SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**

Justice

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INDEX NO. 159964/2016

MOTION DATE

MOTION SEQ. NO. 006 007

ALFRED VACHRIS, IVAN CHAVARRIA-SILES,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, 1834 SECOND AVENUE HOUSING DEVELOPMENT FUND CORP, S3 TUNNEL CONSTRUCTORS, NORMANDIE WINES, INC.,

Defendants.

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DECISION + ORDER ON MOTION

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, S3 TUNNEL CONSTRUCTORS,

Plaintiffs,

-against-

NORMANDIE WINES, INC.,

Defendant.

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Third-Party
Index No. 595889/2018

The following e-filed documents, listed by NYSCEF document number (Motion 006) 208-234, 243, 245-247, 253, 255, 256, 258, 259, 265, 267-269, 272-280, 289

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 189-207, 248-252, 257, 260-264, 266, 281-292

were read on this motion for summary judgment.

Defendant 1834 Second Avenue Housing Development Fund Corp. (1834) moves

pursuant to CPLR 3212 for an order granting it summary judgement dismissing the complaint and all cross claims against it and granting it summary judgment on its cross claim for contractual indemnification against defendant Normandie Wines Inc. (Normandie). Plaintiffs oppose, as do defendants City of New York, New York City Transit Authority, MTA Capital Construction Company, Metropolitan Transportation Authority, and S3 Tunnel Constructors (collectively, City defendants). Normandie partly opposes (mot. seq. 6).

Normandie moves pursuant to CPLR 3212 for an order dismissing plaintiffs' amended complaint, City defendants' third-party complaint, and all other claims, as well as all cross claims, against it. Plaintiffs oppose, as do City defendants. 1834 partly opposes (mot. seq. 7).

I. PERTINENT BACKGROUND

A. Relevant contract provisions

Normandie, as tenant, entered into a lease agreement with 1834, as landlord, on October 1, 1996, the following provisions of which are at issue:

> 4. [Normandie] shall throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, 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, reasonable wear and tear, obsolescence and damages from the elements, fire or other casualty expected.
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> 48. [Normandie] covenants and agrees that to the fullest extent permitted by law, and regardless of negligence or other fault, [Normandie] will and shall indemnify, defend and save [1834] and its directors, officers, employees and agents harmless from and against all claims, losses, actions damages, costs and expenses, including, without limitation, reasonable attorneys' fees, arising out of or resulting from any loss, damage or liability on account of injury or death of any person or persons or damage to any property, in or about the Demised Premises or in any way connected with, related to, or arising out of the use, condition or occupation of the Demised Premises or the adjacent sidewalks, provided however that [1834] shall not be indemnified or held harmless against a claim solely arising out of [1834]'s gross negligence or willful misconduct. The provisions of this Paragraph shall survive expiration or earlier termination of this Lease.

(NYSCEF 231).

B. Complaint and bill of particulars

It is alleged in plaintiffs' amended complaint that on November 23, 2015, plaintiff Alfred Vachris (Alfred) was caused to fall on the sidewalk located outside 1834 Second Avenue in Manhattan (premises) and sustained injuries. They assert causes of action for negligence and for loss of consortium on behalf of Alfred's spouse, plaintiff Ivan Chavarria-Siles (NYSCEF 51). In their bill of particulars, plaintiffs assert that Alfred sustained multiple injuries to his right knee. (NYSCEF 217, 218).

C. Material facts

1. Undisputed facts

The following material facts are undisputed (NYSCEF 191, 248, 261):

(1) Alfred sustained a knee injury on November 23, 2015, when he tripped and fell on an asphalt patch on the sidewalk in front of the premises.

(2) The asphalt patch was placed on the sidewalk by City defendants and/or one of their subcontractors in connection with the work related to the construction of the Second Avenue subway line, which was ongoing near the premises from 2007 through and including 2016.

(3) Construction affected the street and sidewalk on Second Avenue between 94th and 95th Streets.

(4) The sidewalk in front of the premises was eventually fully repaved by the MTA's contractors sometime in 2016.

(5) 1834 owned the premises at the time of Alfred's accident. Normandie was a commercial tenant in the building located at the premises at that time.

(6) Normandie did not create the condition upon which Alfred alleges he tripped.

2. Additional relevant deposition testimony

Alfred testified that he was familiar with the accident location as he lives nearby, and that the sidewalk has been under continuous modification since the subway construction commenced. He testified that he was injured when his left foot got caught in a dip or hole in the sidewalk where there was asphalt against cement. (NYSCEF 199-201).

