

Leon-Maguire v Sheepshead Rest. Assoc. Inc.

2023 NY Slip Op 34925(U)

July 14, 2023

Supreme Court, Kings County

Docket Number: Index No. 507642/2020

Judge: Carl J. Landicino

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 IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of July, 2023.

PRESENT:

HON. CARL J. LANDICINO, J.S.C.

-----X
BRONAGH LEON-MAGUIRE,

Index No. 507642/2020

Plaintiff,

-against-

DECISION AND ORDER

SHEEPSHEAD RESTAURANT ASSOCIATES INC.,
MOMO HIBACHI STEAKHOUSE & BAR,
MOMOYAMA RESTAURANT INC. individually and
d/b/a MOMOYAMA AND LUNDY'S MANAGEMENT
CORP.,

Motions Sequence #3, #4, #5

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	93-104, 107-129, 138-152,
Opposing Affidavits (Affirmations).....	153, 157, 160-169, 171-174, 176, 181-188,
Reply Affidavits (Affirmations)	177, 189, 192-204.

Upon a review of the papers and oral argument, the Court finds as follows:

Plaintiff, Bronagh Leon-Maguire (the "Plaintiff"), alleges injuries sustained on January 28, 2020 after a trip and fall on a purported defective sidewalk fronting the property known as 1901 Emmons Avenue, Brooklyn, New York (the "Property" or "Premises"). Defendant Lundy's Management Corp. ("Lundy's") moves (motion sequence #3) for 1) summary judgment pursuant to CPLR 3212 dismissing the complaint and any cross-claims as against it, and 2) summary judgment in Lundy's favor as against the Momoyama Defendants ("Momoyama") for "Lundy's attorneys' fees and all costs associated with Lundy's defense of this action." Defendant

Momoyama and Defendant Sheepshead Restaurant Associates, Inc. (“Sheepshead”) move (motion sequence #5) for 1) summary judgment pursuant to CPLR 3212 dismissing the action and all cross-claims as against its, 2) summary judgment in favor of Momoyama and Sheepshead for their cross-claim against Lundy’s, and 3) denial of Lundy’s summary judgment motion. Plaintiff moves (motion sequence #4) for summary judgment pursuant to CPLR 3212 on the issue of liability as against all Defendants.

“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” (*Alvarez vs. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923, citing *Winegrad vs. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316; *Zuckerman vs. City of New York*, 49 N.Y.2d 557). “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824

N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Lundy's contends that this action relates to an alleged sidewalk defect and as such, since it is not the owner of the abutting Premises, it has no liability for the sidewalk's condition. Lundy's argues that it is a tenant and sublandlord of the Premises and Sheepshead is the owner of the Property. Lundy's further contends that pursuant to its sublease with Momoyama, Lundy's "delegated any obligation to maintain and repair the sidewalk to Momoyama." Additionally, Lundy's argues that it never performed any repairs to the sidewalk, it did cause or create, or contribute to any purported defect and it "did not derive a special use" of the sidewalk. In furtherance of these contentions, Lundy's argues that it has a right to contractual indemnity from Momoyama pursuant to the terms of their sublease.

In support of its motion, Lundy's proffers a copy of its lease with Sheepshead ("Lease"), its sublease with Momoyama ("Momoyama"), and the depositions of Christopher Chan ("Chan"), the manager of the Momoyama restaurant that operates at the Premises, and Steve Pappas ("Pappas"), the sole principal of Lundy's.

The Lease, in pertinent part at Paragraph 8, reads as follows:

Tenant shall promptly throughout the Term of this Lease at Tenant's cost and expense, take good care of and maintain the Leased Premises and all roadways, sidewalks, curbs and trackage rights, if any (to the extent the same are subject to Tenant's control) on, adjacent and appurtenant thereto, in good order and repair, and shall promptly remove all accumulated snow, ice and debris from any and all roadways, sidewalks and curbs located upon or appurtenant to the Lease[d] Premises and from any and all other sidewalks and curbs adjacent to the Leased Premises.

