

**Harrison v 160-01 Jamaica Ave. Corp.**

2023 NY Slip Op 32414(U)

June 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 517306/2017

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29<sup>th</sup> day of June 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
PAUL HARRISON,

Plaintiff,

Index No.: 517306/2017

**DECISION & ORDER**

-against-

160-01 JAMAICA AVE. CORP., DOST NY INC.,  
JAMAICA CENTER BUSINESS IMPROVEMENT  
ASSOCIATION d/b/a JAMAICA CENTER BUSINESS  
IMPROVEMENT DISTRICT and ATLANTIC  
MAINTENANCE CORP.,

Defendants.  
-----X

**Recitation, as required by CPLR § 2219(a), of the papers considered in the review of Defendant 160-01 Jamaica Avenue Corp. and Defendant Jamaica Center Business Improvement Association d/b/a Jamaica Center Business Improvement District's motions.**

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion and	
Affidavits/Affirmations Annexed.....	150-157; 158-186
Affirmation in Opposition Papers.....	192-194, 226; 188-191
Reply to Opposition Papers.....	265; 232-233

Upon the foregoing papers, Defendant, 160-01 Jamaica Avenue Corp. ("160-01 Jamaica Ave. Corp."), moves (MS#8) for an order, pursuant to CPLR § 3212, granting summary judgment, dismissing Plaintiff, Paul Harrison's ("Plaintiff") complaint and all crossclaims against it. Defendant, Jamaica Center Business Improvement Association d/b/a Jamaica Center Business Improvement District ("Jamaica Center BID"), moves (MS#9) for an order, pursuant to CPLR § 3212, granting summary judgment, dismissing Plaintiff's complaint and all cross-claims against it and granting it summary judgment on its claim for contractual indemnification from Defendant Atlantic Maintenance Corp. ("Atlantic").

Motion #8 and #9

Plaintiff commenced this action to recover damages for personal injuries he sustained on November 6, 2016 after he allegedly tripped and fell on the sidewalk located at 160-01 Jamaica Avenue, in Queens, New York (“Paver Sidewalk”), due to a missing red brick paver. It is undisputed that on the date of the incident, Defendant 160-01 Jamaica Ave. Corp. was the title owner of 160-01 Jamaica Avenue, Queens, New York (“the Premises”) and, Defendant, DOST NY Inc. (“Dost”) was the tenant in possession of the Premises. It is also uncontested that on the date of the incident, contracts were in effect between Defendant Jamaica Center BID and the City of New York Department of Small Business Services (“City Contract”)<sup>1</sup> and between Defendant Jamaica Center BID and Defendant Atlantic (“Maintenance Agreement”)<sup>2</sup>.

In support of its summary judgment motion, Defendant, 160-01 Jamaica Ave. Corp. submitted a portion of Defendant Dost’s witness, Kamal Raza’s (“Mr. Raza”) July 9, 2020 deposition transcript. Mr. Raza<sup>3</sup> testified that in 2016, Defendant Dost was operating a Taco Bell/Pizza Hut at the Premises and that he only observed employees from Taco Bell/Pizza Hut and Jamaica Center BID cleaning the Paver Sidewalk. Mr. Raza further testified that Dost did not receive any complaints from customers or violations from the City of New York for conditions regarding the Paver Sidewalk. Defendant 160-01 Jamaica Ave. Corp. also submitted Defendant Atlantic’s witness, David Goldberg’s (“Mr. Goldberg”) January 28, 2021 deposition transcript. Mr. Goldberg<sup>4</sup> testified that he negotiated the Maintenance Agreement between Defendant Jamaica Center BID and Defendant Atlantic for Defendant Atlantic to provide supplemental sanitation services. Mr. Goldberg further testified that Defendant Atlantic’s employees would make minor brick paver repairs at the sole request of Defendant Jamaica Center BID<sup>5</sup>. Additionally, Defendant 160-01 Jamaica Ave. Corp., submitted the August 6, 2020 deposition testimony of its own witness, Raymond Levy (“Mr. Levy”). Mr. Levy testified that he served as the property manager for the Premises in 2016 and that unless there were issues that arose

---

<sup>1</sup> A copy of the City Contract was submitted as an exhibit, as part of Defendant 160-01 Jamaica Ave. Corp.’s motion for summary judgment (MS#8). *See* NYSCEF Doc. # 154. Under Section 1.02 of the City Contract, the term of the contract commenced on July 1, 2016 and terminated on June 30, 2021.

<sup>2</sup> A copy of the Maintenance Agreement was submitted as an exhibit, as part of Defendant Jamaica Center BID’s motion for summary judgment (MS#9). *See* NYSCEF Doc. # 159. Under Section 4 of the Maintenance Agreement, the term of the agreement commenced on October 1, 2015 and terminated on September 30, 2017.

<sup>3</sup> Mr. Raza served as the president for Dost NY, Inc. before it dissolved around 2017.

<sup>4</sup> Mr. Goldberg was employed as a principal for Atlantic Maintenance Corporation and served as its vice president.

<sup>5</sup> Mr. Goldberg testified that after Defendant Atlantic received a request from Defendant Jamaica Center BID, it would evaluate the request to determine whether the repair was minor—if it believed the repair was minor it would try to repair it, however, if it did not believe the repair being minor, it would inform Defendant Jamaica Center BID that it was beyond the scope of its contract.

requiring his immediate attention, he would routinely pass by the Premises once every couple of months. Mr. Levy further testified that prior to November 2016, he does not recall ever observing any missing brick pavers or any repair work on the Paver Sidewalk when he passed by the Premises. Based on the deposition testimonies of Mr. Raza, Mr. Goldberg and Mr. Levy, Defendant 160-01 Jamaica Ave. Corp. contends that it was not aware of any missing pavers on the Paver Sidewalk and that, since Defendant Dost was the tenant-in-possession of the Premises on the date of incident, Defendant 160-01 Jamaica Ave. Corp. is not liable for the condition of the Paver Sidewalk.

Plaintiff in opposition to Defendant 160-01 Jamaica Ave. Corp.'s motion, referenced the May 3, 2019 deposition testimonies of Defendant 160-01 Jamaica Ave. Corp.'s witness, Mr. Levy, and Defendant Dost's witness, Mr. Raza. While Mr. Levy testified that he believed it was the City of New York that was responsible for the maintenance of the Paver Sidewalk, Mr. Raza testified that it was the landlord's responsibility for maintaining the red pavers on the Paver Sidewalk. Additionally, during Mr. Levy's May 3, 2019 deposition, after being shown the lease agreement between Defendant 160-01 Jamaica Ave. Corp. and non-party VDF Enterprises Inc. ("Lease Agreement"), he testified that he was uncertain as to whether it was in effect on the date of loss and whether the Lease Agreement had been assigned in its entirety to Defendant Dost<sup>6</sup>. Based on their testimony, Plaintiff argued that a question of fact exists as to which entity was ultimately responsible for maintaining the sidewalk at the time of the incident at issue.

In opposition to Defendant 160-01 Jamaica Ave. Corp.'s motion, Defendant Jamaica Center BID contends that under the terms of the City Contract, it may provide supplemental services, "but shall not be obligated to repair, replace or refurbish for a single item, incident or instance of damage or disrepair"<sup>7</sup>. Defendant Jamaica Center BID maintains that the City Contract was not intended to supplant the property owners' legal duties and responsibilities. Thus Defendant 160-01 Jamaica Ave. Corp., the owner of the premises adjacent to the Paver Sidewalk, has a non-delegable duty to maintain the paver sidewalk

<sup>6</sup> In 2003 Defendant 160-01 Jamaica Ave. Corp. entered into a written lease for the premises with non-party VDF Enterprises, Inc. ("VDF"), as the tenant and in 2005, the lease was assigned to Defendant Dost ("2005 assignment of lease"). A copy of the 2003 lease agreement is under NYSCEF Doc. # 33; and a copy of the 2005 assignment of lease is under NYSCEF Doc. # 34.