Defendant MTA Capital Construction Company's assistant project manager testified that the ongoing construction of the Second Avenue subway line involved the removal of areas of sidewalk. (NYSCEF 202),

1834's superintendent testified that before the commencement of the subway construction, the sidewalk in front of the building was in good condition, there were no temporary patches on the sidewalk; the sidewalk in front of the premises was broken and patched several times during construction. Neither 1834 nor its tenants repaired the abutting sidewalk during the construction. (NYSCEF 204).

Normandie's owner testified that the asphalt patch was created after the commencement of subway construction, and that the patch was emptied and refilled at least three times during the construction. He believed the asphalt patch was created by workers in connection with the subway project but could not identify the company and was unaware of any accidents or complaints about the sidewalk before Alfred's accident. He was, however, aware of the existence of the asphalt patch before the accident, although he never informed 1834. (NYSCEF 205).

II. DISCUSSION

A. Motion sequence six

1. Contentions

1834 denies having created the asphalt patch, as it performed no work on the sidewalk

before or on the date of the accident and had no actual or constructive notice of any defect. Thus, it argues, there is no basis for holding it liable for the accident and claims entitlement to contractual indemnification from Normandie pursuant to their lease, and dismissal of the common law indemnification and contribution claims against it. (NYSCEF 209).

In partial opposition, Normandie contends that as the lease obligates it to effect only non-structural repairs to the premises, and as City defendants are responsible for the condition that caused Alfred's accident, there is no basis for holding it liable for contractual indemnification. According to Normandie, if City defendants are not found solely liable for the accident, then the common law indemnification and contribution claims against 1834 must stand given its non-delegable duty to maintain and repair the sidewalk, which was not displaced as Normandie did not launch a "force of harm." (NYSCEF 245).

In separate opposition, plaintiffs contend that 1834's failure to annex a statement of material facts warrants the denial of its motion, but that if its motion is considered, plaintiffs argue that 1834 does not establish that City defendants created the asphalt patch. According to plaintiffs, 1834 had actual and constructive notice of the condition as its own witness testified that 1834 was aware of the sidewalk condition at least six months before the accident. (NYSCEF 246).

Plaintiffs offers the affidavit of a professional engineer, who concludes based on a google street view image of the accident location from 2011, that the sidewalk had been patched with asphalt more than four years before Alfred's accident. He states that the sidewalk concrete was approximately seven-eighths of an inch higher than the asphalt patch, due to the settling of the patch into the underlying supporting soil over time. (NYSCEF 247). Plaintiffs contend that this raises triable issues of fact as to 1834's actual and constructive notice. (NYSCEF 246).

In separate opposition, City defendants argue that absent evidence proving that they created the asphalt patch, 1834 fails to shift its non-delegable duty to them, and that 1834 does not demonstrate that it lacked actual or constructive notice of the defect. They agree that plaintiff's expert raises triable issues of fact. (NYSCEF 272).

In reply, 1834 maintains that, as sidewalk work related to the ongoing subway construction was performed exclusively by City defendants and their subcontractors, the condition that caused Alfred's accident was created by them and that they bear sole responsibility for maintaining and repairing it. It otherwise reiterates its arguments. (NYSCEF 270, 271, 293).

2. Analysis

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Pursuant to the NYC Administrative Code (Admin. Code) § 7-210 (a-b), it is the "duty of the owner of real property abutting any sidewalk… to maintain such sidewalk in a reasonably safe condition… [who] shall be liable for any injury to property or personal injury, including

death, proximately caused by the failure of such owner to maintain such sidewalk…" "[T]he duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner." (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167 [2019]). Summary dismissal of a cause of action brought against a building owner under this section of the Administrative Code requires that the defendant establish, *prima facie*, not only that it did not violate § 7-210, but that it "neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Gyokchyan v City of New York*, 106 AD3d 780, 781 [2d Dept 2013]; *Garcia v City of New York*, 99 AD3d 491, 492 [1st Dept 2012]). Under the provision, liability for injuries proximately caused by the City's affirmative acts of negligence does not shift to abutting property owners. (*Zorin v City of New York*, 137 AD3d 1116 [2d Dept 2016]; *Harakidas v City of New York*, 86 AD3d 624 [2d Dept 2011]).

