SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **05M**

Justice

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IRA J. SCHACTER,

Plaintiff,

- v -

BOLIVAR APARTMENT CORP., THE CITY OF NEW YORK, THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION, THE NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Defendant.

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INDEX NO. 161066/2019

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 001 002 003

DECISION + ORDER ON MOTION

BOLIVAR APARTMENT CORP.

Plaintiff,

-against-

LYNN TORGERSON GARDENS LTD.

Defendant.

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Third-Party
Index No. 596074/2024

The following e-filed documents, listed by NYSCEF document number (Motion 001) 32, 33, 34, 35, 36, 37, 38, 60, 61, 62, 63, 64, 66, 76

were read on this motion to SEVER ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 67, 69, 71

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 68, 72, 73, 74, 75

were read on this motion for SUMMARY JUDGMENT.

Plaintiff Ira J. Schacter ("Plaintiff") moves under CPLR § 603 to sever the third-party action of defendant/third-party plaintiff Bolivar Apartment Corp. ("Bolivar") against third-party defendant Lynn Torgerson Gardens Ltd. ("Lynn"). Lynn moves under CPLR § 3211 to dismiss Bolivar's third-party complaint. Bolivar moves for summary judgment dismissing Plaintiff's complaint.

For the reasons below: Plaintiff's motion to sever is granted; Lynn's CPLR § 3211 motion is granted solely as to contractual indemnity (and any insurance-procurement theory) and otherwise denied without prejudice; and Bolivar's summary-judgment motion is denied.

BACKGROUND AND PROCEDURAL HISTORY

This personal-injury action stems from a November 6, 2018 incident in front of 230 Central Park West. Plaintiff alleges he tripped over a calf-high cast-iron guard/rail enclosing a landscaped area and fell onto spiked ridges in dark, rainy conditions, and that the specific section lacked bushes, rendering the rail a concealed hazard.

The record reflects testimony and party submissions that maintenance of the spiked metal railings and planting program were performed at Bolivar's direction, with seasonal removal and replacement of plantings.

Bolivar impleaded Lynn on October 29, 2024, approximately eighteen days after Bolivar's deposition; Lynn served an answer on May 14, 2025. By June 3, 2025, Plaintiff advised that discovery in the main action was complete and that he was ready to file a note of issue; the court thereafter set party depositions and a compliance conference for October 28, 2025**.**

ARGUMENTS

Plaintiff urges that denial of severance would unduly delay a trial-ready main action and cause prejudice, invoking CPLR § 603's convenience/prejudice standard and decisions permitting severance where the main and third-party actions do not share common factual or legal issues (*see Haber v. Cohen*, 74 AD3d 1281, 1282 [2d Dept 2010]; *Emmetsberger v. Mitchell*, 7 AD3d 483 [2d Dept 2004]).

Bolivar contends that the third-party claims are intertwined (planting/landscaping choices allegedly bearing on the visibility of the guard/rail) and cites authorities counseling that severance be used "sparingly" and is disfavored when common issues and judicial economy favor a single trial (*see Shanley v. Callanan Indus., Inc*., 54 NY2d 52 [1981]; *Barrett v. New York City Health & Hosps. Corp*., 150 AD3d 949 [2d Dept 2017]; *New York Cent. Mut. Ins. Co. v. McGee*, 87 AD3d 622 [2d Dept 2011]).

Separately, Bolivar moves for summary judgment, arguing that it bears no liability for Plaintiff's accident and is entitled to dismissal of the complaint as a matter of law under CPLR § 3212. Bolivar argues that the guardrail and tree well area were open, obvious, and not inherently dangerous, and that any alleged hazard was readily discernible to a reasonably observant pedestrian exercising due care. Bolivar further maintains that it neither created nor had actual or constructive notice of a dangerous condition, emphasizing that the fence and spikes were permanent, visible structures that had existed for years without prior incident or complaint.

Bolivar also asserts that the accident resulted solely from Plaintiff's inattention, noting that Plaintiff was walking during heavy rain and failed to observe a condition that was plainly apparent. Bolivar argues that the presence of rain and darkness do not transform an otherwise safe, visible

structure into a defective or dangerous one. Finally, Bolivar maintains that the City of New York, not Bolivar, bore any responsibility for the sidewalk area, and that Plaintiff cannot establish proximate cause between Bolivar's maintenance of the tree well and the alleged injuries. Accordingly, Bolivar seeks dismissal of the complaint in its entirety, asserting that there are no triable issues of fact concerning notice, defect, or causation. Bolivar also argues its summary-judgment motion, if granted, would moot severance.

