

Kemp v 1000 Broadway, LLC
2022 NY Slip Op 34401(U)
December 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 514687/16
Judge: Robin S. Garson
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At an IAS Part Term, Part 75 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 21st day of December, 2022.

P R E S E N T:

HON. ROBIN S. GARSON,

Justice.

-----X

CONSTANCE KEMP,

Plaintiff,

-against-

Index No.: 514687/16

1000 BROADWAY, LLC, BROOKLYN GC, LLC,
BRAGA CONTRACTING CORP., and DYB LOPEZ
CONSTRUCTION CORP.,

Motion Seqs. 16, 17, 18, 19

Defendants.

-----X

BRAGA CONTRACTING CORP.,

Third-Party Plaintiff,

-against-

DYB LOPEZ CONSTRUCTION CORP.,

Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

323-362, 364-393, 396-417
473-492

Opposing Affidavits (Affirmations) _____

418-422, 423-428, 495-497
499-501, 503-505, 507

Reply Affidavits (Affirmations) _____

516-518, 519, 521, 523
525-526, 528-532, 533-536
429, 538, 540, 542-543
544-545, 546-547, 548-550
551-552

In this personal injury action, defendant Brooklyn GC, LLC (BGC) moves (in motion sequence [mot. seq.] sixteen) for an order, pursuant to CPLR 3212, granting

summary judgment in its favor and dismissing plaintiff Constance Kemp's (plaintiff) claims and all cross claims against it; and granting summary judgment in its favor on its contractual indemnification cross claim against defendant/third-party plaintiff Braga Contracting Corp. (Braga).

Defendant/Third-Party defendant DYB Lopez Construction Corp. (DYB) separately moves (in mot. seq. seventeen) for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing plaintiff's claims, all cross claims and the third-party action against it.

Braga again moves (in mot. seq. eighteen) for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing plaintiff's claims and all cross claims and counterclaims against it; and granting summary judgment in its favor on its third-party complaint based upon common law indemnification and contribution against DYB and its common law indemnification and contribution cross claims against BGC and DYB.

1000 Broadway, LLC (Broadway LLC) moves (in mot. seq. nineteen) for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing plaintiff's claims and all cross claims against it; and granting summary judgment on its contractual law indemnification cross claims against Braga and DYB.

Background

In 2014, Broadway LLC, the owner of a corner lot in Brooklyn located at 865 Willoughby Avenue and 1000 Broadway (Property), hired BGC as its general contractor for construction on the Property, including the erection of a six-story mixed residential and commercial use building (Building). When the Building was nearing completion, BGC

hired Braga as its subcontractor to replace the sidewalks abutting both the Willoughby and Broadway sides of the Building. Thereafter, Braga subcontracted DYB to perform the sidewalk work, which was completed at the end of October 2015. Broadway LLC then hired a property management company, All Year Management NY, Inc. (AYM) in or about October 2015; and the Building's first residential lease was executed on November 19, 2015 with a lease term of December 1, 2015 through November 30, 2016. The sidewalks abutting the Building were inspected and approved by the New York City Department of Buildings (DOB) on December 29, 2015. DOB subsequently issued a certificate of occupancy (C of O) on February 22, 2016.

Two months later, on April 21, 2016 between 9 p.m. and 9:30 p.m., plaintiff alleges that she was walking on the sidewalk in front of 865 Willoughby Avenue in Brooklyn, which she described as a construction site, when her left foot entered a square-shaped opening in the sidewalk resulting from a missing drainage grate, causing her to fall onto the sidewalk and sustain injuries. According to the ambulance report, emergency medical services (EMS) workers arrived at the accident location, stated as "Broadway/Ditmars St – Brooklyn, NY," at 9:06 p.m. and left the scene at 9:14 p.m. to transport plaintiff to hospital.

