SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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PAMELA CAMPBELL,

Plaintiff,

- v -

H&M HENNES & MAURITZ L.P., WESTERN MANAGEMENT CORP., FIFTH AVENUE RETAIL LLC, J.T. MAGEN & COMPANY INC.,

Defendants.

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INDEX NO. 162526/2015

MOTION DATE _____

MOTION SEQ. NO. 003 004 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 171-208, 310, 311, 313-366, 418, 419, 420, 424, 425, 433-439

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 214-249, 414, 415, 416, 417, 421, 441, 445, 446

were read on this motion to/for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 250-271, 367-410, 422, 426-432, 440

were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 272-309, 312, 411-413, 423, 442-444

were read on this motion for summary judgment

Defendant/third-party defendant J.T. Magen & Company Inc. (Magen) moves pursuant to CPLR 3212(b) for an order granting summary dismissal of plaintiff's complaint, defendant/third-party plaintiff H & M Hennes & Mauritz, L.P.'s (H&M) third-party complaint, and defendants Western Management Corp. (Western) and Fifth Avenue Retail, LLC (Retail) and second third-party defendant H & F Restoration & Construction, Inc.'s (H&F) cross claims against it. Plaintiff opposes and cross moves pursuant to CPLR 3205(b) and (c), for an order granting her leave to

amend the complaint to add H&F as a direct defendant. H&M, Western, and Retail partially oppose Magen's motion. H&F and Magen oppose plaintiff's cross motion. (Mot. seq. 3).

H&M moves pursuant to CPLR 3212 for an order granting summary dismissal of all claims and cross claims against it and granting it summary judgment on its claims against Magen for contractual indemnification and breach of contract. Plaintiff opposes and Magen partially opposes. (Mot. seq. 4).

H&F moves pursuant to CPLR 3212 for an order granting it summary judgment on the issue of liability and dismissing the second third-party complaint and all cross claims against it. Plaintiff opposes. Western and Retail oppose and cross move pursuant to CPLR 3212 for an order granting them summary judgment on their cross claims for common law indemnification and contribution against H&F. H&F and Magen oppose the cross motion. (Mot. seq. 5).

Western and Retail move pursuant to CPLR 3212 for an order granting summary dismissal of plaintiff's complaint and all cross claims and counterclaims against them. Plaintiff opposes, and Magen and H&F oppose in part. (Mot. seq. 6).

I. PERTINENT BACKGROUND

A. Relevant contract provisions

H&M and Magen entered into a contract containing the following provisions:

> § 9.1 - Insurance.
> § 9.1.1. Before proceeding with any Work, Contractor shall furnish to Owner and the Architect a certificate in acceptable form executed in duplicate by insurance companies approved by Owner to evidence coverage by Contractor of the insurance required by paragraph 9.1 of the Agreement…
>
> § 9.1.2. The Contractor shall purchase and maintain such insurance in accordance with Exhibit H to the Owner-Contractor Agreement as will protect him and the Owner from claims set forth below which may arise out of or result from the Contractor's operations under the Contract Documents, whether such operations be by himself or by any Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

3. claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees…

§ 9.10 - Indemnity

§ 9.10.1. To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Indemnitees from and against (a) all claims, damages, losses and expenses, including but not limited to, attorneys' fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property…and (2) is caused in whole or in part by any negligent or otherwise wrongful act or omission of the Contractor, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by any party indemnified hereunder…

§ 9.10.3. This paragraph 9.10 shall survive the completion of the Work or earlier termination of this Agreement. § 9.10.4. For purposes of this Agreement, "Indemnified Parties" or "Indemnitees" shall be defined as follows: Owner, …and the respective officers, directors, agents, employees and affiliates of all of the aforementioned parties.

§9.10.8. The Contractor shall indemnify and hold harmless all of the Indemnitees from and against any costs and expenses (including reasonable attorneys' fees) incurred by any of the Indemnitees in enforcing any of the Contractor's defense, indemnity and hold harmless obligations under this Contract.