<sup>7</sup> A copy of the City Contract is under NYSCEF Doc. # 154 and Defendant Jamaica Center BID is referencing Exhibit C-1 ¶ 2.

In support of its motion, Defendant Jamaica Center BID submitted, *inter alia*, the City Contract, the Maintenance Agreement and its witness, Alfred Green's<sup>8</sup> ("Mr. Green") January 11, 2021 deposition transcript. Based on the City Contract and Mr. Green's testimony, Defendant Jamaica Center BID argued that it was only authorized to provide "supplemental services" and to enter into subcontracts to carry out certain provisions of said supplemental services. The supplemental services Defendant Jamaica Center BID contracted to provide, did not obviate Defendant 160-01 Jamaica Ave. Corp.'s responsibility and non-delegable duty as the owner of the premises. Mr. Green specifically testified that pursuant to the City Contract, Defendant Jamaica Center BID, could hire a third-party company, and it did in fact hire Defendant Atlantic, to handle the brick [paver] maintenance for the district<sup>9</sup>. According to Mr. Green, the maintenance of brick pavers included replacing missing or broken brick [pavers]. In addition, Defendant Jamaica Center BID, submitted Defendant Atlantic's witness, Mr. Goldberg's January 11, 2021 deposition transcript. Mr. Goldberg testified that Defendant Atlantic failed to provide any notice about loose bricks to Defendant Jamaica Center BID. Defendant Jamaica Center BID contends that based on Defendant Atlantic's failure to inform Defendant Jamaica Center BID of any loose brick pavers in the area, Defendant Jamaica Center BID did not have actual or constructive notice of the alleged sidewalk condition.

With respect to that branch of Defendant Jamaica Center BID's motion which seeks summary judgment on its contractual indemnification claim against Defendant Atlantic, Defendant Jamaica Center BID argued that pursuant to the indemnification clause contained in the Maintenance Agreement, Defendant Atlantic is required to indemnify Defendant Jamaica Center BID against "any claim, loss, liability, cost or expense . . . that may be sustained by them by reason of . . . (c) any injury to persons . . . arising out of performance of Services, or as a result of any act or omission of them." Defendant Jamaica Center BID maintains that since Plaintiff's claim allegedly arose out of Defendant Atlantic's failure to perform services, it is contractually required to indemnify Defendant Jamaica Center BID.

---

<sup>8</sup> As of October 2018 and up to the time of his testimony on January 11, 2021, Mr. Green has been employed by Defendant Jamaica Center BID as the administration and operations manager. His duties and job functions in that position include supervising the sanitation team and liasoning between local businesses and local city agencies.

<sup>9</sup> Based on Mr. Green's testimony on January 11, 2021, the district encompasses the area from 169th Street to Jamaica to Sutphin Boulevard and Jamaica, covering approximately thirty (30) blocks, including the premises.

In opposition to Defendant Jamaica Center BID's motion, Defendant Dost referenced the City Contract and Defendant Jamaica Center BID's witness, Mr. Green's January 11, 2021 deposition transcript. Defendant Dost contends that under the City Contract, the supplemental services Defendant Atlantic contracted to provide, included the "repair and maintenance of . . . sidewalk pavement. . ." Mr. Green further confirmed during his testimony that the maintenance of the red brick pavers in the area where the Paver Sidewalk is located was part of Defendant Jamaica Center BID's duties and responsibilities. Based on the City Contract and Mr. Green's testimony, Defendant Dost argued that Defendant Jamaica Center BID contractually assumed maintenance responsibilities over the Paver Sidewalk. Additionally, Defendant Dost referred to Defendant Atlantic's witness, Mr. Goldberg's January 28, 2021 deposition testimony. Mr. Goldberg testified that pursuant to the Maintenance Agreement, Defendant Atlantic would, at the request of Defendant Jamaica Center BID, evaluate the condition of the brick [paver] and repair if the repair was minor. Defendant Dost maintained that based on Mr. Goldberg's testimony there exists triable issues of fact as to which party was responsible for notifying the other regarding the need for sidewalk maintenance.

