At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of November, 2022.

P R E S E N T:
HON. DEBRA SILBER,
Justice.

- X

JOEL ROTTENBERG,

PLAINTIFF,

- AGAINST -

THE ALEXANDER COURT CONDOMINIUM,
4102 13TH AVENUE DEVELOPMENT LLC,
4102 REALTY, LLC,
"JOHN DOE", intended to be the owner of Premises 4102 13th AVENUE, Brooklyn, New York, a/k/a 1276 41st St., Brooklyn, New York,
GOURMET GLATT, LLC, GOURMET GLATT,
12th AVENUE SUPERMARKET, LLC,
13th AVENUE SUPERMARKET, LLC
and "JOHN DOE", Intended to be the parking garage on the 41st Street side of the Premises, 4102 13th AVENUE, Brooklyn, New York, a/k/a 1276 41st St., Brooklyn, New York,

DEFENDANTS.

- X

4102 13th AVENUE DEVELOPMENT LLC,

THIRD-PARTY PLAINTIFF,

- AGAINST –

4102 REALTY, LLC,

THIRD-PARTY DEFENDANT.

- X

4102 13th AVENUE DEVELOPMENT LLC,

SECOND THIRD-PARTY PLAINTIFF,

- AGAINST –

13TH AVENUE SUPERMARKET, LLC,

SECOND THIRD-PARTY DEFENDANT.

- X

DECISION/ORDER

Index No. 15883/2014E

Mot. Seq. No. 21

The following papers read herein:	NYSCEF Doc Number
Notice of Motion and Affidavits (Affirmations) ___	170-173
Opposing Affidavits (Affirmations)_____	177-178
Reply Affidavits (Affirmations)_____	179

Upon the foregoing papers, defendant/second third-party defendant 13th Avenue Supermarket LLC (hereinafter "Supermarket") [d/b/a Gourmet Glatt Market] moves for an order, pursuant to CPLR 2221 (d), granting it leave to renew its prior motion which sought an order awarding it summary judgment dismissing all third-party claims against it and for an order vacating the court's award to defendant/third-party plaintiff 4102 13th Avenue Development LLC (hereinafter "Development") of conditional indemnification against it. Supermarket was previously granted summary judgment dismissing plaintiff's claims against it. Defendant Development opposes the motion. Plaintiff does not oppose the motion. For the reasons stated herein, leave to renew is denied.

Background

Plaintiff commenced the instant action on November 10, 2014, against Development and The Alexander Court Condominium alleging that he sustained personal injuries on February 13, 2014, when he slipped and fell on snow and ice on the sidewalk in front of a parking garage entrance at the premises known as 4102 13th Avenue in Brooklyn. The building is on the corner of 41st Street and Thirteenth Avenue, and the entrance to the parking garage is on 41st Street, not 13th Avenue. Plaintiff's complaint alleged that his injuries were proximately caused by defendants' failure to promptly remove the snow and ice from the sidewalk. The bill of particulars specifies, in Paragraph 3, that "the accident occurred on the sidewalk in front, of and abutting the garage entrance

on the 41st Street side of premises known as 4102 13th Avenue, Brooklyn, New York." Development interposed an answer, but defendant The Alexander Court Condominium has never appeared.[1] That Development is the owner of the real property at issue is not disputed. Development subsequently commenced separate third-party actions against Supermarket and 4102 Realty LLC. Plaintiff later commenced three separate additional actions seeking damages for his injuries against 4102 Realty LLC, The Alexander Court Condominium, a "John Doe," Supermarket, and related entities/companies/natural persons, respectively.

By order dated March 29, 2018, this court consolidated the three subsequent actions commenced by plaintiff into the instant action. Extensive motion practice and discovery ensued, and, subsequently, both Development and Supermarket moved for summary judgment.[2]

The Underlying Motions

In support of its motion for summary judgment, Development argued that it was entitled to judgment on the issue of contractual indemnification against Supermarket. Specifically, Development asserted that it was undisputed that it was an out-of-possession owner of the subject premises, that Supermarket leased the garage from Development

[1] This defendant, an unincorporated association, was not correctly named or served. See § 13 of the General Associations Law.
[2] Supermarket also moved for leave to amend its answer to include a statute of frauds (as codified in the General Obligations Law) defense, which was denied.

(indirectly)[3] and operated a supermarket nearby, and that Supermarket used the garage space to park vans used as delivery vehicles. Development noted that Supermarket purchased the supermarket business and goodwill from the prior owner pursuant to a written agreement. Further details are set forth in the court's prior decisions.

Development's garage lease contains a broad indemnity clause: "Tenant shall: . . . indemnify and save harmless Landlord . . . from and against all liability (statutory or otherwise), claims, [and] expenses . . . to which any Landlord Party may (except insofar as it arises out of the act or neglect of such Landlord Party), be subject or suffer . . . [or] arising from or in connection with the use by Tenant of, or from any work or anything whatsoever done by Tenant . . . in any part of the Premises . . . during the term of this Lease." Development contended that the indemnity clause expressly excepts purported indemnification for Development's own negligence, and, as such, the clause is enforceable under the General Obligations Law. Development also argued that the written agreement to indemnify it was in effect and valid at all applicable times. Lastly, Development argued that there is no serious dispute that plaintiff's alleged slip and fall arose from Supermarket's use of the garage. The subject Lease [Doc 99], provides at Paragraph 5.6, in relevant part, that the tenant shall " . . . (5) keep the Premises neat and clean, free from waste, offensive odors, and, in orderly and sanitary condition, free of vermin, rodents, bugs and other pests, including but not limited to keeping the sidewalk adjacent to the Premises on the 4lst Street side of the Building free from refuse, snow, ice and debris." For these reasons,

[3] Specifically, Development leased the subject garage to defendant 4102 Realty LLC, which either sub-leased to or permitted Supermarket's predecessors, the operators of the nearby supermarket (at 1274 39th Street), to store their delivery vans therein.

Development concluded that it was entitled to a judgment of contractual indemnification against Supermarket.

In opposition to Development's motion, and in support of its own underlying motion, Supermarket argued that it should be granted leave to amend its answer to Development's third-party complaint because the proposed amendment — asserting that the garage lease is unenforceable under General Obligations Law § 5-701 and § 5-703[4] — would not prejudice or surprise Development. Supermarket pointed out that a copy of the garage lease agreement was attached to Development's second third-party complaint and noted that this document was not executed by any agent or employee of Supermarket. Therefore, Supermarket claimed, by submitting a copy of the garage lease to this court, Development should not be heard to assert that any defense (including one based on the statute of frauds) against the terms of the subject agreement constitutes surprise or prejudice. Supermarket argued that absent surprise or prejudice, leave to amend pleadings should be freely granted by trial courts in this state. Supermarket claimed that Development would sustain no surprise or prejudice if the proposed amendment was granted. Therefore, Supermarket argued, the proposed amended answer—which contains the statute of frauds defense—should be deemed filed and served *nunc pro tunc*. As Supermarket did not sign the garage lease, which it assumed, it sought dismissal of the claims against it for contractual indemnification.

Supermarket next argued that, as this court found that Supermarket owed no duty to plaintiff with respect to the condition of the subject sidewalk, it was impossible to find it

[4] Commonly referred to as the statute of frauds.

was negligent with respect to the plaintiff's accident. Since both common-law indemnification and contribution require that the contributor/indemnitor was negligent, Supermarket contended that the third-party claims were untenable here. Thus, Supermarket sought dismissal of the claims against it for common-law indemnification and contribution. For these reasons, Supermarket sought summary judgment dismissing all third-party claims asserted by Development.

The Underlying Decision and Order

By decision and order dated August 19, 2021, this court decided the underlying motions. The court found that the record established that in 2010, Supermarket, pursuant to a written purchase agreement, bought the physical supermarket from the prior owner. This court noted that the purchase agreement stated that Supermarket was assuming all relevant leases,[5] as well as purchasing the trade name, goodwill, employee information, customer list, furniture and equipment, telephone number, and inventory of the former supermarket owner. Since Supermarket also assumed the obligations of the garage lease agreement, and accepted the benefits thereof,[6] this court reasoned, Supermarket was thus estopped from claiming it is not bound by the terms of the garage lease agreement. In response to Supermarket's argument that no assumption or assignment had taken place

[5] Indeed, the relevant provision in the subject written purchase agreement states that "the same provision [*sic*] and conditions shall also apply to the lease for the garage adjacent to the Premises"—this clause is easily interpreted as Supermarket's voluntary assumption of the obligations under the garage lease agreement.

[6] The record reflects that after the closing of title in 2010 for the supermarket, Supermarket continuously and exclusively used Development's garage as parking space for its delivery vans.

because the purchase agreement required the garage landlord (Development) to consent to any such assignment, this court noted that the purchase agreement provided that "[i]f such consent is not obtained, this Agreement may be cancelled, in which event Purchaser shall receive a refund of the contract deposit." However, Supermarket did not seek a refund, neither Supermarket nor the prior owner cancelled the agreement, and the closing of title went as planned. Indeed, this court pointed out that the applicable closing statement, prepared by Supermarket's attorney, indicated that the seller "assigned to Purchaser . . . the lease for the parking lot [*sic*] at 4102 13th Avenue, Brooklyn, New York without Purchaser obtaining a consent to the assignment. *Purchaser accepted the garage lease assignment* [emphasis added] without a consent which Seller represented was not obtainable from the owner." For these reasons, this court determined that Supermarket had assumed the obligations[7] under the garage lease agreement and that Supermarket is estopped from disclaiming the validity thereof.

Motions to reargue followed. By decision and order dated May 18, 2022, this court granted leave to reargue, but adhered to its original decision.

Now, Supermarket moves for leave to renew. Counsel avers that when Development's "Managing Partner" [sic] was deposed in 2017, he identified his signature on a condominium declaration, [Doc 171 ¶15] but that "the Condominium Declaration was

[7] Indeed, and as pointed out by Development, Supermarket obtained a general liability insurance policy for the subject garage, which is completely incompatible with Supermarket's alleged understanding that it is not subject to the obligations of the garage lease agreement. Development argued, and this court agreed, that since Supermarket's delivery vans are ostensibly insured under commercial motor vehicle liability policies, the only reason for Supermarket to insure the subject garage is because Supermarket believes itself to be the tenant, and as such, is required to purchase and maintain insurance pursuant to the garage lease agreement.

never provided to Supermarket during discovery. Therefore, it is newly discovered evidence that the Court may consider on a motion to renew." This document, a Declaration of Condominium, was recorded in 2013, and has been available since then on the internet, on the New York City Department of Finance Office of the City Register's website known as ACRIS. It is not new. Further, there is nothing in this document that would change the court's decision.

With regard to the ownership of the property, until 2006, someone named Albert Ades owned Block 5593, Lots 34 and 37. In 2006, he deeded lots 34 and 37 to Development [CRFN 2006000663653]. However, the deed was defectively prepared, and was only recorded on Lot 37. It recites the metes and bounds of two parcels. At some point, Development built the building that is now on the site. In 2008, pursuant to the public website maintained by the NYC Department of Finance, Development merged the two lots, and, as reflected on the digital tax map history of lot changes, Lot 37 was dropped. Therefore, the deed, which should have been recorded on Lots 34 and 37, was only recorded on Lot 37, then, when they merged the lots, they dropped Lot 37, so Development's deed is not recorded against any existing tax lot.

Subsequently, Development obtained approval to divide the property into five condominium units without an offering prospectus from the NY Attorney General's Real Estate Financing Bureau [Doc 172, Page 3]. That letter enabled Development to subdivide Lot 34 into five condominium lots, 1701-1705. The parking garage, it must be noted, is not a condominium unit on its own, but is part of the residential unit, Lot 1701, which includes 20 apartments and 13 parking spaces. The Declaration of Condominium was

recorded in 2013 against Lot 34, and against each of the five new tax lots. However, no deeds were ever filed to transfer ownership of any of the five units from Development, nor have any Unit Owner Powers of Attorney been recorded. A unit owner power of attorney designates the Board of Managers of the condominium to act on behalf of the unit owners with regard to management of the condominium in accordance with its by-laws. See, NY Condominium Act, RPL Article 9B, §339-d et seq. Here, no condominium deeds were ever recorded, nor were any unit powers of attorney recorded, so the condominium can only be described as a condominium in name only. Development owns all five units, and there does not seem to have ever been a board of managers elected to manage the property.

Turning to the substance of the motion, that is, movant's claim that the condominium owns the sidewalk as a "common element" and thus is responsible for clearing it of snow and ice, that is not accurate. Development is the owner of the entire property, that is, all five condominium units, and is primarily responsible for the sidewalk, as the property owner of a non-exempt commercial property.

NYC Administrative Code § 7-210, combined with § 19-152, imposes a non-delegable duty upon property owners to maintain and repair the sidewalk abutting their property, and specifically imposes liability upon property owners for injuries resulting from a violation of the statute (*see Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]. The Administrative Code does not impose any duty on a commercial tenant, leaving that issue to the property owner and his contract (lease) with the tenant. Development, as property owner, was entitled to commence a third-party action against the lessee, Supermarket.

Because §7-210 of the Administrative Code is a derogation of the common law, the court notes that commercial leases must govern the parties' obligations to each other. To be clear, a property owner is no longer entitled to summary judgment on the ground that it is an out-of-possession landlord. The argument that a property owner is an out-of-possession landlord

> "is no longer sound in light of the Court of Appeals' decision in *Xiang Fu He v Troon Mgt., Inc.* (34 NY3d 167, 172-174 [2019]. Notwithstanding any lease provisions requiring [the commercial tenant] to remove snow and ice from the sidewalk, 50 East, as owner of the property abutting the sidewalk, had a nondelegable duty to keep that sidewalk in a safe condition including the removal of snow and ice (*Labiner v Jerome Florist, Inc.*, 189 AD3d 624, 625 [1st Dept 2020]" [internal citations omitted]).

Here, Development, as discussed at length in the court's prior decision, is primarily responsible for the sidewalk, and, pursuant to the lease agreement with Supermarket, is entitled to be indemnified by Supermarket to the extent that Development is found to be liable to plaintiff.

Accordingly, leave to renew is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.