Procedural History

Plaintiff commenced this action by the filing of a summons and complaint against Broadway LLC on August 22, 2016. Issue was joined by the filing of Broadway LLC's answer with affirmative defenses on November 10, 2016. Plaintiff subsequently moved to amend her complaint to add Braga and BGC as defendants on September 27, 2018. By order dated November 5, 2018, plaintiff's motion was granted; and Braga and BGC were

added to this action as defendants.¹ Thereafter, Broadway LLC, BGC and Braga filed their answers to the amended complaint with affirmative defenses and cross claims on December 3, 2018, March 6, 2019 and March 20, 2019, respectively. Next, on April 17, 2019, Braga commenced a third-party action against DYB. Issue was joined by the filing of DYB's answer with counterclaims and cross claims on August 16, 2019. Plaintiff then served a second amended complaint to add DYB as a defendant on August 28, 2019. Broadway LLC, DYB, Braga and BGC filed their answers to the second amended complaint with cross claims on September 2, 2019, September 20, 2019, October 9, 2019 and November 8, 2019, respectively.

BGC's Summary Judgment Motion

On January 21, 2022, BGC filed its summary judgment motion. In support of its motion, BGC submitted the affidavit of licensed engineer and architect Julien Flander (Flander Affidavit), which is undated but notarized on December 29, 2015; its attorney affirmation; its contract with Broadway LLC dated August 1, 2015; its subcontract with Braga dated June 9, 2014; Braga's invoice dated October 31, 2015; DYB's invoice dated October 31, 2015; plaintiff's deposition transcripts; the transcript of its deposition witness; the transcripts of the deposition witnesses for Broadway LLC, Braga and DYB; the Building's first residential lease; and the Building's C of O dated February 22, 2016.

Plaintiff's Deposition Testimony

The accident occurred on Willoughby Avenue between 9 p.m. and 9:30 p.m. on the sidewalk in front of property, which plaintiff now knows as 865 Willoughby Avenue in

¹ Plaintiff previously commenced a separate related personal injury action against BGC and Braga under index number 519912/18, which was later consolidated with this action by order dated April 15, 2019.

Brooklyn. She did not see the address on the date of the accident. Although the streetlights were on, she described the area as dark. The property is a corner lot with one side on Willoughby Avenue and the other on Broadway. She described the accident location as an active construction site, where a new residential building was being erected. However, on the date of the accident, the building was only partially erected, and the property primarily consisted of a big open dirt-filled space surrounded by “boards.” She did not recall the last time she walked by the accident location before the date of the accident. She took a different route when traveling earlier that day. She did not recall seeing any signs depicting the names of the construction companies working at the site during the time period of the accident; and she did not know the name of the property owner or management company.

In describing the accident, she stated that she was walking straight down Willoughby Avenue towards Broadway at a normal pace, looking straight ahead, when her left foot suddenly entered a square hole in the concrete sidewalk, causing her left leg to enter the opening to just above her kneecap and the left portion of her body to fall onto the sidewalk. She did not see the opening before the accident. The rest of the sidewalk was not in good condition, as there was “tar and other things” on the sidewalk. Plaintiff does not know when, how or by whom the opening was created. She never complained about the opening prior to the accident and does not know of any such complaints or of any prior accidents at the accident location. Plaintiff’s daughter and a female pedestrian, the name of whom she never learned, witnessed the accident. The female pedestrian called 911 for an ambulance. Plaintiff remained on the ground until the ambulance arrived approximately 7 minutes later and took her to the hospital. A couple of months after the accident, plaintiff returned to the accident location to look at the opening. When she returned the building

construction had been completed and the opening was covered by a grate. She did not recall seeing any words or engravings on the grate at that time.

Broadway LLC's Deposition Witness

David Friedman (Friedman), part owner and President of All Year Management NY, Inc. (AYM), was produced as Broadway LLC's deposition witness. According to Friedman, Broadway LLC is the owner of the corner property known as 865 Willoughby Avenue and 1000 Broadway in Brooklyn. The property was improved by a six-story mixed use residential and commercial building, for which Broadway LLC hired AYM as the property management company in September or October 2015, when construction of the Building was concluding. Joe Goldman, one of the owners of Broadway LLC, is part owner of AYM. AYM was not involved in any portion of the construction at the Property. Broadway LLC hired BGC, as its general contractor for the construction project. BGC then hired subcontractors to perform the work, including Braga, who was the cement subcontractor hired to replace the sidewalks abutting the Building, and NBE Plumbing (NBE), the plumbing subcontractor hired to install the drain pipe in the sidewalks. He did not know when NBE began and completed their work. He has never heard of DYB.

When AYM was first hired as property manager, the Building was fully erected and ready for tenants to move in. Friedman did an initial walk-through of the inside and outside of the Property. Upon doing so, he inspected the sidewalks abutting the Building to ensure that they were in decent condition and without issue. There are two sidewalk drains with grates approximately five feet from the façade of the Building on Willoughby Avenue. He did not recall any maintenance or repair issues when he first visited the Property. If he had, he would have notified BGC, so that they could address the issue, since he had not formally

become the property manager at the time of his first inspection. He has never seen or been made aware any issues or repairs relating to the sidewalks or drain grates since AYM became property manager.

Friedman did not know who installed the drain grates or when they were installed. When he started working at the Building, the grates were already in place. He has never seen the drain grates missing. He further did not know if the grates have any engravings or if they are removable. To his knowledge since installation of the sidewalk, the drain grates have never been removed. He never directed or hired anyone to clean debris from the drains; and he never checked to see if there were any debris in the drains. There is a light fixture attached to the brick facade on the Willoughby Avenue side of the Building, which was installed during construction and began being used upon the Building's first occupancy. He has never learned of any complaints regarding the outside lighting.

The Building's first residential lease was signed 30 days after AYM started managing the Building; and the first tenant moved in at the end of 2015. However, the ground floor of the Building, where the two commercial spaces were located, were vacant from 2015 to 2019. During that time, there were no boards covering the ground floor windows. Instead, the windows were painted white. Abraham Friedrich (Friedrich) was the AYM property manager assigned to the Building from October 2015 through January 2018. His duties included leasing units, collecting rent and overseeing maintenance of the Property. AYM would only address minor repairs upon tenant request. To request a repair, a tenant would call AYM's management office. Thereupon, the Building superintendent, who was employed by an outside contractor retained by AYM on behalf of Broadway LLC, would address any minor repairs. The superintendent also cleaned the Building and

removed garbage, snow, ice and leaves from the sidewalks abutting the Building. If a major repair was needed, which would include a repair to the sidewalks or drain grates, AYM would inform Broadway LLC, who would directly hire a contractor for the repair.

After completion of the Building construction and up to and through the time of plaintiff's accident, both Friedrich and Friedman would separately visit the Property every two weeks intermittently to perform a "walk-through" of the Building, from the basement to the roof, to ensure the Building was clean and to visually check the electrical and plumbing systems. Friedman's visits would occur once monthly. During the time period of April 21, 2016, there was no construction occurring at the Property and the Building was 95% occupied.

BGC's Deposition Witness

Next, Yoel Blum (Blum), BGC's construction superintendent during the relevant time period, confirmed that BGC was hired by Brooklyn LLC as its general contractor for the construction project at the Property. Blum oversaw the project, which also involved replacement of the sidewalks abutting the Building. He worked at the site for over a year, Mondays through Fridays generally from 7 a.m. to 5 p.m. Blum did not recall when construction began. He started working at the site sometime in 2014. The excavation and foundation work were completed before he started at the site. He was the only BGC employee on site. BGC hired subcontractors to perform the work, including Braga, who according to Blum, removed the existing sidewalk, installed the new sidewalk and installed two square metal drain grates on both the Willoughby Avenue and Broadway sides of the Building. Under the drain grates were drainage pipes that connected to the Building's sewer system. The drainage pipes were installed by the plumbing subcontractor, the name of

whom he did not recall, and connected to the sewer system before the new sidewalks were installed. He did not recall the exact date that the new sidewalk was installed but it was completed over the course of one week in October or November 2015, which was towards the end of the construction project. He did not know if the sidewalk work was performed by Braga employees or by subcontractors. He has never heard of DYB.

After the drain grates were installed, they could be removed with the proper tools. However, he never saw the grates removed after their installation and never learned of any complaints about the sidewalks or grates. After their completion, the sidewalks were approved by DOB. The grates were installed prior to the DOB inspection. He was present when DOB inspected the sidewalks. He did not recall any punch list items relating to the Building's exterior in November or December 2015. He inspected the sidewalks and grates before DOB's inspection and found that they were properly installed. The Building's C of O was issued in February 2016. Neither BGC nor any subcontractors worked at the site after issuance of the C of O since the construction project had been completed.

During the time period of April 21, 2016, there was no construction fencing around the Property and the Building was fully erected and already occupied by tenants. Blum drove by the Building daily during that time period to travel to his office and never saw a drain grate missing on Willoughby Avenue. There was another construction project across the street from the Property on Willoughby Avenue, which was ongoing and surrounded by a construction fence during the time period of April 21, 2016. He did not know who owned that property. BGC did not perform any work on that project.

Braga's Deposition Witness

Jonathon Rocchio (Rocchio), Braga's Business Operations Manager during the relevant time period, confirmed that BGC hired Braga to perform concrete work for the construction project at the Property. Braga performed the excavation and foundation work and hired DYB as their subcontractor to replace the sidewalks abutting the Building. The sidewalk work began in September or October 2015 and was completed by October 31, 2015, as indicated on their invoice to BGC of the same date. When DYB began the sidewalk work, the Building was fully erected. Neither Braga nor DYB worked at the site in any capacity after October 31, 2015.

The sidewalk drains were installed by the plumber, the name of whom he could not recall. DYB framed out two-foot by two-foot openings for drains. The location of the drains was determined by either the general contractor or the plumber. Rocchio did not know who installed the drain grates or when they were installed. After October 31, 2015, he never learned of any complaints relating to the sidewalks or drain grates; and he was never given a punch list regarding the sidewalks after October 31, 2015. DOB inspected and approved the sidewalks after they were completed.

Rocchio drove by the Property daily after October 2015 as part of his daily commute. There was another construction project directly across the street on Willoughby Avenue. In September/October 2015, he recalled the construction project across the street consisting of a vacant lot with a giant Auber drill and surrounded by a fence. The building at that site was not fully erected until November 2016. Braga did not perform any work at that site; and he did not know who owns the property.

DYB's Deposition Witness

Daniel Lopez (Lopez), DYB's Operations Manager during the relevant time period, also confirmed that the sidewalk replacement work at the Property was completed by October 31, 2015. Braga hired DYB to replace the sidewalks at the Property. The Building was fully erected when DYB began its work at the site. Lopez would visit the site daily to check on DYB's work. Approximately one month elapsed between demolition of the existing sidewalk and installation of the new sidewalk on the Willoughby Avenue side of the Building. The drain pipes and grates in the sidewalk were installed by the plumbing subcontractor, the name of which he could not recall, before installation of the new sidewalk. The drains, including the pipes and the grates, were in place before the cement for the new sidewalk was poured. Tape was placed on top of the grates to prevent cement from entering the grates. DYB was not involved in deciding the placement or height of the drain grates. Lopez sent Braga an invoice dated October 31, 2015 within one week after the sidewalk replacements were completed. DOB inspected and approved DYB's sidewalk work at the Property. Lopez never learned of any complaints about missing grates and never learned that any grates were removed after their installation. After DYB completed its work in October 2015, he did not receive any complaints regarding the sidewalks and DYB did not return to the site to perform any additional work.

Flander Affidavit

By affidavit notarized on December 29, 2015, Julien Flander (Flander), a private licensed engineer and architect hired by "Joe Goodman," attests that he inspected the sidewalks abutting the Building; and found that the sidewalks and curbs "were constructed in accordance with the specifications set forth in the Rules and Regulations of the Department of Highways relating to the construction of . . . sidewalks and curbs . . . [; that]

the sidewalks and curbs were constructed to be legally established [sic] lines and grades . . . [; and that a]ll new drainage structures required by the Builders Pavement filing have been installed. All existing drainage structures have been cleaned and are functioning properly” (NYSCEF Doc No. 354).

Pointing to its submissions, BGC argues that it is entitled to summary dismissal of plaintiff’s claims and all cross claims against it since “it is impossible for the plaintiff to have been injured at the [Property] because there was no vacant lot at 865 Willoughby Avenue on April 21, 2016,” as the construction project for which it was retained was completed in December 2015. Notwithstanding, BGC argues that it did not owe a duty of care to plaintiff, since BGC did not cause or create the alleged condition and was not responsible for maintenance of the sidewalk or drain grate where plaintiff alleges to have fallen during the time period of her accident.

BGC further contends that it is entitled to summary judgment on its second cross claim based upon contractual indemnification against Braga.² BGC argues that, by its contract with Braga, Braga agreed to indemnify BGC and hold it harmless against any liability “arising out of or resulting from the Work covered by” the contract and, since the contract included sidewalk installation work, the indemnification provision was triggered.