§ 10.1 – Safety Precautions and programs

§ 10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of this Contract. This requirement shall apply continually and not be limited to normal working hours… The Contractor shall establish a Safety Program for the construction site and monitor compliance by all Subcontractors…

§ 10.2 – Safety of Persons and Property

§ 10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury, or loss to:

1. employees on the Work and other persons who may be affected thereby…
3. other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.9 Off-Site Safety Measures and Traffic

§ 10.9.1 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

> § 10.12 Protection of Work and Property
> § 10.12.1 Contractor shall continuously inspect and protect the Work and property of its Subcontractors, whether finished or unfinished, from damage, injury, or loss arising in connection with operations on the Contract Documents, and shall carry out its operations so as to avoid damage, injury or loss to completed Work and to the work of the Owner and any separate contractor of the owner, including, but not limited to, the Other Contractor.

(NYSCEF 226).

H&F and Magen also entered into a purchase order agreement containing the following indemnification provision:

> To the fullest extent permitted by law, Subcontractor agrees to fully indemnify, defend and hold harmless JTM, Owner, their officers, directors, agents and employees, Building Owner, Landlord, Managing Agent, Lender and all applicable additional indemnitees, if any, their respective agents, officers, directors, agents, employees and partners (hereinafter collectively "indemnitees") from and against any and all claims, loss, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements, whether arising before or after completion of the Subcontractor's work, related to death, personal injuries, property damage (including loss of use thereof) … arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work as well as any additional work, extra work or add-on work, whether or not caused in whole or part by the Subcontractor or any person or entity employed, either directly or indirectly, by the Subcontractor… or (b) any breach of this Agreement. The parties expressly agree that this indemnification agreement contemplates (1) full indemnity in the event of liability imposed against the indemnitees without negligence and solely by reason of statute, operation of law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of the Indemnitees either causing or contributing to the underlying claim in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault whether by statute, operation of law or otherwise where partial indemnity is provided under this agreement…

(NYSCEF 337).

Additionally, Retail, as landlord, entered into a lease with H&M for the ground floor of premises located at 589 Fifth Avenue in Manhattan (NYSCEF 328), thereby agreeing as follows:

> (E) Cleaning. Tenant shall, throughout the term of this Lease, at Tenant's sole cost and expense:
> (ii) Maintain the Premises and all sidewalks immediately adjoining the Premises in a clean, orderly, and sanitary condition (including without limitation the removal of any snow located upon such sidewalks and the necessary salting of sidewalks as and when

necessary to keep them in safe condition).

B. Amended complaint (NYSCEF 26)

It is alleged in plaintiff's amended complaint that on July 2, 2014, she was caused to fall on the sidewalk located outside of the premises due to "a large area of uneven and/or raised and/or cracked and/or broken and/or missing concrete and/or cement." She asserts causes of action for negligence against defendants.

C. Relevant procedural history

On December 8, 2015, plaintiff commenced this action against H&M, Western, and Retail. (NYSCEF 1). On February 25, 201,6 H&M filed a third-party complaint against Magen. (NYSCEF 6). On February 6, 2017 plaintiff filed an amended complaint adding Magen as a defendant. (NYSCEF 26). On August 29, 2018, H&M filed a second third-party complaint, in which it impleaded H&F, a subcontractor, as a second third-party defendant.

D. Relevant deposition testimony

Plaintiff testified that her accident occurred on July 2, 2014, while she was returning to her employer's office located at 589 Fifth Avenue, on the sidewalk approximately halfway between the corner of Fifth Avenue and 48th Street and the entrance to her building, approximately a third of the way down the block. She stated that she "was walking and all of a sudden something grabbed [her] foot and [she] went straight down." When she looked around after her fall, she noticed a lump of hardened cement, which she claims caused her fall. She estimated that the lump was approximately eight inches long and two or three inches high. Although she had never before seen the lump and did not know how long it had been there, she stated that construction had been ongoing at or around the premises for a year before her accident. Plaintiff identified the accident location from a photograph. (NYSCEF 195, 196).

Western's former security guard testified that after plaintiff's accident, someone entered the premises and said that a person had fallen outside. The guard went outside and saw plaintiff on the sidewalk. Another person then showed him the hardened cement. He had seen workers repaving the sidewalk on the day of the accident earlier that day. (NYSCEF 200).

