SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

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JASON B. BASS,

Plaintiff,

- v -

LT 424 LLC,LORD & TAYLOR LLC,THE GRENADIER CORPORATION, WISS, JANNEY, ELSTNER ASSOCIATES, INC.,

Defendant.

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INDEX NO. 150246/2016

MOTION DATE 02/22/2023, 02/22/2023, 02/22/2023, 02/22/2023

MOTION SEQ. NO. 007 008 009 010

DECISION + ORDER ON MOTION

LT 424 LLC, LORD & TAYLOR LLC

Plaintiff,

-against-

THE GRENADIER CORPORATION, WISS, JANNEY, ELSTNER ASSOCIATES, INC

Defendant.

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Third-Party
Index No. 595218/2017

The following e-filed documents, listed by NYSCEF document number (Motion 007) 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 482, 499, 503, 509, 510, 511, 512, 513, 514, 515, 516, 517, 520, 521, 556, 557, 569

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 483, 500, 504, 522, 523, 524, 525, 526, 527, 528, 529, 542, 543, 544, 545, 546, 560

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 484, 501, 505, 507, 508, 518, 519, 547, 548, 549, 550, 551, 561, 562, 563, 564, 570, 571, 572, 573, 574, 575, 576

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 502, 506, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 552, 553, 554, 555, 558, 559, 565, 566, 567, 568

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND) .

Upon the foregoing documents, it is ordered that plaintiff's motion for, inter alia, summary judgment and each defendant, LT 424 LLC, and Lord & Taylor, LLC (collectively "LT"), The Grenadier Corporation ("Grenadier"), and Wiss, Janney, Elstner Associates, Inc. ("WJE") motions for summary judgment are determined as follows:

Plaintiff, a pedestrian on the sidewalk, commenced this action alleging that on October 30, 2015 a piece of facade dislodged from the third-floor water table of defendant LT's building located at 424 Fifth Ave., New York, New York and struck him on the head. By way of background, LT is the owner of the subject building, WJE was the Local Law 11 engineering firm who performed periodic façade inspections of LT's building, and Grenadier is a masonry company who was engaged as the contractor to perform the façade work as prescribed by WJE in its cycle reports and recommendations.

With Motion 007, plaintiff seeks, inter alia, summary judgment on the issue of liability as against LT under the doctrine of *res ipsa loquitur*, and also seeks a finding that he was free from comparative negligence.

With Motion 008, defendant Grenadier seeks summary judgment dismissing all claims against Grenadier.

With Motion 009, defendant LT seeks summary judgment dismissing all claims against LT.

With Motion 010, defendant WJE seeks summary judgment dismissing all claims against WJE.

FACTS

Plaintiff allegedly was struck in the head with a cementitious material while he stood on the sidewalk in front of the building at 424 Fifth Avenue on October 30, 2015.

On October 30, 2015, a cementitious material dislodged from the precise area where WJE had been monitoring spalls at the third-floor water table. The piece of cementitious material that fell had a Zamac Nailin inserted into it, along with some sort of wire mesh. Moreover, the piece of cementitious material that fell on October 30, 2015, fell from the exact location on the third-floor water table where there had previously been an aesthetic spall. A Zamac Nailin had been inserted into the aesthetic spall at the third-floor water table after the Cycle 6 inspection, which took place in June 2006.

In accordance with the requirements set forth in New York City's Bldg. Code (1 RCNY § 103-04 and New York City Constr. Code 28-302.1-.6), LT retained WJE, an architectural and engineering company, to perform periodic façade inspections of LT's buildings, including the building at 424 Fifth Avenue, and to furnish and file "Cycle Inspection Reports" every five years, beginning in the early 1990s. In 1991 or 1992, Jim Triano, the Principal Unit Manager and Director of the East Region for WJE, began to perform work at 424 Fifth Avenue on behalf of WJE. As part of its periodic façade inspections WJE would take "hundreds of photos" of the LT defendants' buildings, showing conditions that were "SWARMP" (Safe With A Repair and Maintenance Program). Among the conditions that WJE monitored from cycle to cycle were some of the "aesthetic blemishes" on the façade, such as the spalls at the third-floor water table of the building at 424 Fifth Avenue, which was made out of limestone.

Grenadier began to perform façade work on the building at 424 Fifth Avenue in the early 2000s. Grenadier's work consisted of performing façade maintenance, as prescribed by WJE in its cycle reports and recommendations.

