SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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LORRAINE FELIX-SCOTT,

Plaintiff,

Index # 518303/2020

-against-

Decision
Motion Seq. #s 3, 4, and 5.

SPG ROCKAWAY, LLC and N2N LOGISTICS, LLC

Defendants.

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HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of these Notice of Motions for Summary Judgment submitted on February 15, 2024.

Papers	Numbered
Notice of Motions and Affirmations	1&2[Exh. A-J];6&7[Exh. A-L]; 11&12[Exh. A-M]
Affirmations/Affidavits in Opposition	3[Exh.A-B]; 9[Exh. A-D]; 14[Exh.A]
Reply Affirmations	5[Exh.A]; 10 and 15
Memoranda of Law	4, 8 and 13

Plaintiff commenced this action due to a trip and fall allegedly caused by a raised and/or uneven condition on a sidewalk, which occurred in front of the premises located at 144-45 156th St., Queens, New York on or about March 10, 2020. SPG Rockaway, LLC (hereinafter, "SPG") is the owner/landlord of the premises and N2N Logistic, LLC (hereinafter, "N2N") is the tenant.

Plaintiff moves pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability against SPG. SPG opposes said motion on the grounds there are genuine issues of facts as to the height differential of the uneven sidewalk flags and plaintiff failed to present admissible evidence that SPG had actual or constructive notice of any defect in the sidewalk.

Defendant, N2N Logistics, LLC, moves pursuant to CPLR 3212 for summary judgment dismissing all of plaintiff's claims asserted against N2N and dismissing all cross-claims asserted by SPG.

SPG moves pursuant to CPLR 3212 for an order granting summary judgment as to SPG's cross-claims against N2N for indemnification.

Plaintiff's motion for summary judgment

Plaintiff alleges that on March 10, 2020, she was walking between 156th and 157th Avenues at a normal pace and looking straight ahead when she stubbed her toe on a raised-up portion of the sidewalk causing her to fall. Plaintiff ~~also~~ relies on the deposition testimony of SPG's property manager, Chris Saeli, in which he stated that the tenant is responsible for everything except for the roof and structural elements of the building. Mr. Saeli further testified that if he had seen a problem, he would have noted it, obtained a proposal from a contractor, and presented it to the tenant who would have to pay for it. According to the deposition testimony of Johann Guye, who is the wife of the owner of N2N, she handled the day-to-day operations of N2N and never noticed any height differentials on the sidewalk. She further testified that if she would have noticed any sidewalk height differentials that, then she would have notified the landlord because she expected the landlord to repair it; it was Ms. Guye's understanding that the landlord was responsible for the sidewalk under the lease agreement. Plaintiff's expert, Robert Fuchs, opined that the uneven condition of the sidewalk was the result of an exposed slab edge with a vertical difference in elevation between sidewalk flags that ranged between ½ of an inch and 1 inch. Plaintiff argues that the ½ inch and greater difference in elevation between flags violates § 2-09 of the New York City Department of Transportation (DOT) Highway Rules and §§ 19-152 and 7-210 of the New York City Administrative Code. Mr. Fuch's relies on historical Google Street view imagery from August 16, 2019, to support plaintiff's argument that the defective condition of the sidewalk existed for at least 7 months prior to the accident.

In opposition, SPG argues that the existence of a dangerous or defective condition depends on the facts of each case and is a question of fact for the jury. Defendant's expert, Peter Chen, opined that the measurement technique implemented by plaintiff's expert failed to account for the structural fill located within the expansion joint and beveled profile edge of the sidewalk flag where plaintiff testified that she stubbed her toe. Mr. Chen determined that the correct height differential between the sidewalk flags ranged from ¼ of an inch to ⅜ of an inch, which is trivial as a matter of law. SPH also argues that plaintiff's moving papers are void of any mention of the alleged intrinsic characteristics or surrounding circumstances magnifying any danger posed so that one could conclude the condition unreasonably hindered plaintiff's safety. For example, the edge of the sidewalk flag that plaintiff allegedly stubbed her toe was not jagged, rough, broken cracked, sharp, dirty, wet, slippery, or dimly lit.

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996). "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986].

