SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

----------x

AIDA CABREJOS,

Plaintiff,

-against-

ALFRED J. POLIZOTTO as Administrator of the Estate of FLORENCE PPOLIZZOTTO and A&M (2015) LLC.,

Defendants.

----------x

Index # 501791/2018

ORDER
Mot. Seq. #s7, 8 and 9

HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motions for Summary Judgment submitted on July 20, 2021.

Papers	Numbered
Notice of Motion and Affirmation	1&2 (Exh. A-O); 5&6 (Exh. A-T)
Notice of Cross-Motion and Affirmation	10&11
Affidavit/Affirmation in Opposition	3(Exh. A-F); 7(Exh. A-H); 8
Replying Affirmation	4(Exh. P)
Other [Memoranda of Law of Def. A&M (2015]	9; 12

This action arises as a result of plaintiff's alleged trip and fall accident which occurred on August 11, 2015 on the property known as 103-54 94th Street, Ozone park, New York. At the time of plaintiff's accident, Florence Polizzotto was the owner of the subject property and the defendant A&M (2015), LLC., was a tenant.

Defendant, A&M (2015) LLC., moves for an order pursuant to CPLR 3212 (Mot. Seq. #7), granting plaintiff summary judgment on the issue of liability dismissing all claims and cross-claims as against defendant A&M (2015), hereinafter referred to as "A&M." Plaintiff opposes defendant, A&M's motion for summary judgment on several grounds, in addition to there being issues of fact which preclude summary judgment from being granted. Defendant, Alfred Polizzotto, as Administrator of the Estate of Florence Polizzotto, moves for summary judgment pursuant to CPLR 3212 (Mot. Seq. #8), dismissing all cross-claims asserted against Polizzotto, on the ground that no triable issues of fact exists; and for contractual indemnification against co-defendant, A&M. A&M cross-moves for summary judgment and dismissal of all cross-claims against A&M and denial of co-defendant, Polizzotto's motion for

summary judgment. Plaintiff opposes defendant, Polizzotto's motion for summary judgment which seeks to dismiss plaintiff's case but does not oppose the relief sought as to indemnification.

Plaintiff commenced this action as a result of an alleged trip and fall accident which occurred when plaintiff, Aida Cabrejos was walking on the sidewalk into the defendant, A&M's store and her foot went into a hole in the sidewalk which allegedly caused her to trip and fall. At the time of the accident, defendant, A&M was operating a store under the name Mandee's located at 193-10 Rockaway Boulevard, also known as 103-54 94th Street, Ozone Park, New York. At the time of the accident, the property was leased by A&M from co-defendant, Florence Polizzotto.

Defendant, A&M's Motion for Summary Judgment

First, this court will address the timeliness of the motion and whether it is properly before this court. The court finds that the motion is timely and properly before the court. The previous motion was not decided on the merits and was deemed null and void by the Hon. Edgar Walker due to the passing of the co-defendant, Florence Polizzotto.

Defendant, A&M moves for summary judgment on the issue of liability dismissing all claims and cross-claims. A&M argues that summary judgment should be granted in its favor for the following reasons: (1) the plaintiff's accident did not occur on a sidewalk as defined by New York City Administrative Code; and (2) that defendant A&M is not the owner of the property abutting the sidewalk and therefore cannot be held liable pursuant to New York City Administrative Code §7-210.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See*, *Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also*, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Section 7-210 of the New York City Administrative Code mirrors the duties of property owners with regard to sidewalks as set forth in Administrative Code Sections 19-152 and 16-123. *See*, *Buonviaggio v. Parkside Assoc., L.P.*, 120 A.D.3d 460, 990 N.Y.S.2d 595 (2nd Dept., 2014), *citing*, *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d at 521, 860 N.Y.S.2d 429, 890 N.E.2d 191 [internal quotation marks omitted]; *Stolyvitskaya v. Dennis Boardwalk, LLC.*, 101 A.D.3d at 1107, 956 N.Y.S.2d 525; *Harakidas v. City of New York*, 86 A.D.3d 624, 626, 927 N.Y.S.2d 673). Although section 7–210 of the Administrative Code does not define the term "sidewalk," section 19–101(d) of the Administrative Code describes a sidewalk as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but

