NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 5

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CHARLES DAVIS,

Plaintiff(s),

-against-

S.A.M. OSHER REALTY II, LLC, ARIEL/MATH REALTY, LLC and DAVID'S CHECK CASHING INC.,

Defendant(s).

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Index №. 25304/2020E

Hon. **ALISON Y. TUITT**
Justice of the Supreme Court

The following papers were read on motion (Seq. No. 2) for **SUMMARY JUDGMENT** submitted on **March 5, 2024**

Notice of Motion (Seq. 7), Affirmations and Exhibits	NYSCEF Doc. # 53-70
Notice of Cross-Motion, Opposition, Exhibits	NYSCEF Doc. # 71-90
Affirmation in Opposition to Cross-Motion, Exhibits	NYSCEF Doc. # 91-93
Affirmation in Reply	NYSCEF Doc. # 94

Upon the foregoing papers, the defendant David's Check Cashing Inc. ("DCC") moves for summary judgment, dismissing the plaintiff's complaint and all crossclaims asserted against it. The defendant S.A.M. Osher Realty II, LLC ("SOR") opposes the motion and cross-moves for an order granting summary judgment with respect to its crossclaims for "contractual indemnification and legal defense" against DCC and directing entry of judgment in its favor. DCC opposes the cross-motion.

Background

This matter arises out of a trip-and-fall accident that allegedly occurred on the sidewalk abutting the premises located at 728 Amsterdam Avenue, New York, New York (the "Premises"). The plaintiff Charles Davis ("Plaintiff") claims that he was caused to trip and fall because of a defective condition on the sidewalk. At pertinent times, DCC occupied the Premises pursuant to a lease agreement with codefendant SOR, the owner of the Premises.

In support of its motion, DCC submits *inter alia* the deposition testimony of the plaintiff Charles Davis ("Plaintiff"); the deposition testimony of Matthew Bardach ("Bardach"), DCC's president; the deposition testimony of Shahram John Gatan ("Gatan") a representative of SOR; the original Lease and rider relating to the premises, and all subsequent modifications, extensions and assignments.

Bardach testified that DCC's employees were only responsible for cleaning and sweeping the sidewalk. He understood that pursuant to the lease, the landlord was responsible for repairing conditions such as the defect that allegedly caused this accident. Bardach further testified that

DCC did not perform any repair work on the sidewalk and had no notice of the allegedly defective condition. Gatan of SOR testified that he visited the subject Premises several times per month, and SOR was responsible for making repairs to the subject sidewalk. Gatan further testified that SOR made no repairs to the sidewalk prior to the date of this accident.

The original lease agreement between the landowner and the tenant at the time, Park Check Cashers, Inc. (hereinafter "Original Lease") requires the landlord/owner to maintain and repair the public portions of the building, both interior and exterior. Paragraph 4 also states that the tenant was responsible for taking good care of the adjacent sidewalks, and at its sole cost and expense, making all "non-structural repairs thereto..." Paragraph 30 of the Original Lease, however, provided: "...and if demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto..." The rider annexed to the Original Lease (the "Rider"), at paragraph 43 provides that owner "shall not be responsible for the repair, upkeep or maintenance of the Premises (exclusive of the roof and the structural aspects of the Building..." The Original Lease was subsequently extended and eventually it was assigned to SOR as the new landlord and owner of the Premises, and DCC as new tenant. All subsequent lease modifications and extensions expressly provided that the Original Lease terms remained in effect, except explicitly as modified by said lease modifications and extensions.

DCC contends that it is entitled to dismissal of Plaintiff's complaint because the owner SOR was required to maintain and repair the sidewalk at issue, as evidenced by the lease and witness testimony. DCC did not create or have any notice of any dangerous condition, therefore it did not breach any duty owed to Plaintiff. DCC further argues that it is entitled to dismissal of SOR's crossclaims for common law and contractual indemnification and contribution. DCC argues that since the lease obligates SOR to repair the sidewalk, the claim for contractual indemnification must be dismissed. Furthermore, SOR is not entitled to common law indemnification against DCC because SOR's liability to Plaintiff is based on its actual wrongdoing in failing to maintain the sidewalk. Since SOR bears some degree of wrongdoing, it cannot receive the benefit of common law indemnity. Lastly, DCC argues that the crossclaim for common law contribution must be dismissed because it owed no duty of reasonable care to SOR aside from its contractual obligations and owed no duty of care to Plaintiff.