The lease between Lundy's and Momoyama (the "Sublease") provided for incorporation of certain provisions in the Lease. The Sublease, in pertinent part, reads as follows:

Except as otherwise expressly provided in, or otherwise inconsistent with, this Sublease, and except to the extent not applicable to the Sublease Premises, the Incorporated Provisions are hereby incorporated in this Sublease by reference with the same force and effect as if set forth herein, except that, unless the context requires otherwise:

5.2.1. References in such provisions to Owner, Landlord, or Lessor shall be deemed to refer to Sublandlord;

5.2.2. references in such provisions to Tenant or Lessee shall be deemed to refer to Subtenant;

5.2.3. references in such provisions to the Leased Premises shall be deemed to refer to the Sublease Premises;

Exhibit C of the Sublease is titled "Exclusions from Incorporated Provisions" and reads, in material part, as follows:

The following provisions of the Overlease [Lease] are not incorporated into this Sublease:

4. The provisions of the Overlease [Lease] relating to subleasing and assignment by Sublandlord [Lundy's] (See Sublease §8).

5. The provision of the Overlease [Lease] relating to alterations, installation, additions or improvements (other than any such provisions relating to the removal thereof at the end of the term). (See Sublease §10).

Christopher Chan sat for deposition on March 29, 2022 (NYSCEF Doc. No. 100). He stated that he was the manager of the Momoyama restaurant at the Premises for 12 years. "I take care of the register and customer service." (Pages 9-10). He stated that Lundy's "manages the building." (Page 19). He stated that Sheepshead was the "owner of the building." (Page 22). He identified the Sublease. (Page 25). He stated that pursuant to the Sublease, his responsibility as to the sidewalk was "[j]ust to keep it clean and free from trash and snow." (Page 26). "I understand that Lundy's management is responsible for any repair work done on the outside of the premises." "As I remember, any work to be done on the outside, we need [Lundy's] consent." (Page 27). After having stated that there were occasions when Momoyama requested repairs and maintenance to be

performed in or around the Property, he stated that he would address it with “Lundy’s management, Steve [Pappas].” (Page 33). He also testified that he previously requested maintenance or repair to the sidewalk. He stated that the request was made “[b]efore the pandemic. Three years ago.” He stated that the requests were made to Mr. Pappas, and that the area of the sidewalk he was concerned about was “[t]he part that’s slightly raised.” (Pages 34-35). He identified a photograph depicting the area (marked as Plaintiff’s #3) and confirmed that he addressed the matter before January 28, 2020 with Mr. Pappas, “[f]our or five times.” (Pages 36-39). He further testified that Pappas stated, “I will take care of it.” (Page 41). He stated that the concrete filler between the flags was there before he complained to Pappas, and he did not know who placed the filler there. (48-49). He also confirmed that the filler was there since he began working at Momoyama. (Page 50). He stated that no work was made to the sidewalk during that time. (Page 51). He also stated that representatives from Lundy’s would visit the Property, “once or twice a year and they probably stopped by without my knowledge, “but that Momoyama did not perform sidewalk inspections.” (Page 54). He stated that some five months prior to the deposition, Momoyama secured a contractor “[t]o change the slabs, the concrete.” (Pages 99-100). “We asked Lundy’s to do it, and they said they have to consult the park department to -- about the tree before they can start work. And we didn’t hear from Lundy’s so we decided to do it ourselves.” (Page 101). Momoyama did not seek reimbursement from Lundy’s. (Page 106). When asked whether at some point the sidewalk area at issue was repatched and shaved, Mr. Chan stated “[y]es.” (Page 118). When asked if this work was performed before or after the Plaintiff’s accident, Mr. Chan stated “I don’t recall.” (Page 118). When asked if the sidewalk was uneven after it was repatched and shaved but before the repair work was ordered by Momoyama, Mr. Chan stated “[i]t was slightly raised still.” (Page 121).

Steve Pappas sat for deposition on April 19, 2022. (NYSCEF Doc. No. 102). He stated that he was the sole owner of Lundy's. "[a]s a lessee, I'm able to lease the space to other tenants." "I operate the building, and that's it." (Page 8). He stated that he had a superintendent who visits the Property "almost every day." He stated that the super "has an employee that works for him and does some cleaning. And also he does repairs..." (Page 11). "So [Salim's] the guy who does the repairs whenever there's a problem." (Page 15). He confirmed that he recalled Mr. Chan telling him "about a problem that he had in the sidewalk" but he did not remember when he was first told. (Page 24). He confirmed that communication was by telephone and Mr. Chan called him approximately three years prior to Mr. Chan's deposition [prior to the accident]. (Page 34). He testified that his response was, "[I]ook at your lease. It's your responsibility under the lease to fix the sidewalk." "What I found later, I found out that my super, Salim, who also did a lot of work for my subtenants, he spoke to him, Mr. Chan. And he say, 'look, its not a big deal. I will shave the - - I will do something to correct the problem.' He corrected it supposedly." (Pages 34-35). He could not recall when that interaction occurred. "I guess right after [Chan's] complaint." (Page 36). He confirmed that he never asked the super to repair the sidewalk and never made repairs to the sidewalk. (Page 37). He stated that between Lundy's and Sheepshead, it was Lundy's "responsibility to take care of the maintenance." (Page 44). Mr. Pappas testified that he visits the Property "at least once a month, a lot of times even more", "to see if there's any problem." He also confirmed that he walked along the exterior perimeter of the building. (Page 80). He testified that he paid the super once a month. He referred to the super as being "like an independent contractor." (Page 108).

David Rizzuto sat for deposition on April 12, 2022 (NYSCEF Doc. 101). He stated that he was employed by non-party Pan Brothers Brokerage Services, Inc. ("Pan"), a property

management firm, and his title was director of operations. He stated that he was a property manager for Pan for 15 of the 30 years he worked for Pan. (Pages 9-10). He stated that the Property was owned by Sheepshead. (Page 11). He described his role on behalf of Pan in relation to the Property as follows: “my role as the director of Pan Brothers is to bill and collect the rent from the one tenant that Sheepshead’s lease has direct is Lundy’s Management Corp.” (Page 15). He stated that he did not know whether Sheepshead had performed any improvement or construction on the Property. (Page 16). He was also “not certain” whether Sheepshead had performed any repairs or maintenance at the Property. (Page 18). He stated that as to the Lease, it was his understanding “that all responsibility requiring repair, structural or non-structural, would be born and the responsibility of the tenant Lundy’s Management Corp.” (Page 22). He also stated that during his limited visits to the Property, he had not “taken particular note of the sidewalks” and has not ever noticed any defective or dangerous condition of the sidewalk. (Page 25). He also stated that two principals of his company had visited the Property. He indicated that the visits were not for inspection, but for discussions with “bank reps and loan brokers” relating to financing of the Property. (Page 28-29). He stated that he was unaware of any complaints relating to the sidewalk abutting the Property. He stated that he was unaware as to whether anyone had injured themselves prior to the date of the subject accident. He further stated that he was unaware of any maintenance or other work performed on the sidewalk. However, he stated, referring to himself, that he did not “think anyone would know more” at Pan and Sheepshead, whether there were complaints, falls, injuries or repairs of the sidewalk. (Pages 35-37). He referred to the Lease as a “triple net” lease and described the term as follows: “when a tenant takes on responsibility of basically an owner of the property in their lease as far as their responsibility to repairs, charges, taxes, utilities, all the above. And that means the landlord is basically billing and collecting rent only, and that’s their

responsibility, and the tenant takes on all other responsibilities.” He acknowledged that it was his understanding that the Lease was such a lease. (Pages 41-42).