Lynn asserts Bolivar controlled planting decisions, that Lynn had nothing to do with the iron rail itself, and that there is no contract imposing defense, indemnity, or insurance-procurement obligations—only service invoices. Plaintiff has no direct claims against Lynn.

DISCUSSION

I. Plaintiff's Motion Seq. 001 for Severance

CPLR § 603 authorizes severance "[i]n furtherance of convenience or to avoid prejudice," and CPLR § 1010 directs the court to consider whether the third-party dispute will "unduly delay" determination of the main action or prejudice substantial rights.

While severance should be exercised sparingly, (*Shanley v. Callanan Indus., Inc*., 54 NY2d 52 [1981]), and is "inappropriate where the claims … involve common factual and legal issues" and where "judicial economy and consistency of verdicts" favor a single trial (*New York Cent. Mut. Ins. Co. v. McGee*, 87 AD3d 622 [2d Dept 2011]; *see also Barrett v. New York City Health & Hosps. Corp*., 150 AD3d 949 [2d Dept 2017], the statutory balance here favors severance.

To be sure, the main action is trial-ready; Plaintiff represented discovery completion and readiness to file the note of issue by June 2025, and a further conference is already calendared. Holding the negligence claim in abeyance while a late-added impleader (filed October 2024) proceeds through its own discovery would unduly delay adjudication of Plaintiff's claims, the very scenario CPLR § 1010 seeks to prevent.

By contrast, any overlap between the main and third-party actions is limited: the jury can decide whether the guard/rail configuration and conditions presented a hazard, and whether Bolivar created or had notice of it, without contemporaneously determining the horticultural vendor's role. On this record, the risks of inconsistent verdicts are manageable, and severance avoids prejudice to Plaintiff while preserving Bolivar's ability to pursue contribution later (*Cf. Haber v. Cohen*, 74 AD3d at 1282; *Emmetsberger v. Mitchell*, 7 AD3d 483).

Accordingly, severance is granted under CPLR § 603/1010.

II. Lynn's Motion Seq. 002 for CPLR § 3211 Dismissal

On a motion to dismiss based on standing the burden is on the moving party to demonstrate that a plaintiff lacks standing. However, to defeat a CPLR § 3211(a)(3) motion, the plaintiff merely needs to raise a triable issue of fact as to whether standing exists (*DLJ Mortgage Capital v*

Mahadeo, 166 AD3d 512, 513 [1st Dept 2018] *citing Deutsche Bank Natl. Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]).

When assessing such a motion, the court confines itself to the four corners of the pleading, accepts the allegations as true, and accords the pleader every favorable inference. In that procedural posture—and even if Bolivar's theories may appear attenuated—the third-party complaint cannot be dismissed insofar as it articulates a facially sufficient claim for common-law contribution, predicated on the allegation that Lynn's planting and maintenance activities may have contributed to the condition or visibility of the guardrail at the locus. Viable questions of fact remain concerning that claim, precluding dismissal at this stage. The question whether Lynn in fact "contributed to or aggravated" the alleged condition is fact-laden and better addressed after disclosure.

Indeed, the record reflects that Bolivar's resident manager testified that the building's board directed the gardening vendor as to what to plant and when, and that the building itself ordered replacements for dead or missing shrubs. Those facts, while arguably narrowing the scope of Lynn's potential liability, do not negate as a matter of law the possibility that Lynn's maintenance activities—or its failure to replace or tend to vegetation in the relevant area—could bear upon the overall visibility of the railing. Thus, although Bolivar's contribution claim may prove tenuous, dismissal at this juncture would be premature, as the claim's viability turns upon factual questions that can only be clarified through targeted discovery. The court therefore finds that the pleading states at least a colorable basis for contribution sufficient to withstand CPLR § 3211 scrutiny.

However, at oral argument on October 21, 2025, counsel for Bolivar conceded that there is no viable contractual indemnity (or insurance-procurement) claim against Lynn: there is no contract containing express indemnification language, and no invoice or work order that could plausibly supply such an obligation.