In opposition and in support of its cross-motion, SOR argues *inter alia* that the lease language, particularly Paragraph 30, required DCC, not SOR, to repair and replace the subject sidewalk, and *inter alia* to indemnify and save harmless SOR from all claims of personal injury arising out of the sidewalk. SOR further contends that it is entitled to summary judgment against DCC on this claim because DCC breached that contractual obligation.

Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case" (*Winegrad v. New York*

University Medical Center, 64 NY2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once a movant meets their initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Applicable Law and Analysis

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. "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" (*Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 174 [2019]). A commercial tenant cannot be held liable to a third party for injuries arising out of a defective sidewalk condition unless "(a) it affirmatively caused or created the defect that caused [P]laintiff to trip, or (b) put the subject sidewalk to a 'special use' for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition" (*Kellogg v. All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept. 2017]; *Collado v. Cruz*, 81 AD3d 542, 542 [1st Dept. 2011]). In addition, tenants may owe a duty of care to pedestrians for injuries sustained as a result of defective conditions on a sidewalk if the controlling lease confers the tenant with comprehensive and exclusive sidewalk maintenance responsibilities (*Abramson v. Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept. 2010]).

In this case, DCC established its entitlement to summary judgment dismissing the Plaintiff's complaint. The record establishes that DCC did not own the Premises, and did not affirmatively create the defect or make special use of the sidewalk for its own benefit (*Kellogg*, 146 AD3d at 617). While Paragraph 30 of the Original Lease directs DCC to repair the sidewalk, this provision alone did not impose on DCC a duty to a third party such as Plaintiff (*Collado*, 81 AD3d at 542; *see also Choudhry v Starbucks Corp.*, 213 AD3d 521, 522-23 [1st Dept 2023]). Moreover, Gatan testified that owner SOR undertook sidewalk repair duties, which demonstrates that the lease provisions did not entirely displace SOR's duty to maintain the sidewalk (*see Alfani v Rivercross Tenants Corporation*, 230 AD3d 1022, 1024 [1st Dept 2024]). Plaintiff did not oppose the motion, therefore he failed to raise a triable issue of fact.

DCC, however, failed to establish its entitlement to summary judgment with respect to SOR's crossclaim for contractual indemnification. The Original Lease provides that DCC was responsible for performing repairs on the subject sidewalk (Original Lease at Par 30). Contrary to DCC's contentions, Paragraph 43 of the Rider does not involve the sidewalk obligations and does not conflict with or supersede the language in the Original Lease. DCC thus failed to establish that it had no contractual duty to maintain and repair the sidewalk, or that this accident did not

trigger the lease's indemnification provision (*Burgos v 14 East 44 St., LLC*, 203 AD3d 688, 689 [2d Dept 2022]).

The remaining crossclaims against DCC asserted in SOR's answer are dismissed as abandoned, as they were not addressed in SOR's opposition papers (see *Medina v 676 Hunts Point Realty Corp.*, 200 AD3d 495, 497 [1st Dept 2021]; *Arias v Sanitation Salvage Corp.*, 199 AD3d 554 [1st Dept 2021]).

SOR's cross-motion for summary judgment on its crossclaim for "contractual indemnification and legal defense" against DCC is denied. To be entitled to summary judgment on a claim for contractual indemnification, a movant is required to "establish that it was free from any negligence and was held liable solely by virtue of the statutory liability" (*Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept. 1999]). SOR failed to demonstrate that it was free of active wrongdoing here. The testimony demonstrates that despite the lease provisions, SOR actually assumed responsibility for repair of the subject sidewalk (*Alfani*, 230 AD3d at 1025). Furthermore, as established in the prior motion (seq 1), there is evidence that the subject condition existed for several years before this accident occurred, demonstrating constructive notice. SOR thus failed to establish its own freedom from fault (*see Heredia v C.S. Realty Assoc. LLC*, 217 AD3d 496 [1st Dept 2023]).

Conclusion

Accordingly, it is hereby

ORDERED, that DCC's motion for summary judgment dismissing Plaintiff's complaint is granted without opposition, and the complaint as asserted against DCC is dismissed, and it is further,

ORDERED, that DCC's motion for summary judgment dismissing SOR's crossclaims is granted in part, and the crossclaims are dismissed except for the crossclaim seeking contractual indemnification, and it is further

ORDERED, that SOR's cross-motion for summary judgment is denied, and it is further,

ORDERED, that the Clerk of this Court is hereby directed to enter judgment accordingly.

Dated: 1/10/25

Hon. **ALISON Y. TUITT, J.S.C.**

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT