SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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SAUNDREA COLEMAN,

Plaintiff,

INDEX NO. 158335/2016

MOTION DATE 10/08/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

Third-Party
Index No. 595538/2018

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80 were read on this motion for JUDGMENT - SUMMARY.

Plaintiff's complaint alleges that on March 23, 2015, she fell on a "slippery concrete parking bumper" while walking through the basement parking garage at 3280 Broadway, New York, New York (the "Building"), sustaining injuries as a result (See NYSCEF Doc. No. 50 [Compl. at ¶¶3, 13-15]). Plaintiff commenced this action on October 4, 2016, asserting claims against defendant the Trustees of Columbia University in the City of New York ("Columbia"), as the owner of the Building, alleging that Columbia was negligent in, inter alia: (i) allowing the "subject surface to be inadequately and improperly lit," and (ii) failing to maintain the floor of the parking garage and remove the hazardous condition which caused her to slip (See NYSCEF Doc.

No. 51 [Bill of Particulars at ¶4]). On July 3, 2018, Columbia commenced a third-party action against the City of New York (the "City"), asserting claims for indemnification and contribution (NYSCEF Doc. No. 52 [Third-Party Compl. at ¶¶5-9]). Discovery was completed as of September 20, 2021 (See NYSCEF Doc. No. 45 [Note of Issue]), after which Columbia filed the instant motion.

Columbia argues that it bears no liability here because it is an out-of-possession landlord with no obligation to maintain the subject parking garage or address the slippery condition which caused plaintiff's fall. In support of its motion, Columbia submits a lease dated February 7, 1994 in which the City leased, inter alia, the "ancillary parking space in the basement" of 3280 Broadway from Columbia's predecessor-in-interest, Jarvis Doctorow c/o 3280 Broadway Realty Co. (the "Lease") (NYSCEF Doc. No. 58 [Lease]).

The Lease provides, in pertinent part, that

> Landlord shall make all exterior and structural repairs, including but not limited to maintenance, repair and replacement of the roof, windows, building—wide plumbing, electrical, mechanical and heating systems, elevators (freight and passenger) and all repairs needed because of Landlord's negligence or because of defective materials or workmanship in the construction and/or improvement of the Demised Premises, as per Article 6, or of the Building of which they are a part.
>
> Landlord shall perform interior repairs to the Demised Premises at the request of Tenant after submission to the occupying agency's lease administration personnel of a cost estimate for any such repair and obtaining approval of Tenant. After Landlord performs the interior repairs to the reasonable satisfaction of Tenant, Landlord shall be reimbursed for the cost of any such interior repairs in addition to a three per cent (3%) administrative fee within forty-five (45) days after submission of a bill and proof of payment …
>
> Tenant may make such ordinary and nonstructural interior repairs as it deems necessary for its occupancy …

(Id. at Art. 13).

Columbia also submits two Lease Amendment and Extension Agreements between Columbia and the City, dated June 2, 2006 and June 18, 2010, respectively (collectively, the "Lease Amendment") which provide, in pertinent part, that Columbia is obligated to "make all exterior and structural repairs, and repairs to the common areas, including, without limitation, repairs to the Building roof, walls, sidewalks, windows, lobby, elevators, and the Building's electrical, plumbing, and HVAC systems serving the [leased space]" while the City was obligated to "take good care of the [leased space] and the fixtures and appurtenances therein" (NYSCEF Doc. Nos. 59 and 60 [Lease Amendment at Article 10]).

Finally, Columbia submits the EBT testimony of Kurt Cordner, the superintendent of the Building (NYSCEF Doc. No. 75 [Cordner EBT at p. 11]). Cordner testified that the basement parking garage could not be accessed without a key and that, while he had a key to the parking garage to perform repairs, he only entered the garage with the NYPD's permission (Id. at pp. 51-52, 61-64, 111-114). Cordner testified that he did not inspect the parking garage, change lightbulbs in the garage, or maintain the floors in the parking garage (Id. at pp. 50-51, 56-57, 99). According to Cordner, these tasks were exclusively performed by the NYPD (Id. at pp. 53, 99). Cordner testified that he had previously repaired leaks in the water pipes in the ceiling of the parking garage but that he had not made any such repairs for at least six months prior to plaintiff's accident (Id. at pp. 60, 65-66, 100-101, 110-113).