The record corroborates that representation: the only document evidencing the relationship is a basic service invoice, devoid of any language requiring Lynn to indemnify or insure Bolivar. Under settled law, a contractual indemnity claim must be founded upon an agreement that is clear, explicit, and unequivocal in expressing such an intention (*Hooper Assoc. v. AGS Computers, Inc.*, 74 NY2d 487 [1989]); none exists here. Accordingly, to the extent the third-party complaint asserts causes of action sounding in contractual indemnification or insurance procurement, those claims are dismissed as a matter of law. As such, in light of Bolivar's concession and the evidence within the record, Lynn's motion is granted solely to the extent of dismissing any claim for contractual indemnification and/or insurance procurement, and is otherwise denied without prejudice to renewal following targeted discovery limited to the contribution theory.

III. Bolivar's Motion for Summary Judgment

Summary judgment lies only where the movant demonstrates entitlement to judgment as a matter of law by tendering evidence that eliminates all material issues of fact; the court's role is issue finding, not issue determination (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *see also Prince v. DiBenedetto*, 189 AD2d 757 [2d Dept

1993][burden shifts only after a prima facie showing]). The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). To be a "material issue of fact" it "must be genuine, bona fide and substantial to require a trial" (*Leumi Financial Corp. v Richter*, 24 AD2d 855 [1st Dept 1965]). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]).

Bolivar has not met its prima facie burden of demonstrating entitlement to judgment as a matter of law. To prevail, a movant must establish, through competent evidence, the absence of any material issues of fact. Here, Bolivar's own submissions belie such entitlement. The deposition testimony of its resident manager, Krzysztof Porycki, establishes that Bolivar—not any municipal agency—maintained and annually painted the black cast-iron railings, and that Bolivar itself added spikes to deter sitting, which were not part of the original design. Mr. Porycki also testified that Bolivar's board directed the gardening vendor what to plant and that the building ordered replacement shrubs as needed, further confirming Bolivar's control over the tree well's condition. Plaintiff's testimony likewise contradicts Bolivar's claim of non-liability, describing a dark, rainy evening with "no lighting directly at the area of the accident" and an "empty space" devoid of bushes where the rail appeared like a "trick wire" across the walkway. This evidence fails to eliminate triable issues of fact and, thus, fails to satisfy Bolivar's initial burden.

Even assuming arguendo that Bolivar had set forth a prima facie showing, the record nonetheless reveals multiple triable issues of material fact that preclude summary disposition. The testimony, photographs, and documentary exhibits raise genuine disputes as to (i) the character and foreseeability of the hazard—a black, spiked, calf-high cast-iron guardrail located in darkness and rain, at a spot allegedly barren of shrubs; (ii) Bolivar's control and maintenance of that structure, including painting and the addition of spikes; and (iii) whether those conditions created or contributed to an unreasonable risk of harm. These issues are squarely within the province of the trier of fact. Indeed, Plaintiff describes a calf-high, spiked, cast-iron guard/rail enclosing a planting bed at 230 Central Park West, encountered at night during heavy rain, in an area allegedly lacking bushes and lighting—circumstances that, if credited, bear directly on visibility and foreseeability. The record includes testimony that Bolivar annually painted and maintained the black railings, added spikes to the well, and controlled the planting program—facts from which a jury could infer both creation and notice.

Bolivar's reliance on the "open and obvious" rubric does not carry the day. Even where a condition is visible, that fact alone "does not preclude a finding of liability" but is, at most, relevant to comparative fault—particularly where the surrounding conditions (e.g., darkness, weather, lack of illumination, absence of vegetation that might cue a pedestrian) may render the hazard a trap for the unwary (*Westbrook v. WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]).

Nor do Bolivar's cited comparators compel dismissal. Its attempt to analogize to *Kovel v. Glenwood Mgt. Corp*., 200 AD3d 460 (1st Dept 2021), overlooks that case's application of the "storm in progress" doctrine to ongoing wintry precipitation—an inapposite framework where the claim here centers on nighttime rainfall diminishing visibility and the alleged absence of lighting and plantings at the locus.

The record, by contrast, marshals evidence that it had "fully" grown dark, that it was "pouring rain," that the fence was painted black, and that "there were no lights" at the accident location—facts a jury could credit in deciding whether the condition was unreasonably dangerous notwithstanding general visibility arguments.