WJE performed its Cycle 6 inspection from June 12, 2006 through June 22, 2006. In order for WJE to physically access the façade and perform the inspection in June 2006, WJE hired Grenadier to provide lift access to the façade.

After finalizing the Cycle 6 Report weeks earlier, on September 26, 2006, WJE helped to solicit bids from contractors, including Grenadier, to perform the work that was highlighted in the Report as SWARMP. Specifically, Triano, on behalf of WJE, sent out, via email, the Local Law 11 repairs drawings to Richard MacDowell and Robert Delmonico at Grenadier, and indicated that WJE would distribute hard copies of the drawings and a project manual at a meeting the following day.

In early October 2006, LT received three bids, including a bid from Grenadier. Winning the bid, Grenadier was engaged as the contractor to perform the façade repairs that were identified as SWARMP during WJE's Cycle 6 inspection, including repairing the delaminated roofing along the top surface of the limestone at the third-floor water table. Grenadier's façade was performed from November 2006 through January 2007.

Richard MacDowell, a former employee of Grenadier, was in charge of Grenadier's work at 424 Fifth Avenue for this project. Notwithstanding, during the week in November 2006 when Grenadier performed its work on the façade of 424 Fifth Avenue, MacDowell went on vacation. In an email dated November 1, 2006, MacDowell advised "I am on vacation next week, and Rich Massone is fully involved and will fill in for me." "Again, I am off next week so Rich Massone will work with you on this." As a result, in MacDowell's place, Richard Massone was supposed

to oversee Grenadier's union laborers to make sure that their work conformed to WJE's drawings, prescriptions, and project manual. However, Massone testified that he "definitely was not present" and, despite MacDowell's representations about Massone's involvement, Massone stated that "[t]here was no reason for [him] to read th[e] [project manual]," which detailed the scope of work, the specific materials to be used, and how the repairs were to be performed. According to Massone, he "did not have to do one thing when it came to the project."

Pursuant to WJE's prescriptions in their Cycle 6 Report, drawings, and/or project manual, Grenadier was supposed to address delaminated roofing next to the spall at the third-floor water table. Grenadier was not supposed to address the spall itself as it was merely aesthetic. Grenadier's owner, Robert Delmonico, understood that the drawings required Grenadier to address the spalls at the third-floor water table using a concrete mortar mix, and not a Zamac Nailin. Triano and Delmonico both testified that it would be improper to use a Zamac Nailin in limestone because it "induces expansion forces when it's driven into place which can cause cracking."

Grenadier's records fail to specify which materials were specifically used in November 2006—while for all of the other work that Grenadier performed at the LT buildings, the materials were specified in transaction and detail reports.

Ordinarily, after a contractor such as Grenadier performed façade work, WJE would physically inspect the façade, using a lift, to ensure that the work conformed to WJE's prescriptions, drawings, and project manual. After Grenadier performed its façade work on the building at 424 Fifth Avenue in November 2006, WJE was not provided with lift access to physically inspect the façade. Instead, WJE merely performed a street level visual inspection. Despite WJE' practice of advising the building owner that it was unable to perform its ordinary physical inspection, WJE failed to inform LT that it performed only a street level visual inspection.

In November/December of 2006, WJE certified that Grenadier's work conformed to its prescriptions, drawings, and project manual, following which WJE certified Grenadier's work and LT paid Grenadier.

Delmonico confirmed that Grenadier performed work on the subject third-floor water table where the piece of debris that struck Plaintiff came from in 2006. But he clarified that Grenadier's repair work and the spalling at issue are in separate and distinct portions of the third-floor water table. Grenadier worked on the horizontal or "top" portion of the water table to remove delaminated waterproofing material, but never worked on the vertical edge, i.e. "bull nose", of the water table.

Since the spall at the third-floor water table (which WJE had been monitoring since the early 1990s) was present in June 2006, and was not present in August 2007, it must have been filled in at some point between June 2006 and August 2007. During the period from June 2006 to August 2007, it is believed that only Grenadier performed work to the façade of the building at 424 Fifth Avenue. Based on the timing and not knowing of other contractors working on façade, Triano testified that Grenadier probably performed that patchwork, but admitted that WJE "would not necessarily be privy to all the contractors working in the building." Triano admitted, however, that "we don't know for a fact that Grenadier installed it."

When WJE performed its next periodic inspection of the façade of the building at 424 Fifth Avenue, despite having monitored the spall at the third-floor water table since the early 1990s, WJE failed to note that the spall—which had been present during its 2006 inspection—was no longer present during its Cycle 7 inspection of the façade.