Braga’s Opposition and Summary Judgment Motion

Braga opposes that branch of BGC’s motion seeking summary judgment on BGC’s cross claim against it and separately moves for summary judgment in its favor including

² Although BGC’s motion contains an argument for summary judgment on its third cross claim against Braga based upon Braga’s alleged failure to procure liability insurance for their work under the parties’ contract, BGC’s notice of motion did not seek such relief. Therefore, said request will not be considered, as it is not properly before the court (*see* CPLR 2214 [a]).

on its third-party complaint against DYB based upon common law indemnification and contribution and its common law indemnification and contribution cross claims against BGC and DYB. In opposition to BGC's motion, Braga argues that BGC is not entitled to contractual indemnification against it since its contract with BGC did not include installation, maintenance and repair of the drain grates.

Next, relying on its attorney affirmation, the parties' deposition testimonies, the relevant contracts and invoices, the Flander Affidavit and the Building's C of O, Braga argues that it is entitled to summary dismissal of plaintiff's claims and all cross claims and counterclaims against it and summary judgment on its cross claims and third-party complaint, since it was not the proximate cause of plaintiff's accident.

DYB's Opposition and Summary Judgment Motion

DYB opposes that branch of Braga's motion seeking summary judgment on the third-party complaint and Braga's cross claim against it. DYB also separately moves for summary dismissal of the third-party complaint, plaintiff's claims and all cross claims against it. In opposing Braga's motion, DYB argues that Braga is not entitled to summary judgment on its third-party complaint and cross claim, since DYB did not cause or create the alleged condition, in that it did not install or maintain the drain grates and had completed the sidewalk work at the site by October 31, 2015, approximately 6 months before plaintiff's accident. In addition to also seeking dismissal of plaintiff's claims and all cross claims against it on this basis, DYB argues that plaintiff's second amended complaint should further be dismissed as time barred, since it was filed after the relevant three-year statute of limitations. DYB argues that the relation back doctrine does not apply to this

action, since DYB did not have notice of the proceeding within the applicable three-year statute of limitations and DYB is not united in interest with the other defendants.

Broadway LLC's Summary Judgment Motion

Broadway LLC separately moves for summary dismissal of plaintiff's complaint and all cross claims against it and for summary judgment on its contractual indemnification cross claims against Braga and DYB.³ In support of its motion, Broadway LLC submitted substantially the same evidence as all other moving defendants as well as a certified copy of the relevant ambulance report. Based upon its submissions, Broadway LLC argues that, as it did not own, operate or perform any work at the location of plaintiff's accident, which plaintiff described as a vacant lot with ongoing construction and is stated as "Broadway/Ditmars St" on the ambulance report, plaintiff's claims and all cross claims should be dismissed as against it. Notwithstanding, Broadway LLC argues that, even if plaintiff's accident occurred on the Property, it is still entitled to summary judgment, since it did not create or cause the alleged condition and did not have actual or constructive notice of the missing drain grate.

Plaintiff's Opposition

In opposition to BGC, Braga, DYB and Broadway LLC's motions, plaintiff argues that there remain triable issues of fact as to whether the defendants caused or created the alleged condition. Plaintiff further argues that Broadway LLC's motion should be denied, since it did not submit any evidence demonstrating lack of constructive notice and since

³ Although all parties' opposition papers to the instant motions are not specifically delineated, the arguments asserted are substantially similar.

Broadway LLC had a duty to maintain the sidewalk abutting its property and the drain grates thereon pursuant to Administrative Code of City of NY § 7-210 and Rules of the City of NY Dept of Transportation [34 RCNY] § 2-07 (b),⁴ respectively. In addition, plaintiff argues that its second amended complaint against DYB is not time barred since the relation back doctrine applies to this action.

Defendants' Reply

In reply, BGC, Braga, DYB and Broadway LLC argue that plaintiff has failed to raise a triable issue of fact to defeat their motions.

Discussion

The Relation Back Doctrine

DYB contends that plaintiff's second amended complaint as against it is barred by the relevant three-year statute of limitations since the complaint was filed on August 28, 2019, more than three years after plaintiff's accident on April 21, 2016 (*see* CPLR 214 [5]). However, plaintiff asserts that its claims against DYB are timely based upon the relation back doctrine (*see* CPLR 203 [b] and [f]).

The relation back doctrine enables “a plaintiff to correct a pleading error--by adding either a new claim or a new party--after the statutory limitations period has expired. The doctrine thus gives courts the ‘sound judicial discretion’ (*Duffy*, 66 N.Y.2d at 477) to identify cases ‘that justify relaxation of limitations strictures ... to facilitate decisions on the merits’ if the correction will not cause undue prejudice . . .” (*Buran v Coupal*, 87 NY2d

⁴ Upon filing her opposition papers to Broadway LLC's motion, plaintiff also filed a second supplemental bill of particulars to include an allegation that Broadway LLC violated 34 RCNY §2-07 (b), which is permitted without leave of court at least thirty days prior to trial pursuant to CPLR 3043 (b).

173, 177-178 [1995] quoting *Duffy v Horton Memorial Hospital*, 66 NY2d 473, 477 [1985]).

Generally, to establish the applicability of the relation back doctrine, a plaintiff seeking to add a new party must demonstrate that “(1) the causes of action arose out of the same conduct, transaction, or occurrence; (2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his [or] her defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against him or her as well” (*Petruzzi v Purow*, 180 AD3d 1083, 1084 [2d Dept. 2020]; *see also Buran*, 87 NY2d at 178; *Brock v Bua*, 83 AD2d 61, 69 [2d Dept. 1981]). The issue of whether the mistake was excusable is immaterial (*see Buran*, 87 NY2d at 182), as “[t]he ‘linchpin’ of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period” (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [2d Dept. 2009] citing *Buran*, 87 NY2d at 1980; *Shapiro v Good Samaritan Regional Hosp. Med. Ctr.*, 42 AD3d 443 [2d Dept. 2007]).

However, the court has held that, when a plaintiff adds a third-party defendant as a direct defendant after the limitations period, the direct claim asserted against that party relates back to the date of service of the third-party complaint, if the third-party complaint was timely served and accompanied by the original complaint since, upon such service, the third-party defendant is deemed to have received sufficient notice of plaintiff's potential claim against it within the limitations period and, therefore, is not prejudiced by plaintiff's subsequent direct claim against it (*see Duffy*, 66 NY2d at 478 citing *McLaughlin*, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, C203:11, p 124; Siegel, NY Prac § 49, at 17-18 [1985 Supp]; 6 Wright and Miller, Federal Practice & Procedure § 1498; *see also Deputron v A & J Tours, Inc.*, 93 AD3d 629 [2d Dept. 2012], [where the court held that unity in interest need not be demonstrated when a third party had actual notice of plaintiff's potential claim against it by virtue of becoming a third-party defendant in the action within the applicable limitations period].

Additionally, CPLR 1009 provides that a plaintiff may amend its complaint without leave of court to assert a direct claim against a third-party defendant within twenty days after service of the third-party answer upon plaintiff's attorney.

Here, as the third-party complaint was filed on April 17, 2019, within the three-year statutory period, and was accompanied by the original complaint, plaintiff's direct claims against DYB in the second amended complaint relate back to the date of service of the third-party complaint. Furthermore, service of the second amended complaint upon DYB without leave of court was proper under CPLR 1009, since the second amended complaint was filed on August 28, 2019, within twenty days of service of DYB's third-party answer upon plaintiff's attorney via NYSCEF.

Summary Judgment

It is well settled that summary judgment may only be granted when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The movant has the burden to make a prima facie showing of entitlement to summary judgment as a matter of law, by submitting admissible evidence demonstrating that there are no material facts that require a trial (*see Giuffrida v Citibank*,

100 NY2d 72 [2003]). Failure to make this showing requires denial of the motion, regardless of the opposing papers' adequacy (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]); *Winegrad*, 64 NY2d at 853). If a prima facie showing is made, the burden shifts to the opposing party to produce admissible evidence demonstrating the existence of a triable issue of fact (*see Alvarez*, 68 NY2d at 324).

BGC, Braga and DYB

In this action, BGC, Braga and DYB move to dismiss all claims against them, contending that they did not owe a duty of care to plaintiff to maintain the sidewalk or the drain grates at the time of her accident. As a finding of negligence must initially be based upon a breach of duty of care owed to the injured plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Federico v Defoe Corp.*, 138 AD3d 682 [2d Dept. 2016]), any duty BGC, Braga and DYB would have had with respect to the sidewalk or grates would have arisen from their respective contracts respective to their work during the Property construction.