Likewise, Plaintiff convincingly underscores that *Holmes v. City of New York*, 211 AD3d 531 (1st Dept 2022) is directly on point here. There, the plaintiff tripped and fell on a metal tree guard with protruding spikes surrounding an empty tree well on the sidewalk abutting the defendant's tavern. The Appellate Division, First Department, held that questions of fact existed as to whether the guard, though arguably visible, nonetheless constituted a hazardous condition by virtue of its nature and location (*id*. at 532). The court further found triable issues as to whether the defendant's own conduct in maintaining or altering the guard contributed to the creation of that hazard (*id*.). *Holmes* thus underscores that the inquiry into visibility and danger is inherently contextual—turning on the interplay between the condition's character, placement, and control—all of which remain vigorously disputed in the present record.

Plaintiff's other comparators (*Mauriello* and *Sanchez*) likewise reinforce that even nominally observable, low-profile fixtures may pose triable hazards when circumstances—crowding, distraction, or, as alleged here, darkness and rain—impair a pedestrian's ability to perceive and avoid them (*see Mauriello v. Port Auth. of N.Y. & N.J*., 8 AD3d 200 [1st Dept 2004]; *Sanchez v. Toys R Us*, 303 AD2d 165 [1st Dept 2003]). While Bolivar attempts to distinguish those cases factually, their through-line is that context matters and often raises jury questions.

Against that backdrop, Bolivar's expert affirmation opining that the guard was non-defective and "readily observable" cannot erase the competing evidence concerning lighting, weather, color contrast, and planting conditions at the precise location—quintessential credibility and weight determinations reserved for the jury.

In sum, disputed issues concerning (i) the character of the condition (a black, spiked, 18½-inch guard/rail), (ii) the foreseeability of harm in darkness and heavy rain with allegedly inadequate illumination and absent shrubbery, and (iii) Bolivar's control and notice (including its painting, maintenance, and addition of spikes) foreclose summary disposition. The motion is therefore denied.

Accordingly, it is

ORDERED that Plaintiff's motion to sever the third-party action of Bolivar Apartment Corp. against Lynn Torgerson Gardens Ltd. pursuant to CPLR § 603 (Motion Seq. 001) is granted; and it is further

ORDERED that, pursuant to CPLR § 1010, the third-party action is severed and shall proceed on a track separate from the main negligence action to avoid undue delay and prejudice to Plaintiff; and it is further

ORDERED that the Clerk is directed to refer the severed third-party action, bearing Index No. 596074/2024 to the inventory of a general IAS-part since the City of New York is not a party to the severed third-party action; and it is further

ORDERED that the motion of third-party defendant Lynn Torgerson Gardens Ltd. to dismiss the third-party complaint (Motion Seq. 002) is granted solely to the extent of dismissing any claim for contractual indemnification and/or insurance procurement, and is otherwise denied without prejudice to renewal after disclosure limited to the contribution theory; and it is further

ORDERED that defendant/third-party plaintiff Bolivar Apartment Corp.'s motion for summary judgment dismissing Plaintiff's complaint (Motion Seq. 003) is denied; and it is further

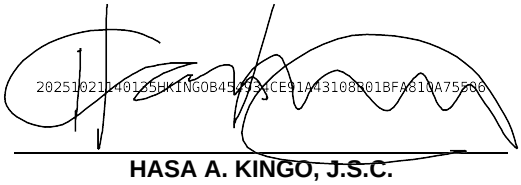
ORDERED that the parties in the main action shall appear for a compliance conference in the DCM Part located at 80 Centre Street, Room 103, New York, New York on Tuesday October 28, 2025, at 2:00 PM as previously scheduled; and it is further

ORDERED that the main action shall be placed on the trial calendar in the ordinary course, once the parties certify via stipulation that all discovery is complete, and the severed third-party action shall proceed on a separate schedule consistent with this decision and order; and it is further

ORDERED that third-party defendant Lynn Torgerson Gardens Ltd. is directed to serve a copy of this decision and order with notice of entry on the Clerk of the General Clerk's Office within ten days from entry and the Clerk shall mark the severed third-party action, bearing Index No. 596074/2024, as severed and refer it to the inventory of a general IAS-part, as previously directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website).

This constitutes the decision and order of the court.



10/21/2025
DATE

HASA A. KINGO, 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:	X	**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**