Delmonico testified that in addition to the estimate for work in 2015, Dieter Toth told Ramirez that they should put up a sidewalk shed. To the contrary, Dieter Toth testified that between January 2015 and July 28, 2015, no one advised him of any unsafe hazard that needed to be immediately addressed at the building.

LAW

Pursuant to CPLR § 3212, a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment of any party." The proponent of a motion for summary judgment must demonstrate the absence of any material questions of fact and set forth a prima facie showing of entitlement to judgment as a matter of law (*see Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

A motion for summary judgment may properly be supported by the sworn deposition testimony of the parties (*see Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 1093 [1985]) (holding that attorney affirmation introducing deposition testimony is evidence in admissible form); *Gaeta v New York News, Inc.*, 62 NY2d 340, 350 [1984]). Where it is clear that there are no genuine issues to be resolved at trial, the case should be summarily decided (*see Andre v Pomeroy*, 35 N.Y.2d 361 [1974]).

Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Failure to do so will result in granting the motion. Only bona fide material issues raised by evidentiary facts in admissible form are sufficient to defeat a motion for summary judgment (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). The

"issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief." (*Kornfeld v NRS Technologies, Inc.*, 62 NY2d 686 [1984]).

Plaintiff's Motion 007

Plaintiff submits this motion for summary judgment on the issue of liability as against LT pursuant to CPLR §3212 under the doctrine of *res ipsa loquitur*, and further seeks freedom from comparative fault.

"*Res ipsa loquitur* permits a fact finder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part." (*Ezzard v One E. River Place Realty Co., LLC*, 129 AD3d 159, 162 [1st Dept 2015]).

The purpose of exclusive control requirement of *res ipsa loquitur* is to eliminate within reason all explanations for injury other than defendant's negligence (*see Dermatossian v New York City Transit Authority*, 67 NY2d 219, 227 [1986]). This does not mean that possibility of other cause must be altogether eliminated altogether, but only that their likelihood must be so reduced that greater responsibility lies with the defendant (*id.*).

"Although comparative negligence is usually a jury question, the court may decide the issue as a matter of law if no valid line of reasoning can be drawn from the evidence at trial which could rationally lead to a finding that plaintiff was negligent" (*Rountree v Manhattan & Bronx Surface Transit Operating Auth.*, 261 AD2d 324, 327 [1st Dept 1999]).

Here, regarding the first prong of the *res ipsa loquitur* test, a piece of façade does not normally dislodge from a building and strike a pedestrian below absent negligent maintenance on

the part of a building owner. "*Res ipsa loquitur* does not create a presumption of negligence; rather it is a rule of circumstantial evidence that allows the jury to infer negligence." (*Ezzard* at 162 [2015]). Nevertheless, a material issue of fact exists as to whether LT was ever notified, after an inspection, of the unsafe condition and of the need to provide protection for pedestrians above the sidewalk.

As to the second prong of the *res ipsa loquitur* test, the record establishes that WJE and Grenadier were hired to perform all of the Local Law 11 façade inspections and repairs. WJE was the only Local Law engineering firm for the building and handled the Local Law 11 façade inspections. Following each inspection, WJE determined the scope of any repair work needed and the work was then contracted out to a third-party company, such as Grenadier, to be completed.

Grenadier performed all of LT's Local Law 11 repairs from 2002 to 2015, including the Cycle 6 repairs in 2006. Pursuant to WJE's prescription in 2006, Grenadier was to perform work at the third-floor water table within a couple of feet of where the spall was filled in. Grenadier was the only contractor with access to the façade during that period of time, and the evidence establishes that no other entity or persons could possibly have filled in the spall during the period of time in question.

Thus, the evidence establishes that WJE and Grenadier both had access to, and control of, the façade of the building at 424 Fifth Avenue, and specifically, the third-floor water table, and as such, plaintiff has utterly failed to establish that the LT defendants had exclusive control.

As to the third prong of the *res ipsa loquitur* test, plaintiff in this situation is the prime example of an innocent victim. The act of walking on the sidewalk adjacent to LT's building on Fifth Avenue can hardly be considered negligent. As such, the issue of comparative negligence

need not to be left for the jury as there are no facts from which the jury could reasonably conclude plaintiff was negligent.

"*[R]es ipsa loquitur* is an often confused and often misused doctrine that enables a jury presented only with circumstantial evidence to infer negligence simply from the fact that an event happened." (*Mejia v New York City Transit Auth.*, 291 AD2d 225, 226-227 [1st Dept 2002]). *Res ipsa loquitur* does not create a presumption in favor of plaintiff, but instead permits the inference of negligence to be drawn from the circumstances of the occurrence (*id.*). "When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that 'certain occurrences contain within themselves a sufficient basis for an inference of negligence'" (*Foltis, Inc. v City of New York*, 287 NY 108, 116 [1941]; see Richardson, Evidence § 93, at 68 (Prince 10th ed)).

The Court of Appeals has instructed that "only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict. That would happen only when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." (*Morejon v Rais Constr. Co.*, 7 NY3d 203 (2006); *see also Maroonick v Rae Realty, LLC*, 205 AD3d 423 [1st Dept 2022]; *Tora v GVP AG*, 31 AD3d 341, 342 [1st Dept 2006]).

Therefore, there are still genuine disputes on material facts with the first and second required element of the *res ipsa loquitur* test.

Moreover, plaintiff's alternative request for a *res ipsa loquitur* jury instruction at the time of trial must be denied as premature, as charging the jury on that doctrine is dependent upon the proof adduced at trial (*see Galue v Independence 270 Madison LLC*, 184 AD3d 479, 480 [1st Dept 2020]).

Accordingly, this motion is granted solely to the extent that plaintiff is found to be free from comparative negligence.

Grenadier's Motion 008

Defendant/third-party defendant Grenadier submitted its motion for summary judgment dismissing all claims, cross claims and third-party claims asserted against Grenadier.

"As a general rule, a limited contractual obligation to provide services does not render the contractor liable in tort for the personal injuries of third parties." (*Church v Callanan Industries, Inc.*, 99 NY2d 104 (2002); *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals has identified three exceptions to this general rule in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to a noncontracting third party (*Espinal* at 140 [2002]). These exceptions are: (1) where the contracting party fails to exercise reasonable care and launches a force of harm; (2) where the non-contracting plaintiff detrimentally relied 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 (*id.*).

In order to establish that the defendant launched a force of harm, the plaintiff must establish that the defendant undertook to render services and then negligently created or exacerbated a dangerous condition (*Espinal* at 141-142 [2002](merely plowing the snow cannot be said to have created or exacerbated a dangerous condition); *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]; *Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]; *Espinal* at 142 [2002]).

In order to establish that the contracting party has entirely displaced the other party's duty to maintain the premises safely, the courts look to the terms of the contract between the contracting parties (*Espinal* at 141 [2002]).

Here, with regard to the first situation, Grenadier was obligated to maintain and repair the façade in accordance with WJE's prescriptions. It is undisputed that Grenadier was the only entity to work on the area of the façade at issue between June 2006 and August 2007. Pursuant to WJE's prescription in 2006, Grenadier was to perform work at the third-floor water table within a couple of feet of where the spall was filled in. The evidence establishes that no other entity or persons could possibly have filled in the spall during the period of time in question.

The non-movants argue that Grenadier undertook to render services and then negligently created or exacerbated a dangerous condition by failing to adhere to WJE's project documents and its material deviation therefrom, as well as the concealment of its negligent work, caused the resulting injury. They assert that the piece of cementitious material that allegedly struck plaintiff fell from the exact location on the third-floor water table where there had previously been an aesthetic spall. Moreover, the piece that fell had a Zamac Nailin and wire mesh inserted into it, consistent with the fact that a Zamac Nailin had been inserted into the aesthetic spall at the third-floor water table after the June 2006 Cycle 6 Inspection. They argue that it was Grenadier who used the Zamac Nailin despite the fact that it was not called for by WJE in its plans.

However, Delmonico testified that Grenadier worked on the building's east elevation on the horizontal edge of the third-floor water table and that there is no record of Grenadier performing any repairs to the vertical ledge of the water table. Further, there is no evidence of Grenadier working with any Zamac Nailins in 2006. Instead, Grenadier's work on the horizontal edge of the third-floor water table entailed removing unsound waterproofing and using 10-61 rapid mortar by Thoroc to repair the horizontal portion of the water table only. 10-61 rapid mortar is prescribed for horizontal surfaces only, WJE did not call for any Zamac Nailins to be used for this

project, and there is no evidence that Grenadier's workers had any Zamac Nailins on them when they worked near the location.

Thus, there is an issue of material fact as to whether Grenadier launched a force or instrument of harm.

