SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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N. V., NATALIA URIEVA,

Plaintiffs,

- v -

JOHN MINI, DISTINCTIVE LANDSCAPES LTD, BROOKFIELD ASSET MANAGEMENT LLC,NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, NEW YORK CITY HOUSING AUTHORITY, THE HUGH L. CAREY BATTERY PARK CITY AUTHORITY

Defendants.

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INDEX NO. 162096/2019

MOTION DATE 07/13/2023, 07/13/2023

MOTION SEQ. NO. 003 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

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

This personal injury action brought by plaintiff Natalia Urieva individually and on behalf of her infant daughter, N.V., arises out of N.V.'s trip and fall on a rope barrier erected around a grassy area of a park by defendant-landscaper John Mini, Distinctive Landscapes Ltd. (John Mini) in collaboration with defendant-park management company Brookfield Asset Management LLC (Brookfield). John Mini now moves for summary judgment, pursuant to CPLR § 3212, dismissing plaintiffs' complaint in its entirety and Brookfield's cross-claims for contribution and indemnification. John Mini argues it did not owe plaintiff a duty of care under the *Espinal* exceptions, have notice of the purportedly hazardous condition, or was required to install the rope barrier in its contract with Brookfield. Brookfield responds that genuine issues of material

fact exist whether John Mini's decision to use the color green for the rope barrier caused a hazardous condition by camouflaging the rope with the grass it was located on.

Plaintiffs cross-move, pursuant to CPLR § 4532-b for the court to take judicial notice of Google Map images they suggest show the rope barrier was not present one year prior to the accident but was present two months before the accident. Plaintiffs respond to John Mini's motion that John Mini is arguing for factual rather than legal analysis, just because the decision was made in collaboration with Brookfield does not change the fact that John Mini created the hazardous condition, and John Mini's installation of the rope barrier was part of its contractual duties with Brookfield to perform "lawn care." John Mini replies that the images do not merit consideration for the timing of the rope barrier's installation does not change whether it is considered a hazardous condition, reiterates that the rope barrier is not dangerous or hazardous, and plaintiffs fail to show that defendants had notice of the hazardous condition.

BACKGROUND

Plaintiff-infant N.V. is a child who was approximately eight years old at the time of the accident and testified she was a patron of the "Pumphouse Park" (the park) all her life (Counter-Statement of Material Facts, ¶ 1, NYSCEF Doc No 76). Brookfield was the park's property manager and contracted with John Mini to perform "lawn care" services for the park (*id.* at ¶¶ 2-3). Such services included a "collective decision" / "collaborative effort" to deter foot traffic on the grass lawn by erecting a rope barrier connected by a series of stakes around its outer perimeter (*id.* at ¶¶ 5, 7-8). The rope and stakes were green (*id.*).

On September 19, 2018, while plaintiff N.V. was attempting to enter the grass lawn of the park she was caused to trip and fall due to the rope barrier, resulting in a facture of her right ankle (*id.* at ¶¶ 4, 12).

Plaintiffs never made any prior complaints about the rope barrier and John Mini and Brookfield never received any complaints nor witnessed any accidents due to the rope barrier (*id.* at ¶ 12; Statement of Material Fact, ¶¶ 15-16, NYSCEF Doc No 52).

DISCUSSION

"It is well settled that '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" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-54 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-11 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co., LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Negligence

As a general rule, contractors who enter into written contracts to perform specified work do not owe a duty to third parties (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, there are three narrow exceptions by which a contract may give rise to tort liability in favor of a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] 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" (*id.* at 140). To demonstrate that a contracting party launched an instrument of harm, the contracting party must have created or exacerbated a dangerous condition, leading to the plaintiff's damages (*id.* at 142). To demonstrate detrimental reliance, the noncontracting party must "ha[ve] actual knowledge of the contract between the contracting parties" (*Aiello v Burns Intern. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]). And to demonstrate entire displacement, there must be a "comprehensive and exclusive" contractual undertaking (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]).

Here, John Mini has failed to meet its *prima facie* burden because there remains a genuine issue of fact whether its decision to install green rope and stakes on grass launched the force or instrument of harm that caused plaintiff N.V. injuries since the green rope and stakes may have created a camouflaged, hazardous condition. Further, John Mini's potential liability is not displaced because the decision to install the rope barrier was made in collaboration with Brookfield.

Accordingly, that part of John Mini's motion for summary judgment to dismiss plaintiffs' complaint will be denied.

Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). "The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-93 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]) and indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

Section 9.2 of the contract between John Mini and Brookfield provides:

> To the fullest extent permitted by Law, Contractor shall defend, indemnify and save harmless the Indemnitees from and against any claim, demand, suit, cause of action, proceeding, damages, fine, fee, penalty, liability, loss, lien, cost or expense . . . for personal injury . . . arising or alleged to have arisen out of, incurred in connection with, or relating to any of the following . . . (b) any act, omission, negligence or willful misconduct of Contractor.

(Contract, NYSCEF Doc No 60, ¶ 9.2). Here, since that part of John Mini's motion to dismiss plaintiffs' complaint against it will be denied and John Mini's alleged negligence is yet to be determined, that part of its motion seeking to dismiss Brookfield's cross-claim for contractual indemnification will also be denied.

Accordingly, that part of John Mini's motion to dismiss all cross-claims for contractual indemnification against it will be denied.

Common-Law Contribution

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia,* 259 AD2d at 65).

Again since John Mini's liability cannot be determined at this stage, its motion to dismiss Brookfield's cross-claim for common-law indemnification will be denied (*see* CPLR § 1401).

Judicial Notice

Plaintiffs' cross-motion to take judicial notice of the Google Map images of the rope barrier will be denied without prejudice to renew before the trial judge.

CONCLUSION

Accordingly, it is

ORDERED that John Mini's motion for summary judgment to dismiss plaintiffs' complaint and all cross-claims against it is denied; and it is further

ORDERED that plaintiffs' cross-motion to take judicial notice of the Google Map images of the rope barrier is denied without prejudice to renew before the trial judge.

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9/11/2023
DATE

PAUL A. GOETZ, J.S.C.

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