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. *See*, *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615 (1997). Generally, the issue of whether a dangerous or defective condition exists on real property depends on the particular facts of each case, and is properly a question of fact for the trier of fact. *Id.* In determining whether a defective condition is trivial as a matter of law, a court must examine the facts presented, including the width, depth, elevation, irregularity, and appearance of the condition, along with the time, place, and circumstances of the injury. *Id.* A defendant "may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection. *See*, *Hutchinson v Sheridan Hill House Corp.*, 26 N.Y.3d 66, 19 N.Y.S.3d 802 [2015].

To constitute constructive notice, a hazardous defect must be visible and apparent, and it must exist for sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *See*, *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 [1986].

Here, plaintiff presented evidence that the alleged defect ranged between ½ of and 1 inch. Nonetheless, plaintiff failed to make a prima facie showing by not submitting evidence of the intrinsic characteristics or surrounding circumstances (sharp edges, lighting, cracks, foreign substances) magnifying the danger posed so that one could conclude the condition unreasonably hindered plaintiff's safety. *See*, *Hutchinson*, supra. In opposition, SPG has raised a material issue of fact regarding whether the defect was trivial by presenting evidence that sidewalk flag height differential ranged from ¼ of an inch to ⅜ of an inch. Therefore, the sidewalk flag height differential is a question for the jury based on the conflicting measurements of both experts. As to constructive notice, a material issue of fact exists whether the image offered by plaintiff's expert fairly and accurately portrays the alleged sidewalk seven (7) months prior to the incident. *See*, *Quinn v City of New York*, 305 A.D.2d 570, 761 N.Y.S.2d 231 (2nd Dept., 2003).

Accordingly, plaintiff's motion for summary judgment is hereby denied.

N2N and SPG's motions for summary judgment

N2N argues that plaintiff cannot establish a prima facie case of negligence against N2N because plaintiff cannot establish that there was a breach of any duty owed to plaintiff by N2N. Specifically, N2N relies on New York City Administrative Code § 7-210, which dictates that property owners retain a non-delegable duty to maintain abutting sidewalks, and that liability can only be imputed on tenants to injured third parties, if the tenant created the dangerous condition had special use of the sidewalk, or the lease is so comprehensive and exclusive so as to displace the owner's responsibility regarding the sidewalk. N2N also argues that SPG's cross-claims must be dismissed because SPG retained the duty to make structural repairs to the sidewalk, according to the subject lease. N2N relies on the following provisions of the lease to argue that sidewalk maintenance and repairs duties fall entirely on the owner:

Article 7-1, states, inter alia, that the landlord shall also keep the entrances, sidewalks, corridors, parking areas and other common areas solely servicing the building in good repair as a prudent owner, with the related expenses being included in operating costs.

Article 7-4, states, inter alia, that throughout the term, tenant, at its sole cost and expense, will take good care of the premises, including but not limited to, the building façade, all entrance doors, loading areas, loading dock levelers, security gates, roll down gates, sidewalks and curbs, mechanical, plumbing, sewers and electrical equipment contained therein and will put, keep, and maintain the same in good order and condition and make all necessary repairs thereto, interior and exterior, non-structural, ordinary, foreseen and unforeseen.

In opposition, plaintiff argues that N2N has not established that there was not a comprehensive and exclusive agreement to entirely displace SPG's duty as the owner to maintain and repair the sidewalk. Plaintiff argues that there is an issue of fact as to whether SPG, as the owner, transferred its obligation to make sidewalk repairs to N2N. Plaintiff asserts that Article 7.1 applies only if there are multiple tenants. Plaintiff further argues that there is an issue of fact as to whether the defective condition was structural or non-structural in nature.

In opposition, SPG argues that N2N failed to address whether any one of the various other conditions set forth in the indemnification clause in Article 19.1 of the lease under which SPG is entitled to indemnification were triggered by plaintiff's personal injury claims. According to SPG, the lease requires the tenant to indemnify the landlord regardless of fault for any claims arising out of incidents occurring in or about the premises. SPG relies on the following provision of the lease to argue that it is entitled to indemnification from N2N since the subject accident occurred during the term of the lease and within or about the premises:

Article 19.1 states, inter alia, **tenant, at all times, shall indemnify, defend and hold Landlord, its officers, directors, employees and agents, harmless from and against any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations, arising from the conduct or management of or from any work or things whatsoever done in or about, the Premises (except to the extent arising out of Landlord's negligence or other wrongful conduct)**, and further will indemnify, defend and hold Landlord, its officers, directors, employees, and agents, harmless against and from any and all claims arising during the Term and based upon any breach or default on the part of the Tenant in the performance of any covenant or agreement on the part of Tenant to be performed pursuant to the terms of this Lease, or arising from any act or neglect of Tenant, its agents, servants, employees, licensees, or contractors, **or arising, from any accident, injury or damage whatsoever caused to any person, firm or corporation occurring during the Term in or about the Premises**, and from and against all costs, attorney's fees, expenses and liabilities incurred in or with respect to any such claim or action or proceeding brought thereon.