Western's vice president testified that Retail was the landlord of 585 Fifth Avenue, and that at the time of plaintiff's accident, he performed building management services for Western, including at the premises, and dealt with H&M, who leased space at the premises. He testified that H&M was responsible for keeping the sidewalk clean pursuant to the lease. While he did not observe plaintiff's accident, he saw a mound of concrete on the sidewalk shortly afterward, which he estimated as approximately six or eight inches by eight inches. Although the vice president did not observe the mound before the accident, he assumed that it may have been used to anchor a sidewalk shed that had since been removed, and that this would have been done by one of H&M's contractors. (NYSCEF 202).

H&M's construction manager testified that it had hired Magen to perform demolition and construction work at the premises and that he was not aware of any work performed on the sidewalk as part of the project. He neither observed nor was aware of any sidewalk defects present before plaintiff's accident, and related that the sidewalk had been replaced a year after the premises opened for business. The construction manager testified that H&M did not inspect the abutting sidewalk while the project was ongoing. (NYSCEF 201).

Magen's senior superintendent testified that Magen was the general contractor for the project pursuant to an agreement with H&M, and that Magen's subcontractors performed all of the construction and demolition work at the site which Magen inspected, but did not directly direct or instruct the workers. According to him, H&F performed cement work at the jobsite, but

the only outdoors concrete work done was the placement of a small strip of concrete around an ornamental glass façade, which had been installed in early May 2014. The senior superintendent inspected H&F's work and saw no issues or spilled concrete, and any scaffolding would have been supported by bolts drilled into existing concrete, not secured by new concrete.

The senior superintendent also testified that Magen employees regularly inspected the jobsite throughout the course of the project and was responsible for inspecting the area of sidewalk around the scaffolding, but not the pedestrian walkway. Magen completed its work on the project on June 30, 2014 and turned the building over to H&M; it continued to perform limited work thereafter. The senior superintendent arrived at the site as plaintiff was being placed in an ambulance; he saw no mound of concrete when he looked around the area. (NYSCEF 198, 199).

H&F's owner and project manager testified that H&F had a subcontract to perform masonry, fireproofing, waterproofing, and concrete work at the jobsite, and that it was the only concrete subcontractor for the project, although another subcontractor performed concrete work in a different part of the building for another tenant. The owner related that the only work performed by H&F on the building's exterior was the June 2014 installation of a small strip of concrete that went around the store's new façade, which was 6 or 12 inches wide and four inches deep; customarily such work would not result in excess concrete. The process, according to the owner, was to mix the concrete inside the building, put the mixed concrete into a wheelbarrow, and bring it to the proper site. When he started working at the jobsite, he noticed the poor condition of the sidewalk and became aware of plaintiff's accident when he received paperwork "probably more than two years later". (NYSCEF 203).

II. DISCUSSION

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]).

A. Motion sequence three

1. Contentions

Magen contends that as it neither owned nor leased the premises, it or its subcontractor did not create or have actual or constructive notice of the condition that caused plaintiff's accident, and absent a contractual relationship with plaintiff, there is no basis for it to be held liable for her injuries. Additionally, as it was not negligent, it argues, it cannot be held liable for common law indemnification or contribution to any parties, or for contractual indemnification to H&M. It also maintains that Western and Retail's claims for contractual indemnification and failure to procure insurance should be dismissed as against it, as its contract with H&M does not constitute a basis for finding any contractual obligations to them. (NYSCEF 208).

In opposition, plaintiff contends that there exist triable issues of fact as to whether Magen and all movants had constructive notice of the dangerous condition, as the defect was plainly

visible, and while there is conflicting testimony as to how long the mound existed before her injury, there was sufficient time for movants to discover the defect. She also asserts that Magen owed her a duty of care, either due to its "comprehensive and exclusive" maintenance agreement with H&M, or because the condition was created by one of its subcontractors. (NYSCEF 315).

Plaintiff offers the affidavit of an architectural engineer, who concludes that the concrete mound originated when either: 1) the construction shed or scaffolding was taken down, or 2) the subcontractor spilled concrete while performing their work on the exterior store front. He also opines that while a variety of factors may affect how long it takes concrete to harden, it generally takes at least 24 to 48 hours, and thus the mound must have been present for at least 24 hours before plaintiff's accident. (NYSCEF 339).

In partial opposition, H&M argues that there exist material issues of fact as to whether the mound of concrete resulted from negligent acts or omissions by Magen and/or its subcontractor, specifically as to whether sidewalk and/or concrete work was performed on the day of the accident, and thus its common law indemnification and contribution claims should not be dismissed. Even if Magen was not negligent, its contract with H&M entitles H&M to contractual indemnification even absent Magen's negligence. (NYSCEF 363).

In separate partial opposition, Western and Retail contend that Magen assumed a duty of care for the sidewalk while its subcontractor was performing perimeter concrete work, and that as questions of fact are raised as to Magen's negligence, its claims for common law indemnification and contribution should not be dismissed. (NYSCEF 418).

In reply, Magen denies that its contract with H&M is "comprehensive and exclusive" or that it is vicariously liable for H&F's alleged negligence, as H&F was not negligent and it did not supervise, direct, or control H&F's work. It contends that plaintiff's expert's affidavit should

be disregarded absent his qualifications, and in any event, his conclusions are conclusory and unsubstantiated, and he did not consider all of the evidence. It also argues that Western and Retail are precluded from seeking indemnity for their own negligence, and that its unambiguous contractual indemnity obligation with H&M is not triggered absent negligence. According to Magen, its contractual obligation to procure insurance was not triggered as plaintiff's accident did not arise from its work or that of its subcontractors. It otherwise reiterates its arguments. (NYSCEF 433-439).

2. Analysis

a. Duty to plaintiff

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). A duty of care is owed a third party by a contractor who has contracted to render services when:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launches a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

(*Medinas v MILT Holdings LLC*, 131 AD3d 121 [1st Dept 2015], quoting *Espinal*, 98 NY2d at 140).

Here, the first circumstance is not applicable absent an allegation that Magen created the condition that caused plaintiff's accident, and thus, it cannot be found to have launched a force or instrument of harm. (*Kenny v Turner Const. Co.*, 155 AD3d 479 [1st Dept 2017] [general contractor did not launch force of harm where it did not perform the allegedly defective work, despite contractual obligation to owner to supervise the project]). And it is undisputed that

second circumstance is inapplicable.

The third *Espinal* circumstance applies where the defendant has, by contract, "entirely absorb[ed]" the other party's duty to maintain safe conditions on the subject premises. (*Rahim v Sotile Sec. Co.* 32 AD3d 77 [1st Dept 2006], quoting *Espinal*, 98 NY2d at 141). While the contract here is sufficiently comprehensive to fall under this category (*see e.g. Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994] [finding maintenance agreement sufficiently comprehensive where it required defendant to train, manage, supervise and direct all support services employed in performance of daily maintenance duties]), it is undisputed that Magen ceded control of the premises back to H&M before plaintiff's accident. Thus, Magen had not entirely absorbed the duty to maintain the premises at the time of plaintiff's accident.

Additionally, as it is uncontroverted that while Magen inspected the work of its subcontractors, it otherwise did not direct or control them, and thus it is not vicariously liable for their negligence. (*Nelson v E&M 2710 Clarendon LLC*, 129 AD3d 568 [1st Dept 2015]).

b. Indemnification and contribution

Liability for common law indemnification and contribution may not be imposed against parties that are not negligent and do not exercise actual supervision and control over the injury-producing work. (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-78 [2011]; *Ausby v 365 W. End LLC*, 135 AD3d 481, 482 [1st Dept 2016]). Thus, there is no basis to hold Magen liable for common law indemnification or contribution

As the contract between Magen and H&M requires Magen to indemnify H&M for injuries "caused in whole or in part by any negligent or otherwise wrongful act or omission of the Contractor, any subcontractor…" and in light of the existence of triable issues of fact as to whether H&F created the condition which caused plaintiff's injury (*infra*, II.D.2.a), Magen fails

to meet its burden on this motion to dismiss H&M's contractual indemnification claim against it.

c. Insurance procurement

Western and Retail do not oppose the portion of Magen's motion seeking to dismiss their cross claim for breach of contract for failure to procure insurance.

B. Plaintiff's cross motion

1. Contentions

Plaintiff seeks to amend her complaint to add H&F as a direct defendant, arguing that the amendment relates back to the original claim as it arises from the same transaction or occurrence, and that H&F would have been named as a direct defendant but for an excusable mistake. Plaintiff alleges that H&F is united in interest with Magen and that as a party to the action, H&F would not be surprised or prejudiced. (NYSCEF 315).

In opposition, H&F argues that the plaintiff's proposed amendment is time-barred and that the statute of limitations for negligence had expired before the commencement of the third-party action, which brought it into the lawsuit. H&F denies that the claim relates back, as it was not united in interest with any defendant and had no notice of plaintiff's complaint before being served with the third-party complaint. It also denies that it owed a duty to plaintiff. (NYSCEF 424).

In separate opposition, Magen denies that H&F creates the defect that caused plaintiff's accident, and that therefore, the proposed amendment lacks merit. (NYSCEF 425).

2. Analysis

Pursuant to CPLR 3025(b), leave to amend pleadings shall be freely given where "the amendment is not patently lacking in merit" and the nonmoving party suffers no prejudice.

(*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015], quoting *Pink v Ricci*, 100 AD3d 1446 [4th Dept 2012]). The movant bears the burden of establishing that the proposed amendments are "not palpably insufficient or clearly devoid of merit." (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]).

> "[W]here . . . a proposed amended complaint contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted"

(*O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83 [1st Dept 2017] [citations omitted]; *see also Carlino v Shapiro*, 180 AD3d 989, 990 [2d Dept 2020] [relation-back unavailable where original allegations provide no notice of need to defend against allegations of amended pleading]; *Giambrone v Kings Harbor Multicare Ctr.,* 104 AD3d 546, 548 [1st Dept 2013] [salient inquiry in deciding whether otherwise untimely claim in amended pleading relates back to timely commenced action is whether original pleading gives notice of transactions or occurrences to be proved pursuant to the amended pleading]).

Here, as it is undisputed that H&F did not become a party to the litigation until after the statute of limitations had expired and that H&F was not made aware of the accident until years later, the original complaint afforded insufficient notice that plaintiff would bring a claim against it. (*See e.g. August Bohl Contracting Co., Inc. v Swyer Co., Inc.*, 74 AD3d 1649 [3d Dept 2010] [even actual notice of potential claim insufficient to invoke relation back doctrine where notice not provided in the original pleading itself]; *Polo, Ralph Lauren Corp. v City of New York*, 193 AD2d 411 [1st Dept 1993] [while third-party defendants, as participants in consolidated tort actions, had notice of underlying occurrence, such notice insufficient to permit plaintiff to commence direct action after running of statute of limitations]).

Plaintiff's contention that H&F is united in interest with Magen is immaterial, as H&F is a party to this action. (*See Buran v Coupal*, 87 NY2d 173 [1995] [establishing three-part test for relation back for non-parties]). Even if the *Buran* test were applicable, the proposed amendment would fail, as "joint tortfeasors are generally not united in interest, since they frequently have different defenses," and plaintiff fails to establish that Magen is vicariously liable for plaintiff's actions. (*LeBlanc v Skinner*, 103 AD3d 202 [2d Dept 2012]; *Vanderburg v Brodman*, 231 AD2d 146 [1st Dept 1997]).

C. Motion sequence four

1. Contentions

H&M denies having created the condition which caused plaintiff's accident or having had actual or constructive notice of it and argues that testimony indicating that concrete work was performed on the day of the accident demonstrates that the mound did not exist for enough time to establish that it had constructive notice of it. Thus, it asserts that it cannot be held liable to plaintiff, and claims that based on its contract with Magen, it is entitled to contractual indemnification from Magen even if Magen was not negligent, as plaintiff's accident arose from Magen's actions or omissions. (NYSCEF 215).

In opposition, plaintiff maintains that there exist triable issues as to whether H&M had constructive notice of the condition, as the origin of the mound is disputed, and her expert states that it must have existed for at least 24 hours before the accident. She argues that H&M's lease with Retail establishes that it at least shared responsibility for maintaining the sidewalk. (NYSCEF 315).