Liability - The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter “the Sidewalk Law”). The Sidewalk Law provides in pertinent part that:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

An owner subject to the Sidewalk Law must “provide any evidence showing that she properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a proximate cause of the plaintiff’s injuries.” See *James v. Blackmon*, 58 AD3d 808, 809, 872 N.Y.S.2d 179, 180 [2d Dept 2009]. “Thus, in support of a motion for summary judgment dismissing a cause of action pursuant to Section 7-210, the property owner has the initial burden of demonstrating, *prima facie*, 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.” *Harakidas v. City of New York*, 86 AD3d 624, 627, 927 N.Y.S.2d 673, 676 [2d Dept, 2011]. “Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury.” *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include “the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury.” *Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 978, 688 N.E.2d 489, 490 [1997], quoting *Caldwell v. Vill. of Island Park*, 304 N.Y. 268, 107 N.E.2d 441 [1952]. Also, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. See *Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006]; *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005].

“Moreover, and contrary to defendants' assertion, a landowner's duty under section 7-210 is an affirmative, nondelegable obligation. As the Court explained in *Sangaray*, ‘the purpose underlying the enactment of [section 7-210 is] to incentivize the maintenance of sidewalks by abutting landowners in order to create safer sidewalks for pedestrians and to place liability on those who are in the best situation to remedy sidewalk defects’ (*Sangaray*, 26 NY3d at 799). Accordingly, a nondelegable duty incentivizes owners to make decisions that optimize the safety and proper care of sidewalks, reducing harm to third parties and litigation costs. This interpretation of the code not only is mandated by the language and supported by the legislative history, but also promotes the City Council's intent to place the duty squarely on the shoulders of those in the best position to maintain sidewalks in a reasonably safe condition and to insure against loss. Otherwise, if owners may delegate this responsibility and attendant liability, then they have no incentive to ensure that the delegatee is competent and properly insured... However, to be clear, nothing in section 7-210 prevents a landowner from entering into a maintenance agreement with tenants and third parties. While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section

7-210... Moreover, if litigation ensues, the landowner generally has an indemnification action against a tenant or lessee who covenants to maintain the property. Defendants' objection to this policy consideration is best addressed to the City Council, which, at this juncture, has chosen to impose liability on owners of land abutting city sidewalks. As we have repeatedly made clear, 'the courts 'do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters within its powers' '(*Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, 695 [1991], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 73)."

-*Xiang Fu He v. Troon Mgt., Inc.*, 34 NY3d 167, 174, 175, 137 N.E.3d 469, 114 N.Y.S.3d 14, 2019 N.Y. Slip Op. 07643 [2019].

" 'However, Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable' (*Muhammad v St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2018]; see *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d at 171). 'Thus, to prevail on a motion for summary judgment, a plaintiff must demonstrate, prima facie, that the property owner created the defect or had actual or constructive notice of the defect' (*Robinson v Hess Retail Stores, LLC*, 197 AD3d 517, 518 [2021]; see *Vasquez v Giandon Realty, LLC*, 189 AD3d 1120 [2020])... '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury' (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]). Summary judgment should not be granted where 'the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive' (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 84 [2015])."

-*Curry v. E. Extension, LLC*, 202 AD3d 907, 908, 159 N.Y.S.3d 684 (Mem), 2022 N.Y. Slip Op. 01001 [2d Dept 2022].

This non-delegable duty notwithstanding, a tenant may be held directly responsible by an injured party as a result of a trip and fall relating to a dangerous sidewalk condition abutting the leased Premises.

" '[A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk

which imposes liability upon the lessee for injuries caused by a violation of that duty' (*Martin v Rizzatti*, 142 AD3d 591, 592-593 [2016]; see *Hsu v City of New York*, 145 AD3d 759, 760 [2016]). Additionally, '[a]s 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 at 760; see *Martin v Rizzatti*, 142 AD3d at 593). Only '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, [may] the tenant . . . be liable to a third party' (*Hsu v City of New York*, 145 AD3d at 760 [internal quotation marks omitted]; see *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2016])."

-*Brady v. 2247 Utica Ave. Realty Corp.*, 210 AD3d 621, 621-622, 177 N.Y.S.3d 627, 2022 N.Y.

Slip Op. 06100 [2d Dept 2022].

Motion Sequence #3

Lundy's moves for summary judgment dismissing the action in that, as lessee of the Property, it has no duty to the Plaintiff. Lundy's also states that it is Sheepshead, as owner of the Property, that has a non-delegable duty to maintain the sidewalk abutting its property in reasonably safe condition. Turning to the merits of the motion made by Lundy's (motion sequence #3) the Court finds that there is an issue of fact as to whether Lundy's superintendent Salim, caused or created the condition at issue when he purportedly "shaved down" the sidewalk. As noted above, Steve Pappas of Lundy's stated that Salim made repairs to the raised sidewalk flag by shaving it down. He stated that Salim did this work on behalf of Momoyama not Lundy's. Mr. Chan stated that no work was ever performed by Momoyama (except well after the accident) and he was unsure who shaved down the sidewalk flag and when that occurred. Mr. Chan also stated that concrete filler between the sidewalk flags was present from the time he began working at Momoyama. As such, Mr. Chan does not confirm that he engaged the services of Salim, as stated by Mr. Pappas. Additionally, Mr. Chan provided an affidavit (Motion #5, Exhibit J) wherein he contends that Lundy's performed work and Momoyama did not perform any work, other than the work

Momoyama performed after the accident. Salim himself was not deposed. It is therefore unclear whether repairs were made and on whose behalf they were made. Accordingly, Lundy's has failed to show that they had no liability for the alleged condition. Accordingly, Lundy's motion to dismiss the complaint is denied. *See Rivera v. City of New York*, 192 AD3d 932, 933, 140 N.Y.S.3d 730 [2d Dept 2021]; *Harakidas v. City of New York*, 86 AD3d 624, 627, 927 N.Y.S.2d 673, 677 [2d Dept 2011].¹

Motion Sequence #4

Turning to the merits of the motion made by the Plaintiff (motion sequence #4), the Court finds that even assuming that the Plaintiff may have established that the Defendants had actual or constructive notice of the condition of the sidewalk at issue, the Plaintiff has not established, as a matter of law, that the condition alleged to have caused the Plaintiff's accident constituted a dangerous and defective condition. "The question of whether or not a dangerous or defective condition exists depends on the particular facts and circumstances of each case and is a question of fact for the jury..." *See Guerrieri v. Summa*, 193 AD2d 647, 598 N.Y.S.2d 4 [2d Dept 1993]. Even assuming the depth of the alleged defect has been determined, the measurement itself does not render the condition defective or dangerous as a matter of law. In *Trincere v. County of Suffolk* (90 N.Y.2d 976, 977, 688 N.E.2d 489, 490 [1997]) the Court of Appeals held that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." (*Id* at 977). Therefore, granting summary judgment to a defendant

¹ Lundy's in its reply affirmation has sought to introduce an additional affidavit of Steve Pappas signed months after the motion (motion sequence #3) by Lundy's was submitted and the opposition papers were filed. An attempt to introduce new evidence in reply is not appropriate and will not be considered. *See U.S. Bank Nat'l Ass'n v. Kohanov*, 189 A.D.3d 921, 923, 141 N.Y.S.3d 137, 140 [2d Dept 2020].

“based exclusively on the dimensions of the ...defect is unacceptable.” (*Id* at 977-978). Additionally, even assuming that the Plaintiff showed that the condition of the sidewalk was a violation of 19-154(a)(4) of the Administrative Code of the City of New York, such a violation constitutes some evidence of negligence and does not constitute negligence *per se*. See *Aponte v. New York City Hous. Auth.*, 197 AD3d 1283, 153 N.Y.S.3d 582 [2d Dept 2021]. The Plaintiff’s reliance upon *Tropper v. Henry St. Settlement* is misplaced. The holding in *Tropper* does reference the Sidewalk Law 7-210 and 19-154(a)(4) of the Administrative Code. However, the Court’s finding of a defective condition as a matter of law was a product of an unrefuted allegation that there was an approximately three inch flag deviation.