Here, as City defendants offer no response to Normandie's statement of material facts, the assertion that they created the asphalt patch is deemed admitted pursuant to 22 NYCRR § 202.8-g. In any event, there is unrebutted testimony that the asphalt patch did not exist before the commencement of the subway construction, and that City defendants and their subcontractors solely performed work on the sidewalk abutting the premises before the accident. Thus, 1834 meets its *prima facie* burden of establishing that City defendants are responsible for the condition which caused plaintiffs accident, and that it is not. (*See Trawinski v Jabir & Farag Properties, LLC*, 154 AD3d 991 [2d Dept 2017] [denying summary judgment for City defendants where plaintiff raised triable issue of fact concerning their involvement in affirmative creation of defective condition of subject sidewalk]; *Arzeno v City of New York*, 128 AD3d 527 [1st Dept 2015] [City and its agencies exercised control over fire hydrant and surrounding area during the

pendency of its work to replace blacktop on surrounding sidewalk, to the exclusion of the owners]).

As 1834 has demonstrated that it was not negligent here, it may not be held liable for common-law indemnity or contribution.

B. Motion sequence seven

1. Contentions

Normandie contends that, as City defendants created the asphalt patch, and the owner of real property, not the tenant, bears a non-delegable duty to maintain the abutting sidewalk, it is free of negligence and thus all claims against it must be dismissed, including all claims for indemnification and contribution. Additionally, it argues, it is entitled to common law indemnification and contribution from City defendants, as they created the condition that caused the accident. (NYSCEF 190).

In opposition, plaintiffs maintain that there exist triable issues of fact as to whether Normandie assumed a duty of care to third parties to maintain and repair the sidewalk pursuant to the lease, which it characterizes as a "comprehensive and exclusive" maintenance agreement. They also allege that their expert raises triable issues of fact as to whether City defendants created the asphalt patch, and whether Normandie had actual or constructive notice of the condition that caused the accident. (NYSCEF 249).

In partial opposition, 1834 maintains that it is entitled to indemnification from Normandie pursuant to the lease. (NYSCEF 254).

In separate opposition, City defendants assert that there are triable issues of fact as to whether they created the asphalt patch, whether Normandie assumed a duty to maintain the sidewalk under the lease, and whether it had actual or constructive notice of the condition.

(NYSCEF 281).

In reply, Normandie argues that the lease was not comprehensive and exclusive, as it obligated them to make only non-structural repairs to the sidewalk, and observes that there is no evidence that they created the asphalt patch, or that they made special use of the sidewalk. Thus, it denies that there is a basis for holding them liable to plaintiffs. Additionally, it contends that, as 1834 and City defendants did not oppose their statement of material facts, all statements contained therein are deemed admitted. It otherwise reiterates its arguments. (NYSCEF 260, 263, 291).

2. Analysis

In light of the non-delegable duty imposed on the owner of the premises to maintain and repair the abutting sidewalk (Admin. Code § 7–210), lease provisions obligating a tenant to repair the sidewalk impose on the tenant no duty to a third party. (*Collado v Cruz*, 81 AD3d 542 [1st Dept. 2011]). However, where a tenant makes special use of a sidewalk, or is obligated by lease to maintain it, the property owner and tenant may be held liable as joint tortfeasors. (*Smoot v Rite Aid*, 185 AD3d 411 [1st Dept 2020]; *Larosa v Corner Locations, II, L.P.*, 169 AD3d 512 [1st Dept 2019]).

Here, it is undisputed that Normandie did not create the condition that caused plaintiff's accident, nor is it contended that it made special use of the sidewalk. Moreover, the lease with 1834 falls far short of constituting a comprehensive and exclusive maintenance agreement, given its narrow scope obligating Normandie to effect non-structural repairs only. Thus, there is no basis for holding Normandie directly liable to plaintiffs. (*Crimlis v City of New York*, 200 AD3d 555 [1st Dept 2021]).

Absent evidence of Normandie's negligence, it may not be held liable for common-law

indemnity or contribution, nor may it hold any other party liable for common-law indemnity or contribution.

As the accident did not arise from Normandie's "use, condition or occupation" of the premises, but was due to City defendants' construction, Normandie is not obligated to indemnify 1834 pursuant to the lease.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendant 1834 Second Avenue Housing Development Fund Corp. for summary judgment (seq. 6) is granted, to the extent of severing and dismissing all claims and cross claims against it, and otherwise denied; it is further

ORDERED, that defendant Normandie Wines Inc.'s motion for summary judgment (seq. 7) is granted, to the extent of severing and dismissing all claims and cross claims against it and otherwise denied; and it is further

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a settlement conference with Justice Jaffe.

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6/2/2022
DATE

BARBARA JAFFE, J.S.C.

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