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third person (*see Church v Callanan Indus.*, 99 NY2d 104 [2002]; *Maltese v Metropolitan Transp. Auth.*, 179 AD3d 780 [2d Dept. 2020]; *Randazzo v Consolidated Edison Co. of New York, Inc.*, 177 AD3d 796, 798 [2d Dept. 2019]). However, there are three exceptions to this general rule: (1) where a contracting party, in failing to exercise reasonable care in the performance of its 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 (*see Espinal*, 98 NY2d at 140). Thus, "a contractor

may be liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk” (*Nativo v Dragonetti Bros. Landscaping Nursery & Florist, Inc.*, 190 AD3d 981, 982 [2d Dept. 2021]), if one of the *Espinal* exceptions apply. However, such is not the case.

Instead, BGC, Braga and DYB have established, *prima facie*, that they had completed their work at the construction project prior to the issuance of the C of O in February 2016, two months before plaintiff’s accident in April 2016, thus eliminating any triable issues of fact as to whether they owed a duty of care to plaintiff. In opposition, plaintiff failed to raise a material issue of fact to preclude summary judgment in favor of these defendants. As such, those branches of BGC, Braga and DYB’s motions seeking the dismissal of plaintiff’s claims against them are granted.

Broadway LLC

It is well settled that “a landowner owes a duty of care to maintain his or her property in a reasonably safe condition (*see Gronski v County of Monroe*, 18 NY3d 374, 379, 963 NE2d 1219, 940 NYS2d 518 [2011]; *Basso v Miller*, 40 NY2d 233, 241, 352 NE2d 868, 386 NYS2d 564 [1976]). “That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others' (*Gronski*, 18 NY3d at 379, quoting *Butler v Rafferty*, 100 NY2d 265, 270 [2003])” (*Agbosasa v City of New York*, 168 AD3d 794, 795-796 [2d Dept. 2019]).

Upon seeking summary judgment in a case involving a trip and fall on its property, a landowner must make a *prima facie* showing that it neither caused or created the alleged condition nor had actual or constructive notice the condition. To provide constructive

notice, the alleged condition must be visible and apparent and exist for a sufficient length of time prior to the accident to permit it or its' employees to discover and remedy the condition (*see Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599 [2d Dept. 2010]; *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655 [2d Dept. 2009]; *see also Bruk v Razag, Inc.*, 60 AD3d 715 [2d Dept. 2009]; *Gordon v American Museum of Natural History*, 67 NY2d 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” (*Braudy v Best Buy Co., Inc.*, 63 AD3d 1092 [2d Dept. 2009], quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 599 [2d Dept. 2008]).

Here, it is undisputed that Broadway LLC is the Property owner and was in possession and control of the Property at the time of plaintiff's accident. As the Property owner, Broadway LLC had a duty to maintain the sidewalks abutting the Property in a reasonably safe condition pursuant to Administrative Code of the City of NY § 7-210. In addition, as owner of the sidewalk drain grate at issue, Broadway LLC had a duty to maintain the grate in a reasonably safe condition pursuant to 34 RCNY § 2-07 (b). More specifically, 34 RCNY § 2-07 (b) (1) states that “[t]he owners of covers or gratings on a street⁵ are responsible for monitoring the condition of the covers and gratings . . .”; 34 RCNY § 2-07 (b) (2) requires that “[t]he owners of covers and gratings shall replace and repair any cover or grating found to be defective . . .;” and 34 RCNY § 2-07 (b) (3) mandates that owners of covers and grates ensure that they are “flush with the surrounding

⁵ The definition of “street” includes “sidewalk” (*see* 34 RCNY § 2-01; *see also Flynn*, 84 AD3d at 1019).

street surface” (34 RCNY § 2-07 [b] [1], [2] and [3]; *see also Flynn v City of New York*, 84 AD3d 1018 [2d Dept. 2011]). The testimonies of BGC, Braga and DYB’s deposition witnesses establish that the drain grates were installed as part of the construction project on the Property. Furthermore, Broadway LLC does not dispute that it owns the drain grates on the sidewalks abutting the Property and had them installed as part of the construction project.

