SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

Index Number: 713400/2020

Motion Date: October 25, 2020

Motion Seq. No.: 11

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ADELINE MONTEAU,

Plaintiff,

-against-

JAMAICA FIRST PARKING, LLC, IMPERIAL PARKING (U.S.), LLC, IMPERIAL PARKING (U.S.), INC., IMPARK INCORPORATED, IMPARK and IMPERIAL PARKING CANADA CORP.,

Defendants.

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JAMAICA FIRST PARKING, LLC,

Third-Party Plaintiff,

-against-

AAA MAINTENANCE, LLC,

Third-Party Defendant.

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The following electronically filed (EF) papers read on this motion by the defendant, Jamaica First Parking, LLC, for an Order: pursuant to CPLR 3212 dismissing the plaintiff's Summons and Complaint and all cross-claims asserted; pursuant to CPLR 3212 for this moving defendant against co-defendant Imperial Parking (U.S.) LLC for contractual indemnification; and granting defendant Jamaica First Parking, LLC, such other and further relief as to this Court may deem just and proper. Defendant Imperial Parking (U.S.), Inc., Imperial Parking (U.S.), LLC, Imperial Parking Canada Corp. cross-move for an Order: seeking summary judgment dismissing plaintiff's complaint and partially denying the summary judgment motion of co-defendant, Jamaica First Parking, LLC to the extent it seeks contractual indemnification against Imperial Parking (U.S.), Inc., Imperial Parking (U.S.), LLC and Imperial Parking Canada Corp.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits…..……...……..	EF 42-61
Notice of Cross-Motion – Affirmation – Exhibits…….	EF 62-64
Affirmation in Opposition - Affirmation - Exhibits……...	EF 66-68
	EF 69
Affirmation in Reply……..…	EF 70

Upon the foregoing papers, it is Ordered that defendant Jamaica First Parking, LLC's motion is determined as follows:

Plaintiff commenced the above-entitled action to recovery for damages allegedly sustained when plaintiff slipped and fell on ice in a parking lot on or about February 4, 2014 at or near parking garage located in the County of Queens. It is alleged that Jamaica First Parking, LLC, (hereinafter "defendant Jamaica") was the owner of the parking lot on the date of the alleged incident.

Defendant Jamaica First Parking, LLC, filed this summary judgment pursuant to CPLR 3212 seeking dismissal of plaintiff's Summons and Complaint and all crossclaims asserted; and pursuant to CPLR 3212 for defendant Jamaica and against co-defendant Imperial Parking (U.S.) LLC for contractual indemnification.

Defendant Imperial Parking (U.S.), Inc., Imperial Parking (U.S.), LLC, Imperial Parking Canada Corp. (collectively "defendant Imperial") seeking summary judgment dismissing plaintiff's complaint and partially denying the summary judgment motion of co-defendant, Jamaica First Parking, LLC to the extent it seeks contractual indemnification against Imperial Parking (U.S.), Inc., Imperial Parking (U.S.), LLC and Imperial Parking Canada Corp.

A defendant moving for summary judgment in a slip-and-fall case has the burden of establishing, prima facie, that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence (*see Arzu v County of Nassau,* 76 A.D.3d 1036 [2010]; *Perez v New York City Hous. Auth.,* 75 A.D.3d 629 [2010]; *Edwards v Great Atl. & Pac. Tea Co., Inc.,* 71 A.D.3d 721 [2010]). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it (*see Gordon v American Museum of Natural History,* 67 N.Y.2d 836, 837 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v New York Racing Assn., Inc.,* 57 A.D.3d 598, 598-599 [2008]; *see Schiano v Mijul, Inc.,* 79 A.D.3d 726, 726-727 [2010]; *Farrell v Waldbaum's, Inc.,* 73 A.D.3d 846, 847 [2010]; *Ames v Waldbaum, Inc.,* 34 A.D.3d 607 [2006]).