With regard to the second exception, plaintiff has not proven that he detrimentally relied on any contractual agreement between LT and Grenadier. Plaintiff never alleged in his original complaint nor in his amended complaint that he detrimentally relied on any contractual agreement between LT and Grenadier. Further, the entire record, including plaintiff's deposition testimony, is devoid of any evidence that plaintiff knew of any contractual agreement between LT and Grenadier or its terms, and that he detrimentally relied on such a contract and its terms.

With regard to the third exception, in order to establish that the contracting party has entirely displaced the other party's duty to maintain the premises safely, the courts look to the terms of the contract between the contracting parties (*id.*).

In the instant matter, the deposition testimony of Ramirez regarding ascertaining several bids and rejecting Grenadier's proposal shows that Grenadier did not fully displace LT's obligations to safeguard the premises. There is no contract language that would suggest Grenadier assumed LT's duty to maintain the façade. The contract referred to in LT's bill of particulars, is simply a July 12, 2006 letter from Grenadier to LT stating that it would perform items 1-6 of WJE's Cycle 6 report, as well as a corresponding bid form and project manual, none of which state that Grenadier is responsible for safeguarding LT's premises. Though Grenadier routinely performed work for LT, Grenadier was retained on a case-by-case basis and, for the most part, was retained via a bidding process. Furthermore, Grenadier also worked with WJE on the projects related to Local Law 11.

Thus, Grenadier has not entirely displaced the other party's duty to maintain the premises safely.

Furthermore, to establish actual notice, it must be shown that the defendant knew of the alleged dangerous condition for sufficient amount of time in advance of plaintiff's injury to have remedied the defective condition in the exercising of reasonable care (*Braishfield v Grand Union Co.*, 17 NY2d 474 [1965]).

To establish constructive notice, a plaintiff must prove that the condition must be visible and apparent and existed for a sufficient length of time prior to the accident to permit a defendant to discover and remedy said condition (*see Negri v Stop & Shop, Inc.*,115 AD2d 529 [1985]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Here, the non-movants allege that Grenadier should have known it was launching an instrument of harm during its negligent performance of façade maintenance when it improperly used Zamac Nailin to patch a spall at the third-floor water table. Delmonico knew that it would be improper to use a Zamac Nailin in limestone because it "induces expansion forces when it's driven into place which can cause cracking."

However, Grenadier argued that a review of the emails, invoices, purchase orders, estimates, proposals within Grenadier's possession, along with the Local Law 11 Cycle reports showed that Grenadier had no reason to know that a Zamac Nailin was located beneath the vertical edge of the third-floor water table.

Thus, there is a dispute of material fact as to whether Grenadier had actual or constructive notice that a Zamac Nailin was located at the third-floor water table of the premises.

Additionally, as for the cross claims, LT asserts third-party claims and cross-claims against Grenadier for contractual indemnity, common law indemnity, contribution, breach of contract for

failure to procure insurance, and breach of express and implied warranty. WJE also asserted cross claims against Grenadier for contribution and common law indemnity.

The predicate of common-law indemnification is vicarious liability without actual fault on the part of the indemnitee in causing the claimed injuries (*see Raquet v Braun*, 90 NY2d 177 [1997]). "Consistent with the equitable underpinnings of common-law indemnification, case law imposes indemnification obligations upon those actively at fault in bringing about the injury, and thus reflects an inherent fairness as to which party should be held liable for indemnity" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]; *Mas v Two Bridges Assocs.*, 75 NY2d 680 [1990]).

A defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule" (*Klinger v Dudley*, 41 NY2d 362 [1977]; *Dole v Dow Chem. Co.*, 30 NY2d 143 [1972]). "A contribution claim can be made even when the contributor has no duty to the injured plaintiff." (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 559 [1992]; *Garrett v Holiday Inns*, 58 NY2d 253, 261 [1983]). "In such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable." (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568 [1987]; *Garrett*, 58 N.Y.2d at 261 [1983]).

Here, the contract referred to by LT consists of a July 12, 2006 letter from Grenadier to LT stating that it would perform items 1-6 of WJE's Cycle 6 report, as well as a corresponding bid form and project manual, none of which contain any language requiring Grenadier to indemnify, defend or hold LT harmless, or any language requiring Grenadier to procure insurance in favor of

LT. Since LT has failed to point to any indemnity or insurance language, its contractual indemnity and breach of contract claims must fail.

As for cross claims against Grenadier for contribution, common law indemnity and breach of warranty, there is still a dispute of material facts. Just as LT reasonably relied upon WJE to ensure that Grenadier performed its work correctly in accordance with its contract, they reasonably relied upon Grenadier to correctly perform its work in compliance with applicable project documents and specifications.

LT argued that by undertaking repair of the façade and failing to adhere to WJE's specification regarding areas of repair and materials to be used pursuant to the subject contract, Grenadier actively created or exacerbated a dangerous condition by negligently performing the façade maintenance, particularly, in that it improperly used Zamac Nailin to patch a spall at the third-floor water table.

However, Grenadier argued that there is no evidence that Grenadier installed the Zamac Nailin at issue. Instead, the testimony of three representatives from Grenadier over four days states that Grenadier was never asked to repair spalling along the bullnose of the third-floor water table, and would not make this repair if the same was never requested or paid for by LT.

Thus, there is a question of fact as to whether Grenadier employees actually used the Zamac Nailin at issue.

LT's Motion 009

In this case, the defendant/third-party plaintiff LT moved for (1) summary judgment in favor of LT dismissing the amended complaint and all cross claims and counterclaims against them, and (2) summary judgment in favor of LT on their cross claims and on their third-party complaint against Grenadier and WJE.

Here, LT disputes that it breached a duty that proximately caused plaintiff's injury since it failed to have notice. However, here the hazardous condition was visible and apparent and had existed for a sufficient period of time that LT should have known about it and taken reasonable steps to eliminate or minimize the hazard. Therefore, LT had constructive notice of the hazardous condition. Furthermore, the issue of proximate cause depends on foreseeability and "what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve." (*Derdiarian v Felix Contr. Corp.,* 51 NY2d 308 [1980]).

Accordingly, there are genuine issues of material fact that needed to be resolved at trial and the motion is denied in its entirety.

WJE's Motion 010

With this motion, the defendant/third-party defendant WJE moved for summary judgment seeking dismissal of the claims asserted by plaintiff in its Amended Complaint as well as the cross claims of defendants LT and Grenadier.

In order to prevail the party moving for summary judgment must present evidence that creates a genuine issue of material fact regarding at least one of the four elements necessary to establish a prima facie case: (1) the existence of a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) a causal link between the breach and the plaintiff's injury; and (4) actual damages suffered by the plaintiff as a result of the injury (*see Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986]; *Solomon v City of New York*, 66 NY2d 1026 [1985]).

WJE asserts that it does not owe plaintiff a duty of care. While plaintiff is silent on this question, the question ultimately depends on an underlying question of fact as to whether WJE

entirely displaced LT's duty to inspect the façade of the building which should be resolved by a fact finder.

Accordingly, the court denies WJE's summary judgment motion seeking to dismiss the negligence claim against WJE.

As for the branch of the motion seeking to dismiss LT's claim of professional malpractice, WJE correctly contends that LT's claim will fail as a matter of law without an expert (*Suppiah v Kalish,* 76 AD3d 829, 832 [1st Dept 2010]). Nevertheless, LT is not moving for summary judgment on that issue at this juncture and, therefore, it was not yet incumbent on them to provide proof that there was a departure from accepted standards of practice and that the departure was a proximate cause of the injury. Ironically, since it is WJE's motion for summary judgment, the burden is on it and it fails to provide an expert to state that they did not depart from accepted standards of practice. Accordingly, this branch of the motion must also be denied.

As to the branch of the motion concerning common-law indemnification, WJE contends that LT's claim for common-law indemnification fails as a matter of law because LT cannot prove that it did not contribute to the plaintiff's accident.

This argument is unavailing as here, in order to seek indemnification, LT is not required to demonstrate that it did not play any role in causing the plaintiff's injuries. Rather, LT only needs to establish that its liability is secondary and WJE bears greater responsibility for the accident. In other words, the party seeking indemnification, LT, does not need to show that it did not contribute to plaintiff's accident. LT only needs to show that WJE was more responsible for plaintiff's injuries and LT was only secondarily liable. Thus, the Court denies WJE's summary judgment seeking to dismiss LT's common-law indemnification claim against WJE in this motion.

Accordingly, it is hereby ORDERED that plaintiff's motion is granted solely to the extent of finding that plaintiff is free from comparative negligence; and it is further

ORDERED that defendant/third-party defendant Grenadier's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant/third-party plaintiff LT's motion for summary is denied in its entirety; and it is further

ORDERED that defendant/third-party defendant WJE's motion for summary judgment is denied in its entirety; and it is further

This constitutes the decision and order of the Court.

6/16/2023
DATE

RICHARD LATIN, J.S.C.

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