In opposition to Defendant Jamaica Center BID's motion, Plaintiff referenced Defendant Jamaica Center BID's witness, Mr. Green's January 11, 2021 deposition testimony. Mr. Green testified, after being shown certain photographs, that the area where the Plaintiff's accident allegedly took place was encompassed within the Jamaica Center BID. Based on Mr. Green's testimony, Plaintiff contended that since Defendant Jamaica Center BID has voluntarily and contractually assumed maintenance responsibilities over the Paver Sidewalk, it is liable for the condition of the Paver Sidewalk.

A defendant moving for summary judgment in a trip-and-fall case has the initial burden of making a *prima facie* showing, through evidence in admissible form, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Rivera v Queens Ballpark Co., LLC*, 134 AD3d 796 [2d Dept. 2016]). To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*Przywalny v New York City Tr. Auth*, 69 AD3d 598, 598 [2d Dept. 2010]). 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 cleaned or inspected relative to the time when the

plaintiff fell (*Id* at 599; *Braudy v Best Buy Co., Inc.*, 63 AD3d 1092, 1092 [2d Dept. 2009]). Mere reference to general cleaning practices or inspections, with no evidence regarding any specific inspection of the area in question, is insufficient to establish a lack of constructive notice (*Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept. 2019]). A failure to make a *prima facie* showing of entitlement to judgment as a matter of law requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant makes the *prima facie* showing, the burden then shifts to the non-movant to raise a material issue of fact requiring a trial. *Id.* In considering a motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]).

“Landowners generally owe a duty of care to maintain their property in a reasonably safe condition and are liable for injuries caused by a breach of this duty” (*Maharaj v Kreidenweis*, 214 AD3d 717, 718 [2d Dept. 2023]; *Narainasami v City of NY*, 203 AD3d 831, 832 [2d Dept. 2022]; *Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; *see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). The scope of a landowner’s duty extends to maintaining its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*Alonzo v City of NY*, 188 AD3d 1123, 1124 [2d Dept. 2020]). However, a landowner who has transferred possession and control, such as an out-of-possession landlord, is generally not liable for injuries caused by dangerous conditions on the property (*Gronski v County of Monroe*, 18 NY 3d 374 [2011]). An out-of-possession landlord can be held liable for injuries that occur on the premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct (*Maharaj v Kreidenweis*, 214 AD3d 717 at 719; *Washington-Fraser v Industrial Home for the Blind*, 164 AD3d 543, 544 [2d Dept. 2018]). Reservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition, but only where the condition violates a specific statutory provision and there is a significant structural or design defect (*Ingargiola v Waheguru Mgt.*, 5 AD3d 732, 733 [2d Dept. 2004]); and Administrative

Code of the City of New York § 7-210, by its terms, unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition (Administrative Code § 7-210; *Curry v Eastern Extension, LLC*, 202 AD3d 907, 907 [2d Dept. 2022]; *Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797 [2016]).

While the term “owner” is not defined, it has been strictly construed to encompass “all owners, regardless of their out-of-possession status and whether the owner has contracted with the lessee or another to keep the sidewalk in a reasonably safe condition” (*Xiang Fu He v Troon Mgmt.*, 34 NY3d 167, 173 [2019]). As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party (*Hsu v City of New York*, 145 AD3d 579, 560 [2d Dept. 2016]; *Martin v Rizzatti*, 142 AD3d 591, 592-593 [2d Dept. 2016]). However, the Court of Appeals has recognized that there are exceptions to this general rule and that there are situations in which a party who enters into a contract may be said to have assumed a duty of care to third parties (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). One of those exceptions is where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner’s duty to maintain the sidewalk, the tenant may be liable to a third party (*Hsu v City of New York*, 145 AD3d 759 at 760; *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2d Dept. 2016]).

Here, Defendant 160-01 Jamaica Ave. Corp. argued, *inter alia*, that it is entitled to summary judgment because it did not have a duty to maintain the Sidewalk Pavers under the Lease Agreement. The Court finds that Defendant 160-01 Jamaica Ave. Corp.’s submissions failed to demonstrate, *prima facie*, that it actually was an out-of-possession landlord and that Co-Defendant Dost assumed the exclusive obligation to maintain the Premises and the abutting Sidewalk Pavers. The Lease Agreement, referred to in the moving papers, failed to establish that Defendant 160-01 Jamaica Ave. Corp. relinquished control over the premises to such a degree as to extinguish their duty to maintain the Premises. (*see Iturrino v Brisbane S. Setauket LLC*, 135 AD3d 907, 908 [2d Dept. 2016]). Since the Lease Agreement provided that Defendant 160-01 Jamaica Ave. Corp. could enter the Premises, it was not so comprehensive and exclusive as to entirely displace the landowner’s duty to maintain the sidewalk (*Paperman v 2281 86th St. Corp.*, 142 AD3d at 541). Assuming, *arguendo* that, Defendant 160-01 Jamaica Ave. Corp. could satisfy its *prima facie* burden that it was an out-of-possession landlord, both Plaintiff and Co-Defendant Jamaica Center BID, have raised triable issues of fact as to whether Defendant

160-01 Jamaica Ave. Corp., by reserving its right to enter the leased premises to make repairs, had a duty imposed by statute to be held liable for injuries sustained as a result of subsequently-arising dangerous conditions.

The Court finds that Defendant 160-01 Jamaica Ave. Corp. had also failed to establish that it did not have constructive notice of the alleged hazardous condition and Defendant submitted no evidence as to when the subject sidewalk was last inspected prior to the accident (*Ariza v Number One Star Mgt. Corp.*, 170 AD3d 639 [2d Dept. 2019]). Since Defendant 160-01 Ave. Corp. has not met its *prima facie* burden of showing entitlement to summary judgment on the issue of liability, the court need not review the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

The Court will address that part of Defendant Jamaica Center BID's motion for summary judgment on its claim for contractual indemnification. "[T]he right to contractual indemnification depends upon the specific language of the contract," and "[t]he 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 facts and circumstances" (*Shaughnessy v Hutington Hosp. Assn.*, 147 AD3d 994, 999-1000 [2d Dept 2017]). "[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]). However, "[a] court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930-931 [2d Dept. 2016]; *Arriola v City of New York*, 128 AD3d 747, 748-749 [2d Dept. 2015], quoting *Jamindar v Uniondale Free School Dist.*, 90 AD3d 612, 616 [2d Dept. 2011]).

The record indicates that ¶ 8 of the Maintenance Agreement contains a broad indemnity provision which provides, *inter alia*, that Defendant Atlantic will indemnify and hold harmless, Defendant Jamaica Center BID. However, Defendant Jamaica Center BID failed to demonstrate that it was free from any negligence in the happening of the subject accident. Thus, the Court finds that Defendant Jamaica Center BID is entitled to a conditional order of summary judgment on its claim for contractual indemnification against Defendant Atlantic if Defendant Atlantic is found liable.

Accordingly, after oral argument and review of the submitted documents, Defendant 160-01 Jamaica Ave. Corp.'s motion for summary judgment (MS #8) is denied as it failed to establish, *prima facie*, that it did not have constructive notice of the alleged hazardous condition; and Defendant Jamaica Center BID's motion (MS #9) seeking indemnification is granted to the extent that Defendant Jamaica Center BID is entitled to a conditional indemnification order on its claim for contractual indemnification against Defendant Atlantic. That part of Defendant Jamaica Center BID's motion seeking to dismiss Plaintiff's complaint and all claims and cross-claims against it is denied since there are issues of fact present warranting a trial.

Issues not addressed are either moot or without merit.

This constitutes the Decision and Order of the Court.

ENTER

  
HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**