However, Broadway LLC failed to submit any evidence to demonstrate the last time the sidewalk drain grate was inspected relative to plaintiff’s accident to establish lack of constructive notice. Failure to make such showing warrants denial of Broadway LLC’s motion regardless of the sufficiency of the opposition papers (*see Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936 [2d Dept. 2019]; *Mei Xiao Guo v Quong Bid Realty Corp.*, 81 AD3d 610 [2d Dept. 2011]). Contrary to Broadway LLC’s attorney’s assertion in his reply affirmation that Friedman and Blum “inspected and observed the area daily in April 2016 . . .” (NYSCEF Doc No. 548 – reply affirmation at ¶ 11), Friedman testified that he would visit the Property once monthly, but did not state when he last visited the Property respective to plaintiff’s accident and that the visit included an inspection of the grate (*see* NYSCEF Doc No. 487 – Friedman deposition transcript at pg. 43). Moreover, Blum, BGC’s deposition witness, was not an agent of Broadway LLC in April 2016, as BGC has completed its work at the Property as Broadway LLC’s general contractor at least two months before plaintiff’s accident. Notwithstanding, Blum merely testified that he would drive by the Property as part of his daily commute, not that he inspected the grate on a daily basis (*see* NYSCEF Doc No. 477 - Blum deposition transcript at pg. 47).

Notwithstanding, denial of Broadway LLC's motion is further warranted, since there remains a material issue of fact as to whether the accident even occurred on Broadway LLC's property given plaintiff's testimony that the accident occurred in front of a construction site and the relevant ambulance report, which states the accident location as "Broadway/Ditmars St." As such, Broadway LLC's request for summary judgment in its favor is denied.

Cross Claims, Third-Party Complaint and Counterclaim

The right to contractual indemnification is only found where it is clearly indicated in the language in the contract (*see Reisman v Bay Shore Union Free School Dist.*, 74 AD3d 772, 773 [2d Dept. 2010]; *George v Marshalls of MA., Inc.*, 61 AD3d 925, 930 [2d Dept. 2009]). A party seeking contractual indemnification must demonstrate that the party against whom indemnification is sought is negligent and that it is free of negligence, since a party may not be indemnified for its own negligent conduct (*see George*, 61 AD3d at 929-930; *Cava Constr. Co., Inc. v Gaeltec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept. 2009]).

Similarly, "[the principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party]" (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept. 2008]). Thus, a party seeking common law indemnification must also establish that the underlying accident was caused by the negligence of party against whom indemnification is sought and not by its own negligence (*see George*, 61 AD3d at 929).

As this court has found that plaintiff's accident was not caused by any negligence on the part of BGC, Braga and DYBA, those branches of said defendants' motions seeking dismissal of all cross claims and/or counterclaims against them based upon indemnification, contribution and/or failure to procure insurance are granted. That branch of DYB's motion seeking dismissal of the third-party complaint is also granted on the same basis.

Conclusion

Accordingly, it is hereby

ORDERED that those branches of BGC's motion (mot. seq. sixteen) seeking summary judgment in its favor and dismissal of plaintiff's second amended complaint and all cross claims against it are granted; plaintiff's second amended complaint as against BGC and all cross claims against BGC are hereby dismissed; the motion is otherwise denied; and it is further

ORDERED that those branches of DYB's motion (mot. seq. seventeen) seeking summary judgment in its favor and dismissal of plaintiff's second amended complaint, all cross claims against it and the third-party action are granted; plaintiff's second amended complaint as against DYB, all cross claims against DYB and the third-party complaint are hereby dismissed; and it is further

ORDERED that those branches of Braga's motion (mot. seq. eighteen) seeking summary judgment in its favor and dismissal of plaintiff's second amended complaint and all cross claims and counterclaims against it are granted; plaintiff's second amended complaint as against Braga and all cross claims and counterclaims against Braga are hereby dismissed; the motion is otherwise denied; and it is further

ORDERED that Broadway LLC's motion (mot. seq. nineteen) is denied, in its entirety. The caption shall be amended in accordance with the foregoing

The court, having considered the parties' remaining contentions, if any, finds them unavailing. All relief, not expressly granted herein is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

12/21/22



J. S. C.