In reply, N2N argues that Article 7.1 of the lease shows that the lease was neither comprehensive nor exclusive enough to entirely displace the owner's duty to maintain the sidewalk. Similarly, Article 7.4 states that N2N's responsibility concerning the sidewalk is for

non-structural repairs only. N2N further argues that Article 19.1 of the lease states that indemnity is not triggered for claims arising out of the landlord's negligence for wrongful conduct.

Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk. The provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party. *See*, *Martin v Rizzatti*, 142 A.D.3d 591, 36 N.Y.S.3d 682 (2nd Dept., 2016). However, 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. *See*, *Hsu v City of New York*, 145 A.D.3d 759, 43 N.Y.S.3d 139 (2nd Dept., 2016). 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. *See*, *Xiang Fu He v Troon Mgt., Inc.*, 34 N.Y.3d 167, 114 N.Y.S.3d 14 [2019]. A raised portion of a sidewalk is a structural repair, which is the responsibility of the landlord. *See*, *Mannapova v Aufrichtig*, 186 A.D.3d 825, 127 N.Y.S.3d 790 (2nd Dept., 2020).

Here, N2N has established, prima facie, that it did not owe a duty to a third-party, such as the plaintiff, to maintain and repair the alleged structural sidewalk defect. *See*, *Berkowitz v Dayton Constr.*, 2 A.D.3d 764, 769 N.Y.S.2d 730 (2nd Dept., 2003). A plain reading of Article 7.1 reflects that it is the owner/landlord's duty to keep the sidewalk in good repair. Furthermore, a plain reading of Article 7.4 reflects that the tenant is only responsible for non-structural maintenance and/or repairs of the sidewalk. Accordingly, the lease was not so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk. *See*, *Paperman v 2281 86th St. Corp.*, 142 A.D.3d 540, 36 N.Y.S.3d 488 (2nd Dept., 2016). The court finds that no material issue of fact as to the responsibility of the non-structural maintenance and/or repairs of the sidewalk exists.

With respect to N2N's motion to dismiss SPG's cross-claims, N2N established, prima facie, that under the express and unambiguous terms of the lease, any contractual obligation of N2N to indemnify SPG was not triggered. *See*, *Hanna v Milazzo*, 179 A.D.3d 907, 118 N.Y.S.3d 122 (2nd Dept., 2020). A party's right to contractual indemnification depends upon the specific language of the relevant contract. *See*, *Desena v North Shore Hebrew Academy*, 119 A.D.3d 631, 989 N.Y.S.2d 505 (2nd Dept., 2014). A party's right to contractual indemnification depends upon the specific language of the relevant contract. *See*, *Gurewitz v City of New York*, 175 A.D.3d 658, 109 N.Y.S.3d 167 (2nd Dept., 2019).

Here, the court interprets a plain reading of Article 19.1 as stating that the tenant shall indemnify the landlord for any and all claims arising from the conduct, management, or work on the premises, except for the landlord's negligence or other wrongful conduct. The court focuses on the key phrases "any and all claims" and "arising from the conduct or management of or from any work or things whatsoever done in or about, the premises, except to the extent arising out of landlord's negligence or other wrongful conduct." SPG's argument that the exception to the landlord's own negligence does not apply to subsequent language in the lease, namely "or arising, from any accident occurring during the term in or about the premises" is misguided and unpersuasive. The exception for landlord's own negligence applies to all claims. There would be no need to include the exception language in the lease if the tenant was obligated to indemnify

landlord for any and all claims. As such, SPG has failed to raise a triable issue of fact in opposition to N2N's prima facie showing. See, *Tolpa v One Astoria Sq.*, LLC, 125 A.D.3d 755, 4 N.Y.S.3d 230 (2nd Dept., 2015).

Likewise, in relation to SPG's motion for summary judgment for contractual indemnification, SPG has failed to establish a prima facie showing as indemnification has not been triggered per the terms of the lease.

Accordingly, N2N's motion for summary judgment is hereby granted in its entirety, and SPG's motion for summary judgment is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
July 3, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
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