Defendant's contention that the defect is trivial and nonactionable is also rejected. Although triviality requires a consideration of all the specific facts and circumstances of the defect, not just its size (*see e.g. Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]), here defendant has failed to come forth with any facts to controvert plaintiff’s estimate that the flagstone was displaced by approximately three inches on a heavily trafficked sidewalk.

Tropper v. Henry St. Settlement, 190 AD3d 623, 624–25, 141 N.Y.S.3d 33 [2d Dept 2021].

No measurements were provided and no expert report was produced in relation to an inspection of the condition in this action. There is no allegation of a defect similar to that found in *Tropper*. See also *Lopez v. 1675 Realty*, 209 AD3d 407, 408, 176 N.Y.S.3d 225 [1st Dept 2022][“ $\frac{3}{4}$ of an inch to 1 inch deep and 2 $\frac{1}{2}$ inch to 4 $\frac{1}{2}$ inch wide condition”]. Accordingly, Plaintiff’s motion for summary judgment on the issue of liability is denied.

Motion Sequence #5

Turning to the merits of the motion made by Defendants Sheepshead (motion sequence #5), the Court finds that Defendant Sheepshead has failed to meet its *prima facie* burden.² As stated above, the Court has held that “a landowner's duty under section 7-210 is an affirmative, nondelegable obligation.” *Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 174, 137 N.E.3d 469 [2019; see also *Gambino v. 475 Park Ave. S., LLC*, 197 AD3d 621, 150 N.Y.S.3d 235 [2d Dept 2021]. As the Court stated in *Xiang Fu He v. Troon Mgmt., Inc.*, “the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210.” *Id.* In the instant matter, Sheepshead, as owner, cannot delegate its duty to repair any sidewalk defect to a tenant or other party. Further, Sheepshead has not shown that the alleged condition was *de minimis* as a matter of law. See *Hahn v. Wilhelm*, 54 AD3d 896, 898, 865 N.Y.S.2d 240, 241 [2d Dept 2008]; *Jackson v. Fenton*, 38 AD3d 495, 496, 831 N.Y.S.2d 260, 261 [2nd Dept, 2007]; *Palmer v. 165 E. 72nd Apartment Corp.*, 32 AD3d 382, 819 N.Y.S.2d 105, 105 [2nd Dept, 2006]. Accordingly, the motion, as it relates to Sheepshead as the owner of the Premises, is denied.

As it relates to Momoyama (motion sequence #5) the Court finds that there is an issue of fact that prevents this Court from granting summary judgment in its favor. Momoyama argues that summary judgment should be granted in its favor, dismissing the complaint as against it, as it was not responsible for repairing the sidewalk and the Sublease placed responsibility for sidewalk repair upon Lundy's. The Court finds that the Sublease is unclear regarding who had ultimate

² The Court notes that although motion sequence #5 seeks summary judgment in favor of Momoyama's and Sheepshead's cross claims (as reflected in their amended answer for indemnification and contribution) against Lundy's, neither party addresses or references the indemnity provisions of the Lease or the Sublease, or otherwise argues for summary judgment in relation to those cross-claims. Accordingly, the Court will not search the record and make a determination in relation to this relief.

responsibility to repair the sidewalk at issue. *See Sampino v. Crescent Assocs., LLC*, 34 AD3d 779, 782, 825 N.Y.S.2d 135, 138 [2d Dept 2006]; *Lupo v. Montauk Properties, LLC*, 20 AD3d 398, 398, 798 N.Y.S.2d 510, 511 [2d Dept 2005]. Additionally, there are issues of fact in relation to whether Momoyama independently engaged the services of Lundy's superintendent and is therefore responsible for having caused and created the condition at issue. Salim was not deposed. Although Steve Pappas of Lundy's stated that Salim made repairs on behalf of Momoyama, and not Lundy's, and Christopher Chan acknowledged that someone "shaved down" the sidewalk flag at issue prior to the Plaintiff's incident, the specific facts relating to that work on the sidewalk are unknown.³ Accordingly, Momoyama's motion for summary judgment dismissal of the complaint is denied.