not including the curb, intended for the use of pedestrians" (*Stoloyvitskaya v. Dennis Boardwalk, LLC.*, 101 A.D.3d at 1107, 956 N.Y.S.2d 525). In the case at bar, the plaintiff's alleged accident, as shown by the plaintiff in identifying the location of the trip and fall during her deposition (*Exh. "F" and Exh. "L" to mot. Seq. #7*) indicates that the plaintiff fell on a walkway utilized by pedestrians to gain access to the stores after exiting the parking lot. Defendant, A&M argues that because the plaintiff's alleged fall took place on the walkway, as opposed to the sidewalk, that Administrative Code §7-210 does not apply. In opposition to A&M's motion for summary judgment, plaintiff merely states that A&M has failed to provide any case law to support its contention that NYC Admin. Code §7-210 does not apply.

As of September 14, 2003, the Administrative Code of the City of New York §7-210, in effect, shifted the liability for injuries arising from a defective sidewalk from the City of New York to the owner of the real property which abuts the defective sidewalk. In *Khalmova v. City of New York*, 95 A.D.3d 1280, 945 N.Y.S.2d 710 (2nd Dept., 2012), the court held that the Supreme Court properly determined that the brick walkway where the plaintiff allegedly fell, which ran parallel to a concrete section of the sidewalk, was part of the "sidewalk" for purposes of liability under Administrative Code of the City of New York §7-210. In addition, the court held that Admin. Code of the City of New York §7-210, included an obligation to maintain the brick walkway in a reasonably safe condition. *See, Khalmova, supra, citing, Flynn v. City of New York*, 84 A.D.3d 1018, 923 N.Y.S.2d 635; *Vidakovic v. City of New York*, 84 A.D.3d 1357, 924 N.Y.S.2d 537; *Smirnova v. City of New York*, 64 A.D.3d 641, 882 N.Y.S.2d 513. Contrary to A&M's argument that the Administrative Code of the City of New York §7-210 does not apply, the court finds that the code is applicable. However, the court does find based upon the lease agreement by and between the co-defendants, which is not in dispute, that defendant, A&M as the lessee was not responsible for the repair of the defective walkway. There is deposition testimony to support A&M's argument that the repair of the alleged defect, as identified by plaintiff was a structural repair pursuant to the wording of the lease, and the responsibility of the landlord. (*See, deposition testimony of Christopher Rosselli, property manager for co-defendant, Polizzotto, Exh. "G," p. 57-58*).[1]

Furthermore, as decided in *Xiang Fu He v. Troon Management, Inc.*, 34 N.Y.3d 167, 114 N.Y.S.3d 14 (2nd Dept., 2019), "if litigation ensues, the landowner generally has an indemnification action against a ***tenant or lessee who covenants to maintain the property***." [*emphasis added*]. In this case, the record establishes that the landlord was responsible for the structural repair of the subject premises.

Accordingly, the court finds that the defendant, A&M has established its *prima facie* entitlement to summary judgment as a matter of law. A&M's summary judgment motion dismissing all claims and cross-claims against A&M (2015) LLC., is hereby granted in its entirety.

[1] . The court notes that plaintiff's argument as to A&M's submission of unsigned deposition testimony has been negated. Proof of submission was addressed via annexed copies of the signatures. See, Exh. P.

Co-Defendant's Cross-Motion for Summary Judgment & Contractual Indemnification

Next, this court will address the cross-motion of co-defendant, ALFRED J. POLIZOTTO as Administrator of the Estate of FLORENCE POLIZZOTTO, hereinafter "Polizzotto," for summary judgment dismissing all claims and cross-claims against the Estate of Florence Polizzotto and for an order granting summary judgment on its cross-claims for contractual indemnification against co-defendant, A&M (2015), LLC. Plaintiff and defendant, A&M oppose co-defendant's cross-motion for summary judgment.

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material facts. The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See, Gutt v. Bryan*, 21 Misdc.3d 1121(A), 873 N.Y.S.2d 511 (2nd Dept., 2008). In support of its motion for summary judgment for dismissal of all claims and cross-claims and contractual indemnification, co-defendant, Polizzotto, relies upon the deposition testimony of Christopher Rosselli, it's property manager and the lease between Polizzotto and A&M for the subject premises. Polizzotto points to paragraph 21(A) of the rider to the lease agreement which states in pertinent part as follows:

> Tenant shall:
>
> (a) Keep the demised premises, Tenant's storefront...and outside area ....and storefront and other area allocated for the exclusive use of the Tenant in good repair.