In partial opposition, Magen contends that the indemnity obligation in its contract is not triggered absent negligence, and that H&M does not demonstrate that Magen or its

subcontractors created the condition that caused the accident or had actual or notice of it. Rather, the evidence offered by H&M shows only that H&F installed a concrete footer around the building and that it did not create the alleged defect. It also asserts that the security guard's testimony that the sidewalk was being repaved on the day of the accident is incredible as a matter of law, as it is contradicted by other testimony, and that, in any event he did not know who was performing the work. It argues that H&M is not entitled to a conditional order of indemnification absent proof that H&M was not negligent. Additionally, it argues that H&M fails to demonstrate that it breached its contractual obligation to procure insurance, as the only evidence H&M submits is an unauthenticated letter from its insurer denying H&M's tender request, which even if considered, is not sufficient. (NYSCEF 417).

In reply, H&M contends that plaintiff's expert affidavit should be disregarded because the expert both omits and misrepresents critical evidence, including incorrectly stating that plaintiff was able to identify the claimed defect from photos, and failing to reference testimony that stated dimensions for the defect that differed than those offered by plaintiff. It argues that any duty of care owed to plaintiff was displaced by Magen, and that the security guard's credible and consistent testimony demonstrates that concrete work was performed the day of the accident. It otherwise reiterates its arguments. (NYSCEF 441, 445).

2. Analysis

a. Liability to plaintiff

In light of the non-delegable duty imposed on the owner of the premises to maintain and repair the abutting sidewalk (Administrative 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]).

To obtain summary dismissal of a cause of action under this section of the Administrative Code, the defendant must establish, *prima facie*, not only that it did not violate Admin Code § 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]).

Here, it is undisputed that H&M neither created nor had actual notice of the allegedly defective condition. "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's employees to discover and remedy it." (*Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]). To demonstrate a lack of constructive notice, a defendant must offer "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell." *(Ross v Betty G. Reader Revocable Tr.*, 86 AD3d 419, 421 [1st Dept 2011]).

Absent evidence as to when H&M last inspected the sidewalk before plaintiff's accident, it fails to meet its burden of establishing that it lacked constructive notice.

b. Contractual indemnification

"Where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature." (*Spielmann v 170 Broadway NYC LP*, 187 AD3d 492, 494 [1st Dept 2020], quoting *Jamindar v*

Uniondale Union Free School Dist., 90 AD3d 612 [2d Dept 2011]). As H&M fails to demonstrate that there are no triable issues of fact as to its negligence, its request for indemnification is premature.

D. Motion sequence five

1. Contentions

H&F contends that H&M, Western, and Retail's cross claims for contractual indemnification should be dismissed against it, as it did not expressly agree to indemnify any of them and as they are not entitled to contractual indemnification absent establishing that they are free of negligence. It argues that, in any event, the indemnification provision is not triggered, nor is there a common law indemnification obligation, absent its negligence, and that the evidence clearly shows that the only exterior concrete work it performed at the jobsite was the laying of a small strip of concrete, approximately 12 inches wide by 4 inches deep, around the perimeter of the storefront, which was inspected and approved by Magen. Additionally, it argues that H&M, Western, and Retail's cross claims for failure to procure insurance should be dismissed as it fully complied with the insurance procurement provision and submits a copy of the general liability policy issued to H&F naming Magen as additional insured. (NYSCEF 271).

In opposition, plaintiff contends that there are factual issues as to whether H&F created the defective condition, claiming that there is considerable evidence that it performed the work which created the mound of cement that caused her accident. (NYSCEF 315).

In separate opposition, H&M also contends that there is ample evidence that H&F performed exterior concrete work around the time of plaintiff's accident, and thus its contractual and common law indemnification claims should not be dismissed. It argues that the clear intent of the H&F/Magen purchase order is to include H&M as an indemnitee, and it is clear that any

liability arises from the work performed by H&F and Magen. (NYSCEF 367).

In separate opposition, Western and Retail contend that they are free of fault absent evidence that they caused or created or had actual or constructive notice of the alleged defect, and thus they are not liable to H&F for common law indemnification and contribution. They also cross move for a judgment on their common law indemnification and contribution claims against H&F, arguing that H&F created the dangerous condition and that they are free from negligence. (NYSCEF 376).

H&F opposes Western and Retail's cross motion, denying that it created the defect that caused plaintiff's accident. (NYSCEF 426). In reply, it reiterates its arguments. (NYSCEF 440).

2. Analysis

a. Common law indemnification and contribution

As it is clear from testimony that H&F was the only party performing exterior concrete work in connection to the construction project in the days leading to plaintiff's accident, plaintiff, H&M, Western, and Retail raise triable issues of fact as to whether H&F created the condition which caused plaintiff's accident. Thus, dismissal of their claims for common law indemnification and contribution is premature.

b. Contractual indemnification

Pursuant to H&F's purchase order agreement with Magen, it agreed to indemnify

> JTM, Owner, their officers, directors, agents and employees, Building Owner, Landlord, Managing Agent, Lender and all applicable additional indemnitees… from and against any and all claims, loss, suits, damages, liabilities… arising out of or in connection with or as a result of or as a consequence of (a) the performance of the Work . . .

Thus, H&F's contention that it is only contractually obligated to indemnify Magen has no merit.

c. Insurance procurement

H&M, Western and Retail do not oppose the portion of H&F's motion seeking to dismiss

their cross claims for breach of contract for failure to procure insurance.

d. Western and Retail's cross motion

As Western and Retail fail to demonstrate that there are no triable issues of fact as to their negligence, their request for indemnification is premature. (*See infra* II.E.2).

E. Motion sequence six

1. Contentions

Western and Retail contend that plaintiff's claims should be dismissed as against them absent evidence that they caused or created the alleged defective condition or that they had actual or constructive notice of it, and as there were no prior complaints of excess cement on the sidewalk. They also argue that the evidence shows that H&F created the defective condition, and that they lacked sufficient time to discover and remedy it. (NYSCEF 275).

In opposition, plaintiff contends that pursuant to Admin Code § 7-210, Western and Retail owe a non-delegable duty as owner and manager of the premises to maintain the sidewalk abutting their property, regardless of their status as out of possession landlords. She contends that there are triable issues as to whether they had constructive notice of the defective condition. (NYSCEF 315).

In partial opposition, H&F maintains that, given Western and Retail's non-delegable duty to maintain the sidewalk and as it did not create the defective condition, they have not met their burden of proving that its cross claims should not be dismissed. (NYSCEF 312).

In separate partial opposition, Magen asserts that Western and Retail have not met their burden of establishing either that they were not negligent as a matter of law, or that H&F created the defective condition. Thus, it argues that its cross claims against them should not be

dismissed. (NYSCEF 413).

In reply, Western and Retail contend that Magen and H&F's cross claims for contractual indemnification should be dismissed absent privity and they deny having created the defective condition or having had actual or constructive notice of it, as the condition was created by H&F within two hours of plaintiff's accident. (NYSCEF 442-444).

2. Analysis

For an owner of real property to obtain summary dismissal of a cause of action under Administrative Code of the City of New York § 7-210, the defendant must establish, *prima facie*, not only that it did not violate it but also 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]). "[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]).

As Western and Retail offer no evidence of when they last inspected the sidewalk, they fail to meet their burden of establishing that they lacked constructive notice.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant/third-party defendant Magen & Company Inc.'s motion for summary judgment (seq. 3) is granted, to the extent that plaintiff's claims against it, and any cross claims for common law indemnification and breach of contract for failure to procure insurance, are severed and dismissed, and is otherwise denied; it is further

ORDERED, that plaintiff's cross motion for leave to amend the complaint is denied; it is

further

ORDERED, that defendant/third-party plaintiff H & M Hennes & Mauritz, L.P.'s motion for summary judgment (seq. 4) is denied; it is further

ORDERED, that second third-party defendant H & F Restoration & Construction, Inc.'s motion for summary judgment (seq. 5) is granted, to the extent that H&M, Western and Retail's cross claims for breach of contract for failure to procure insurance are severed and dismissed, and is otherwise denied; it is further

ORDERED, that defendants Western Corp. and Retail, LLC's cross motion for summary judgment is denied; and it is further

ORDERED, that defendants Western Corp. and Retail, LLC's motion for summary judgment (seq. 6) is denied.

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6/27/2022
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