The evidence submitted by defendants Jamaica and Imperial demonstrate that issues of fact exist as to which defendant was responsible for the dangerous condition that caused plaintiff to fall. Therefore, defendants Jamaica and Imperial failed to meet their initial burden demonstrating that neither created the alleged hazardous condition nor had actual or constructive notice of its existence.

Defendant Jamaica also seeks summary judgment pursuant to CPLR 3212 on the ground of contractual indemnification against the defendant Imperial.

It is well settled that the right to contractual indemnification depends on the specific language of the contract. (*See Lesisz v Salvation Army,* 40 AD3d 1050 [2d Dept 2007]; *Kader v*

City of N.Y., Hous. Preserv. & Dev., 16 AD3d 461 [2d Dept 2005]). The contractual indemnification clause in which defendant Jamacia relies upon in relevant part, reads as follows:

> Indemnity Provision: to the fullest extent permitted by law and notwithstanding any provisions herein to the contrary, the manager will indemnify and hold harmless Owner, their officers, directors, partners, representatives, agents, and employees from and against any and all actions, claims, suits, liens, judgment, damages, losses and expenses, including legal fees and all court cost and liability (including statutory liability) arising from injury and/or death of the manager, its officers, directors, agents, employees, licensees and subcontractors, except for and to the extent that those actions, claims, suits, liens, judgments, damage losses and expenses are caused by the negligence of the owner. Manager will defend and bear all costs of defending any actions or proceedings brough against Owner, their officers, directors, agents and employees, arising out of or incident to the Agreement and/or arising in whole or in part out of such acts, omission, breach of default. The foregoing indemnity shall include injury or death or any employee of the Manager and shall not be limited in any way by an amount or type of damage, compensation, or benefits payable under any applicable workers compensation, disability benefits or other similar employees benefits act. Manager herby waives the provisions of partners, representative, agents and employees to pursue recovery from the manager under theories of contribution, common law indemnity and contractual indemnity in the vent that the injured party is an employee of the manager who does not sustain a "grave injury."

The branch of defendant Jamaica seeking contractual indemnification from co-defendant Imperial is denied. "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.,* 58 AD3d 660, 662 [2d Dept 2009]; *see* General Obligations Law § 5–322.1; *Hirsch v Blake Hous., LLC,* 65 AD3d 570, 571[2d Dept 2009]). Labor Law § 200 is a codification of the common-law duty of an owner or contractor to provide employees with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127-128 [2d Dept 2008]). When an accident arises from a dangerous condition on the premises, an owner may be held liable if it created the condition or failed to remedy it despite having actual or constructive knowledge of it (*see Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d at 763; *Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2009]; *Chowdhury v Rodriguez*, 57 AD3d at 128). The owner's duty to provide a safe place to work encompasses the duty to make reasonable inspections" (*Kennedy v McKay*, 86 AD2d 597, 598 [2d Dept 1982]; *see Colon v. Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2009]; *Wynne v State of New York*, 53 AD3d 656, 658 [2d Dept 2008]), and the question of whether the danger should have been apparent upon visual inspection is generally a question of fact (*see Urban v. No. 5 Times Sq. Dev., LLC,* 62 AD3d 553, 555 [1st Dept 2009]). Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition (*see Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003]).

As explained above, defendant Jamaica failed to establish that there are no triable issues of fact as to the alleged negligence of defendant Jamaica in connection with plaintiff's slip and fall. (*see Hirsch v. Blake Hous., LLC*, 65 AD3d at 571; *Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2d Dept 2008]; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708–709 [2d Dept 2007]). Consequently, that branch of defendant Jamaica's motion which is for summary judgment on their crossclaim for contractual indemnification from co-defendant Imperial is denied.

Accordingly, the notice of motion filed by defendant Jamaica and cross-motion by defendant Imperial are denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: January 14, 2022

FILED
1/18/2022
COUNTY CLERK
QUEENS COUNTY

HON. LOURDES M. VENTURA, J.S.C.