lease is negotiated between two sophisticated parties and a broad indemnification clause is coupled with an insurance procurement requirement, General Obligations Law § 5-321 will not prohibit indemnity (7 NY3d 412, 419 [2006]). In that instance, “[the landlord] is not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance” (*id.*, quoting *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 161 [1977]).

Here, the Lease and the Rider contain three indemnification provisions. The first, found in paragraph 8 of the Lease, requires Tenant to indemnify Owner “against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant . . . of any covenant on [sic] condition of this lease, or the carelessness, negligence or improper conduct of the Tenant” (Lease, ¶ 8). The latter two, contained in paragraphs 48 and 66 of the Rider, are much broader. They do not limit indemnification to costs not reimbursed by the Owner’s insurer, do not require a breach or negligence on the part of Tenant to be triggered, and apply regardless of Landlord’s negligence. Pursuant to the terms of the parties’ agreement, the Rider’s broader indemnification provisions “shall prevail” (Rider, ¶ 82; *see also Amill v Lawrence Ruben Co., Inc.*, 100 AD3d 458, 460 [1st Dept 2012] [finding that, as between a narrower indemnification provision in the lease, limiting indemnification to costs not reimbursed by insurance, and a broader one in the rider, which

contained no such limitation, the broader one controlled, where “the terms of the lease provided that the rider’s language would prevail”).

However, contrary to JAD’s contention, the Rider’s broader provisions are unenforceable under General Obligations Law § 5-321. Both paragraph 48 and 66 provide for indemnification regardless of landlord’s negligence. As discussed above, should plaintiff prevail in the instant case, it will be because JAD breached its nondelegable duty to repair the sidewalk. Because JAD is seeking indemnification for its own negligence, General Obligations Law § 5-321 is applicable (see *Delgiudice v Papanicolaou*, 5 AD3d 236, 237 [1st Dept 2004] [explaining that, “should the landlord be found negligent, then he will not be permitted to rely on . . . the lease in order to compel his tenant to defend and indemnify him since he cannot be indemnified for his own negligence”]).

JAD does not get the benefit of the holding in *Great N. Ins. Co. v Interior Constr. Corp.* (7 NY3d 412), to avoid GOB § 5-321’s prohibition against indemnity. While the instant case is in many ways similar to *Great N. Ins. Co.*—it involves a commercial lease that was negotiated at arm’s length and contains an insurance procurement provision—it also differs in one critical respect: Casa Pizza failed to procure additional insured coverage.

“In the absence of the insurance policy [Casa Pizza] was supposed to obtain, the subject indemnification provision[s] do[] not have the favorable effect of allocating loss for the purpose of placing the risk on the party with insurance coverage. Relief from the bar against exemption from liability for a party’s own negligent acts is granted only where recovery against the negligent party is obviated by the availability of adequate insurance. Since the effect of enforcing the indemnification provision[s] in the instant matter would be to exempt [JAD] from liability for an injury that was [purportedly] caused by its own negligence without the commensurate protection afforded by insurance coverage, the indemnification provision[s] [are] void and unenforceable” (*Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 541 [1st Dept 2013] [internal citations omitted]).

As such, paragraphs 48 and 66 of the Rider are unenforceable and JAD's contractual indemnification cross claim is limited to the indemnification available to it under paragraph 8 of the Lease.

Paragraph 8 of the Lease provides indemnification for damages, including attorney's fees, not covered by insurance and "incurred as a result of any breach by Tenant . . . of any covenant on [sic] condition of this lease." Pursuant to the Lease, Casa Pizza was responsible for non-structural and structural repairs to the subject sidewalk. The Lease unambiguously provides that the "Tenant shall . . . take good care of the demised premises . . . and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto" (Lease, ¶ 4) as well as "all repairs-and replacements to the sidewalks and curbs adjacent thereto" (*id.*, ¶ 30). As such, "[t]he tenant may be held liable to the owner for damages resulting from a violation of paragraph 30 of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its [restaurant]" (*Collado*, 81 AD3d at 542 [finding that, while the tenant owed no duty to the plaintiff to maintain and repair the sidewalk under Administrative Code of the City of New York § 7-210, it nonetheless was required to indemnify the landlord for breach of its obligation to do so under the lease]). Therefore, to the extent it is determined that plaintiff's accident arose out of Casa Pizza's "failure to fulfill its obligations under the lease . . . [it] must indemnify [JAD]" [*Wahl v JCNYS, LLC*, 133 AD3d 552, 553 [1st Dept 2015] [granting summary judgment to landlord on its contractual indemnification cross claim in a trip and fall case, based on tenant's failure to cure sidewalk defects, as required under the lease]; *see also O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 646 [2d Dept 2017] [finding that "[the tenant] may be required to indemnify the owner notwithstanding the owner's nondelegable obligations under Administrative Code of the City of New York § 7-210 if the tenant was contractually responsible

for performing sidewalk repairs and failed to comply with that contractual duty”). Accordingly, JAD’s motion for summary judgment on its contractual indemnification cross claim is granted, conditioned on a determination that the defective sidewalk caused plaintiff’s injury and a showing of “losses which are not reimbursed by the insurance policy the owner obtained” (*Collado*, 81 AD3d at 543 [affirming grant of “conditional order of contractual indemnification in favor of the owner”]).

iv. Contribution

Defendants dispute whether JAD may seek contribution from Casa Pizza.

“The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks and citation omitted]). To prevail on a cross claim for contribution, “a [defendant] is required to show that the [codefendant] owed it a duty of reasonable care independent of its contractual obligations, . . . or that a duty was owed to the plaintiff[] as injured part[y] and that a breach of that duty contributed to the alleged injuries” (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 17 [2d Dept 2019] [internal quotations marks and citations omitted]; see *Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011] [internal citation omitted] [denying a claim for contribution, where “[third-party plaintiff] failed to raise an inference that [third-party defendant] owed it a duty of reasonable care independent of its contractual obligations, or that [third-party defendant] owed a duty directly to plaintiff, and that a breach of either duty contributed to plaintiff’s injuries”]).

As explained above, Casa Pizza is not liable to plaintiff based on its snow removal efforts and it had no duty to plaintiff to maintain and repair the sidewalk. While Casa Pizza did owe a

duty to JAD to maintain and repair the sidewalk under the Lease, the breach of a contractual duty is not enough to create a claim for contribution (*see Chunn*, 83 AD3d at 417). Consequently, JAD's cross claim for contribution is dismissed.

Accordingly, it is hereby

ORDERED that defendant JAD Realty LLC's motion for summary judgment (motion sequence number 006) is granted to the extent of:

1. dismissing defendant Casa Pizza, Inc.'s cross claims;
2. granting summary judgment on JAD Realty LLC's cross claim for breach of contract;
3. granting conditional summary judgment on JAD Realty LLC's cross claim for contractual indemnification, pending a finding of liability to plaintiff and a showing of out-of-pocket costs; and

the motion is otherwise denied; and it is further

ORDERED that defendant Casa Pizza, Inc.'s motion for summary judgment (motion sequence number 007) is granted to the extent of:

1. dismissing the complaint in its entirety as against it, with costs and disbursements to defendant Casa Pizza, Inc. as taxed by the Clerk upon the submission of an appropriate bill of costs; and
2. dismissing JAD Realty LLC's cross claims for contribution and common law indemnification; and it is further

ORDERED that the action is severed and continued against defendant JAD Realty LLC; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

1/10/2022

DATE



SHLOMO HAGLER, 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