Plaintiff opposes Columbia's motion for summary judgment dismissing the complaint, arguing that Columbia is not an out-of-possession landlord but that, even if it is in out-of-possession landlord, it may nevertheless be liable for its failure to maintain the building's elevators

and its failure to maintain the pipes in the ceiling of the parking garage (which pipes may have leaked, causing the subject condition)[1].

The City opposes that branch of Columbia's motion seeking summary judgment on its third-party indemnification claim against the City, on the grounds that issues of fact exist as to whether the condition on which plaintiff slipped was created by Columbia's failure to repair leaking pipes.

DISCUSSION

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Columbia has met its burden of proof for summary judgment. Columbia has established that it is an out-of-possession landlord through its submission of the Lease, Lease Amendment, and Cordner EBT testimony (See Estrella v Rex Realty of Connecticut, Inc., 188 AD3d 562, 562 [1st Dept 2020]; Dinkins v Kansas Fried Chicken, Inc., 158 AD3d 420, 421 [1st Dept 2018]). Contrary to plaintiff's contention, the fact that Columbia's superintendent, Cordner, could access the parking garage with the NYPD's permission does not undercut this conclusion (See Kopetic v

[1] Plaintiff submitted opposition to the instant motion six months after the return date. To the extent that plaintiff proffers the same principal argument addressed in the City's timely opposition—i.e., that issues of fact exist as to whether the condition on which plaintiff slipped was created by Columbia's failure to repair leaking pipes —this Court discerns no prejudice to Columbia in considering plaintiff's opposition on its merits.

Port Auth. of NY & New Jersey, 176 AD3d 530, 531 [1st Dept 2019]; see also Brocco v. Eastern Metal Recycling Terminal LLC, 2021 WL 6205987, at *2 [NY Sup, Ct, 2021] affd, 211 AD3d 628 [1st Dept 2022] ["[t]he right to enter for emergencies, maintain certain utilities, approve alterations, direct relocation within the property, prohibit hazardous conditions, require the maintenance of fixtures and equipment, and adherence to rules and regulation does not negate that Port Authority was an out-of-possession landlord"]). Neither does the fact that Columbia occupied other portions of the Building vitiate its status as an out-of-possession landlord (See Moran v 369 Lexington Borrower II LLC, 2021 NY Slip Op 30737[U], *6 [Sup Ct, NY County 2021] ["[t]he fact that the defendants maintained an office in the building … failed to transform defendants into in-possession landlords … "]).

As an out-of-possession landlord, Columbia can only be found liable in this negligence action if it either: (i) is contractually obligated to make repairs or maintain the premises; or (ii) has a contractual right to re-enter, inspect and make needed repairs, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (Henry v Hamilton Equities, Inc., 161 AD3d 418, 418-419 [1st Dept 2018]). Neither of these circumstances apply here. Here, the Lease and Lease Amendment and Cordner's undisputed testimony establish that Columbia's maintenance obligations were limited to structural repairs and repairs to the "electrical, plumbing, and HVAC systems" and it was under no contractual obligation to address the slippery condition which allegedly caused plaintiff's fall (Howard v Alexandra Rest., 84 AD3d 498, 499 [1st Dept 2011]; Fleming v 173 Broadway Assoc., LLC, 2022 NY Slip Op 32802[U], *3 [Sup Ct, NY County 2022]). In addition, while Columbia has a contractual right to re-enter the parking garage to make repairs, Columbia's failure to install adequate lighting and to remove the greasy, oily substances on the floor—do not constitute

structural or design defects (See Uppstrom v Peter Dillon's Pub, 172 AD3d 497, 499 [1st Dept 2019] ["inadequate lighting is not a structural or design defect"]; see Figueroa v Skillman Realty Co., 154 AD3d 470 [1st Dept 2017] ["the wet floor that allegedly caused plaintiff to slip and fall was not a significant structural or design defect contrary to a specific statutory safety provision"]). Finally, plaintiff fails to identify any specific statutory safety provision that was violated by Columbia (DeJesus v Tavares, 140 AD3d 433, 433 [1st Dept 2016]). Accordingly, Columbia has established its prima facie case.