Indemnification

SubLease Provisions:

6. Insurance and Indemnification

6.2. Indemnity of Overlandlord Whenever, pursuant to any of the Incorporated Provisions as incorporated herein, Subtenant is required to indemnify or defend Sublandlord, Subtenant shall be required also to indemnify or defend Overlandlord and such other persons as shall be entitled thereto under the Overlease.

6.3. Indemnity of Sublandlord. In addition to Subtenant's obligations under Section, Subtenant shall indemnify, defend and hold harmless Sublandlord from and against any loss, cost, damage or expense (including reasonable attorneys' fees), or any claim therefor, arising out of (a) actions taken by Sublandlord at Subtenant's request pursuant to Section , or (b) any failure by Subtenant to observe or perform any of the terms, covenants or conditions of this Sublease required to be observed or performed by Subtenant, including any loss, cost, damage or expense which may result from (i) any default under or termination of the Overlease arising by reason

³ Mr. Pappas made representations as to his conversations with Salim concerning Salim's work performed for Momoyama. The remaining parties did not raise admissibility concerns in relation to hearsay. The parties addressed these statements and utilized them in support of their positions, making them admissible. *See Carey v. Five Bros.*, 106 A.D.3d 938, 940, 966 N.Y.S.2d 153 [2d Dept 2013].

of any such failure, or (ii) any holding over by Subtenant in the Sublease Premises beyond the expiration or sooner termination of this Sublease, including any such liability with respect to the entire Overlease Premises arising out of such holding over by Subtenant.

Lundy's moves (motion sequence #3) for summary judgment on its cross-claim against Momoyama for contractual indemnification. Lundy's argues that Momoyama had a duty to repair the sidewalk under the Sublease and that Momoyama's failure to make such repairs triggered the indemnity provision of that lease. Although Lundy's seeks to provide language in its Attorney Affirmation in Support (NYSCEF Doc. 94, Paragraph 23, Page 6), purportedly from Paragraph 5.6 of the Sublease, the paragraph referenced does not correspond to Paragraph 5.6 ("Performance by Subtenant of its Obligations under Sublease") of the Sublease. The language quoted in the papers corresponds to the indemnification provisions found in the Sublease at Sections 6.2 and 6.3 referenced above. The Court will therefore refer to those sections found in the Sublease annexed.

Generally, "[a] party's right to contractual indemnification depends upon the specific language of the relevant contract." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. Additionally, "[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." *Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010]. In the instant proceeding, the Court has found that there is an issue of fact regarding Lundy's freedom from negligence and whether its employee caused and created the condition at issue. Insofar as Lundy's liability has not been determined, the

issue of contractual indemnity cannot be determined at this time. Therefore, Lundy's application for summary judgment on its cross-claim for indemnification is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

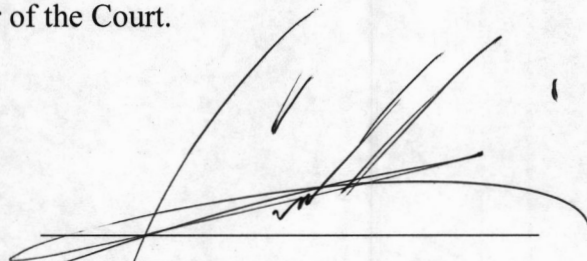
The motion by Lundy's (motion sequence #3) for summary judgment is denied.

The motion by the Plaintiff (motion sequence #4) for summary judgment is denied.

The motion by Sheepshead and Momoyama (motion sequence #5) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

mb
KINGS COUNTY CLERK
FILED
2023 JUL 25 AM 9:46