In addition, Polizzotto argues that A&M, as the tenant-lessee under the terms of the lease did in fact, jointly and severally covenant to make repairs and indemnify the landlord as per the following terms of the lease agreement:

> **Repairs. Second**.—That, throughout said term the Tenant will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either; make all repairs in and about the same necessary to preserve them in good order and condition, which repairs shall be, in quality and class, equal to the original work; probably pay the expense of such repairs, suffer no waste or injury...
>
> **Indemnify Landlord. Second**....forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or under tenants of the Tenant and also for any

matters or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto.

In opposition to Polizzotto's motion summary judgment on the issue of liability, plaintiff argues co-defendant's proof does not support summary judgment given the fact that Polizzotto retained responsibility for structural repairs pursuant to the lease agreement between Polizzotto and A&M. Defendant, A&M in opposition to Polizzotto's cross-motion argues that the property manager for Polizzotto, Christopher Rosselli, conceded that the alleged cause and defect identified by the plaintiff, is a structural repair and the responsibility of the owner-landlord, and also points out two paragraphs to the subject lease (paragraph 2) and the rider to the lease (paragraph 33), which state that the landlord is responsible for structural repairs and that the tenant's obligation shall not include structural or roof repairs. (*See, Exh. "M"*).

NYC Administrative Code § 7-210, combined with section 19-152, imposes a nondelegable 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 A.D.3d 542 [1st Dept., 2011]; Stein v. 1394 Hous. Corp., 31 Misc.3d 1224[A], 2011 NY Slip Op 50813[U] [Sup. Ct., NY Co., 2011]. Section 7-210 provides in pertinent part:

"a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.

"b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

Based on the record, the court finds that the co-defendant, Polizzotto, has failed to establish its *prima facie* entitlement to summary judgment as a matter of law on the issue of liability. The lease is clear as to the landlord's obligation to make structural repairs to the subject premises, in addition to the fact that the landlord's property manager conceded that the alleged defect was structural and the responsibility of the landlord.

With respect to that portion of its cross-motion which seeks summary judgment on the issue of contractual indemnification, the court finds that based on the record, the relief cannot be granted. The right to contractual indemnification depends upon the specific language of the contract. (Dos Santos v. Power Auth. of State of N.Y., 85 A.D.3d 718, 722, 924

N.Y.S.2d 558, *quoting*, George v. Marshalls of MA, Inc., 61 A.D.3d 925, 930, 878 N.Y.S.2d 143). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*see*, Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487, 491-492, 549 N.Y.S.2d 365, 548 N.E.2d 903). While a landlord and tenant are free to negotiate at arm's length for allocation of the risk of liability to third parties, to the extent that such a broad indemnification for the fault of another can ever be effective, the language expressing such intent must be unmistakable (*see*, Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d 412, 417, 823 N.Y.S.2d 765, 857 N.E.2d 60; Stern's Dept. Stores, Inc. v. Little Neck Dental, 11 A.D.3d 674, 675, 783 N.Y.S.2d 645; *Moore v. First Indus.*, 296 A.D.2d 537, 538, 745 N.Y.S.2d 220).

Accordingly, co-defendant, Polizzotto's cross-motion for summary judgment is denied in its entirety.

Defendant, A&M thereafter cross-moved for an order granting summary judgment dismissing all claims and cross-claims as against defendant, A&M and denying the relief sought in co-defendant, Polizzotto's motion for summary judgment.

The court notes that the cross-motion received and filed as NYSCEF Document No. 215 is seeking the same relief sought in defendant, A&M's motion for summary judgment (Mot. Seq. #7) as to dismissal of the claims and cross-claims against defendant, A&M which has been granted. The portion of this cross-motion which seeks an order denying the relief sought in co-defendant, Polizzotto's cross-motion in its entirety has also been decided herein.

Accordingly, the motions are decided as follows:

Defendant, A&M's motion (Mot. Seq. #7) for summary judgment is granted in its entirety.

Co-Defendant, Polizzotto's cross-motion (Mot. Seq. #8) for summary judgment is denied in its entirety.

Defendant, A&M's cross-motion (Mot. Seq. #9) for summary judgment is granted in its entirety.

Dated: Brooklyn, New York
January 6, 2022

HON. LISA S. OTTLEY, J.S.C.