In opposition, plaintiff and the City fail to raise triable issues of fact. To the extent that plaintiff and the City speculate that the subject condition may have been caused by leaking pipes in the ceiling of the parking garage, they fail to point to any evidence in the record that supports this theory. The presence of a slippery condition does not, standing alone, support a reasonable inference that a leaking pipe created that condition (See Segretti v Shorenstein Co., E., L.P., 256 AD2d 234, 235 [1st Dept 1998] ["mere speculation regarding causation is inadequate to sustain the cause of action"]; see also Zanki v. Cahill, 2 AD3d 197, 199 [1st Dept 2003], affd, 2 NY3d 783 [2004] ["plaintiff offers nothing more than speculation or guesswork to support her contention that the alleged recurring condition existed on the stairwell at the time of her accident, and also caused her accident"]). Neither does the fact that Cordner repaired a pipe in the parking garage over six months before plaintiff's accident support the contention that another leak caused this condition (See Gomez v. 192 E. 151st St. Assocs., L.P., 26 AD3d 276, 278 [1st Dept 2006] [plaintiff's notification of unspecified bathroom leak to superintendent, at least a year before accident, did not permit inference that such leak caused ceiling collapse]).

Plaintiff's argument that Columbia's negligent failure to maintain the lobby elevator of the Building was the proximate cause of her injuries—because she would not have had to travel

through the parking garage to use the freight elevator had the lobby elevator been working—is unavailing. "[P]laintiff's accident is simply too far removed from the orbit of [Columbia's] duty to inspect and maintain the [elevator] to serve as a predicate for the imposition of liability" (Morales v P.S. El., Inc., 167 AD2d 520, 520 [2d Dept 1990]; see also Pub. Adm'r of Cnty. of New York v. Fifth Ave. Dev. Corp., 180 AD2d 473, 474 [1st Dept 1992] ["the injuries sustained by plaintiff's decedent arose not from his use of the stairs, which is a reasonably foreseeable consequence of an inoperable elevator, but from the onset of a heart attack"]). Accordingly, that branch of Columbia's motion seeking summary judgment dismissing plaintiff's complaint is granted and the complaint is dismissed.

In light of the foregoing, that branch of Columbia's motion seeking judgment on its third-party claim for contractual indemnification is denied as moot (See e.g., Ayala v Lockheed Martin Corp., 22 AD3d 394, 394 [1st Dept 2005] ["[s]ince the complaint in the main action had been dismissed, there was no surviving issue as to whether appellants were entitled to prevail on their third-party claim for indemnification"]). To the extent that Columbia seeks an award from the City of its attorney's fees incurred to this point, this branch of its motion is also denied. The indemnification provision in the Lease requires the City to indemnify Columbia for

> any and all liability, fines, suits, claims, demands, expenses and actions of any kind or nature arising by reason of injury to person or property occurring on or about the Demised Premises, the Building, or the real property of which they form a part, occasioned in whole or in part by its acts or omissions or the acts or omissions of any person present by its license and/or permission, express or implied or by reason of performing preventive maintenance pursuant to a maintenance contract.

(NYSCEF Doc. No. 58 [Lease at Art. 22]). However, "a contract provision employing the language of third-party claim indemnification may not be read broadly to encompass an award of attorney's fees to the prevailing party based on the other party's breach of the contract; the provision must

explicitly so state" (Gotham Partners, L.P. v High Riv. Ltd. Partnership, 76 AD3d 203, 209 [1st Dept 2010]) and the Lease language here does not satisfy this demanding standard.

Accordingly, it is

ORDERED that the branch of the motion by the defendant/third-party plaintiff Trustees of Columbia University in the City of New York for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the branch of the motion by the defendant/third-party plaintiff Trustees of Columbia University in the City of New York for judgment on its third-party indemnification claim is denied; and it is further

ORDERED that the defendant/third-party plaintiff Trustees of Columbia University in the City of New York's third-party complaint against the City of New York is dismissed; and it is further

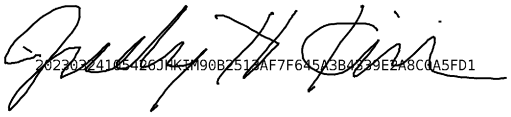
ORDERED that the third-party defendant City of New York's counterclaim in the third-party action is dismissed; and it is further

ORDERED that within ten days from the date of this decision and order, counsel for the Trustees of Columbia University in the City of New York shall serve a copy of this decision and order, with notice of entry, on all parties; and it is further

ORDERED that within ten days from the date of this decision and order, counsel for the Trustees of Columbia University in the City of New York shall serve a copy of this decision and order, with notice of entry, on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



3/24/2023
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE