Gerez v 97-44 Sutphin Realty LLC
2026 NY Slip Op 30190(U)
January 12, 2026
Supreme Court, Kings County
Docket Number: Index No. 531778/2023
Judge: Wavny Toussaint
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At an IAS Term, Part 70 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 12th day of January, 2026.

PRESENT:
HON. WAVNY TOUSSAINT,
Justice.

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JEFRY A. CONCEPCION GEREZ,

Plaintiff,

-against-

97-44 SUTPHIN REALTY LLC, SC & IT, INC., BP PRODUCTS NORTH AMERICA, INC., SHELL USA, INC., SHELL OIL PRODUCTS COMPANY LLC and SHELL GAS STATION,

Defendants.

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Index No.: 531778/2023
MS #3 4 5 6
DECISION AND ORDER

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	115-132; 90-113; 133-146; 172-187
Affirmations in Opposition and Exhibits Annexed	156-162; 164-167, 188; 168-170; 190-194
Reply Affirmations and Exhibits Annexed	195; 198-201; 196-197; 203
Parties' Letters to Chambers	202, 204

Upon the foregoing papers, three post-Note of Issue motions and one cross-motion have been joined for disposition before the Court, as re-arranged herein for ease of analysis in two related groups, as follows:

In the first group of papers, plaintiff Jefry A. Concepcion Gerez ("plaintiff") moves (Seq. 05) for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability against defendant 97-44 Sutphin Realty LLC ("Sutphin") and for a

further order, pursuant to CPLR §§ 3211 and/or 3212, striking Sutphin's affirmative defense of plaintiff's alleged comparative fault/culpable conduct, whereas Sutphin and defendant Shell USA, Inc. and Shell Oil Production Company LLC (collectively, "Shell") jointly move (Seq. 04) for an order, pursuant to CPLR § 3212, granting them: (1) summary judgment dismissing the amended complaint against them and all cross-claims against them insofar as such cross-claims are based on common-law negligence; and (2) summary judgment on their cross-claims against defendant SC & IT, Inc. ("SCIT") for contractual and common-law indemnification.

In the second group of papers, plaintiff cross-moves (Seq. 06) for an order, pursuant to CPLR § 3212, granting partial summary judgment on the issue of liability against SCIT and for a further order, pursuant to CPLR §§ 3211 and/or 3212, striking SCIT's affirmative defense alleging plaintiff's comparative fault/culpable conduct, whereas SCIT moves (Seq. 03) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the amended complaint and all cross-claims against it.

All the foregoing motions are opposed.

Background

On May 23, 2023, at approximately 11:00 p.m., plaintiff, then 27 years old, allegedly sustained injuries after tripping and falling on a deteriorated patch of concrete measuring approximately two inches deep and three feet across (the "pothole") at a Shell gas station located at 97-44 Sutphin Boulevard in Queens, New York (the "site"). At the

time of the accident, Sutphin owned the site,[1] whereas SCIT operated a Shell-branded gas station and a convenience store at the site (the "C-store").

On October 31, 2023 (as amended and supplemented on November 8, 2023), plaintiff commenced this action against (among others) Sutphin and SCIT, as well as against Shell, to recover damages for personal injuries arising from his trip and fall allegedly caused by the pothole.[2] Sutphin, SCIT, and Shell (collectively, "defendants") in their respective answers asserted cross-claims against one another for contractual, common-law indemnification/contribution, and breach of contract in failing to obtain insurance (as applicable). In addition, and as relevant herein, Sutphin and SCIT asserted against plaintiff the affirmative defense of comparative fault/culpable conduct.[3]

Discussion

I. Applicable Law

A prima facie case of negligence requires a showing that the defendant owed a duty of reasonable care to the plaintiff and its breach of that duty was the proximate cause of the resulting injury to the plaintiff (*Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 584 [1994]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 562 [2d Dept 2003]).

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[1] Sutphin's Response to Notice to Admit, dated April 23, 2024, ¶ 1 (NYSCEF Doc No. 42).

[2] The remaining named defendants in this action, BP Products North America, Inc. and Shell Gas Station, have not appeared in this action.

[3] Sutphin's Verified Answer with Cross-Claims to Amended Complaint, dated December 27, 2023, First and Second Cross-Claims Against SCIT; Third Affirmative Defense (NYSCEF Doc No. 96); SCIT's Verified Answer to Amended Verified Complaint, dated August 7, 2024, First and Second Cross-Claims Against Sutphin; Eighteenth Affirmative Defense (NYSCEF Doc No. 101); Shell's Answer to the Amended Verified Complaint, dated December 29, 2023, First through Fourth Cross-Claims Against Sutphin and SCIT (among others) (NYSCEF Doc No. 97).

A property owner, or a party in possession or control of real property, has a duty to maintain the premises in a reasonably safe condition, and will be held liable if it created or had actual or constructive notice of the dangerous or defective condition at the premises (*Octobre v Soiefer*, 240 AD3d 503, 505 [2d Dept 2025]). Over time, the "law of premises liability . . . has moved inexorably, by statute and common law, in the direction of providing greater protection to persons on premises" (*Alnashmi v Certified Analytical Grp., Inc.*, 89 AD3d 10, 11 [2d Dept 2011]). Landowners whose property is open to the public (such as the site at issue) have a continuing, non-delegable "duty to maintain their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Graham v New York City Hous. Auth.*, 229 AD3d 605, 606 [2d Dept 2024]; *Cox v 118 E. 60th Owners, Inc.*, 189 AD3d 1169, 1170 [2d Dept 2020]). It follows that store owners and operators are "charged with the duty of keeping their premises in a reasonably safe condition for the benefit of their customers" (*Cortes v King Kullen Grocery Co., Inc.*, 210 AD3d 949, 950 [2d Dept 2022] [internal quotation marks omitted]).

Conversely, "[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (*Mallet v City of New York*, 184 AD3d 633, 633 [2d Dept 2020] [internal quotation marks omitted]). "When an out-of-possession landlord retains some control and some contractual duty to make repairs to the leased premises, the question of liability will turn on whether the injury-producing

condition fell within the landlord's contractual responsibilities" (*Plunkett v 519 Gourmet Deli & Grill, Inc., No. 5*, 233 AD3d 814, 815-816 [2d Dept 2024]).

Ultimately, "control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v Goldberg*, 27 NY2d 887, 889 [1970]). "Due weight" must be given to the parties' course of conduct, which includes the out-of-possession landowner's ability to access the premises or to what extent the landowner "surrendered control over the property such that [its] duty is extinguished as a matter of law" (*Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011], *rearg denied* 19 NY3d 856 [2012]).

II. Plaintiff's Claim Against Sutphin (Landlord)

As noted, plaintiff moves for partial summary judgment on the issue of liability against Sutphin, whereas Sutphin moves for (among other things) summary judgment dismissing plaintiff's claims against it. Plaintiff asserts that Sutphin, as the site owner, owed him a non-delegable duty of care and had actual or constructive notice of the pothole. The record, viewed in its totality, however, fails to support plaintiff's contention that Sutphin, despite its status as an out-of-possession landlord, retained the requisite control over the site or assumed responsibility for the site through its parent company, nonparty Atlantis Management Group ("Atlantis").

The pretrial testimony of James Martino ("Martino"), a territory manager for Atlantis, was inconclusive on the issue of Sutphin's control of the site. Martino had no personal knowledge of any pre-accident inspections of the site by Sutphin or by Atlantis, nor whether any complaints regarding the pothole were (or were not) lodged with Atlantis's

repair portal (NYSCEF Doc. No. 105; Martino's EBT tr at page 86, lines 8-10; page 88, lines 3-8). Further, Martino testified that he had not observed any potholes or other defective concrete conditions during his own visits to the site (*Id.*, at page 66, lines 12-20).

The pretrial testimony of Ashish Chawla ("Chawla"), a SCIT employee who was managing the site at the time of the accident, likewise failed to establish that Sutphin had actual or constructive notice of the pothole. Although Chawla recalled notifying Martino, by email and by text message, about the pothole at the site and confirmed that the photographs shown to him at his deposition depicted the pothole (NYSCEF Doc. No. 106; Chawla's EBT tr at page 27, lines 8-16; page 37, lines 6-13; page 40, lines 15-19), Chawla's e-mail and text message to Martino about the pothole are not part of the record before the Court. Further, Chawal could not testify with any degree of certainty whether he made such reports to Martino *before or after* plaintiff's accident (*Id.*, *compare* Chawla's EBT tr at page 27, lines 23-25 ["Few months ago"]; page 29, lines 4-5 ["Right away"]; *with* page 37, lines 14-18 ["I reported (the pothole) to (Martino), long time, long time it was broken"]; page 38, lines 3-15 [testifying that he did not know whether he reported the pothole to Martino/Atlantis before or after plaintiff's accident]).[4] Inasmuch as plaintiff failed to meet his prima facie burden of whether Sutphin had actual or constructive notice of the pothole, denial of the initial branch of plaintiff's motion for partial summary judgment on the issue of liability against Sutphin is warranted without regard to the

[4] Assuming that Chawla reported the pothole to Martino by e-mail or text before the accident, Chawla did not know whether – and nothing in the record indicated that – his reports were, in fact, posted into the Atlantis repair portal (*Id.*, Chawla's EBT tr at page 41, line 23 to page 42, line 8).

sufficiency of the latter's opposition (*Winegard v New York University Medical Center*, 64 NY2d 851, 853 [1985]).[5]

Concurrently, Sutphin moves for summary judgment dismissing plaintiff's claim against it. In that regard, Sutphin asserts that: (1) it has been out of possession and control of the site since purchasing it on September 14, 2011; (2) upon purchase, it assumed its predecessor-in-title's then-effective triple-net lease for the site with SCIT (the "underlying lease");[6] (3) the underlying lease expired on (and was not renewed since) September 30, 2021; and (4) from and after October 1, 2021 (including on the accident date), SCIT was (and remains) a holdover tenant with the continuing obligations to maintain and repair the site. In this regard, Sutphin relies (in addition to the underlying lease and the related documents which it submitted with its initial moving papers) on a set of three exhibits which it proffered for the first time with its reply papers (collectively, the "reply exhibits").[7]

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[5] The credibility of plaintiff's testimony (though questioned for its veracity by defendants) is not a proper issue at the summary-judgment stage (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Contrary to defendants' contention, they did not establish that plaintiff's deposition testimony was "unworthy of belief or incredible as a matter of law" (*Caccioppoli v Mayfair Hous., LLC*, 241 AD3d 1524, 1525 [2d Dept 2025]).

[6] Lease, dated January 7, 2008, between GOC Realty Corp. (Sutphin's predecessor-in-title) and Power Asset Management Corp. (SCIT's assignor), as amended by Lease Modification Agreement, dated January 6, 2011 (collectively, the "Lease") (NYSCEF Doc Nos. 109 and 110, respectively). The Lease was assigned to SCIT with the consent of Sutphin's predecessor-in-title, dated September 14, 2011 (NYSCEF Doc No. 111). In connection with Sutphin's acquisition of the fee interest in the site by deed, dated September 19, 2021 (NYSCEF Doc No. 120), Sutphin assumed its predecessor-in-title's obligations under the lease as a landlord, pursuant to the Assumption and Assignment Agreement, dated of the same date (NYSCEF Doc No. 113).

[7] The three reply exhibits are comprised of: (1) a 30-day termination letter, dated June 16, 2025, from Sutphin to SCIT to the effect that SCIT "remained at the [site] as a holdover occupant on a month-to-month basis" from and after September 30, 2021, and that legal action would be taken for failure to vacate the site on or before July 31, 2025; (2) certain e-mail correspondence from August 6, 2025; and (3) Atlantis's "Statement of Account Activity" regarding SCIT's alleged debt to Shell (NYSCEF Doc Nos. 199, 200, and 201, respectively). By letter to the Court, dated August 11, 2025, SCIT objected to Sutphin's submission of the reply exhibits (NYSCEF Doc No. 202).

As a threshold matter, the Court, in its discretion, declines to consider Sutphin's reply exhibits. As a general rule, reply papers are intended to address arguments raised in opposition, not to introduce new arguments, grounds, or evidence in support of the initial papers (*Gelaj v Gelaj*, 164 AD3d 878, 879 [2d Dept 2018]). "There are exceptions to this rule, including when evidence is submitted in response to allegations made for the first time in opposition, or when the other party is given an opportunity to respond to the reply papers" (*id.*). Neither of those exceptions applies here. The time for Sutphin to produce the reply exhibits would have been in support of its motion to support its original contention that "[SCIT] is considered to be a holdover tenant and still occupies the [site] as the sole tenant with the same rights and responsibilities under the lease."[8] Further, SCIT was not given an opportunity to respond to the reply exhibits by way of a sur-reply (*Wells Fargo Bank, N.A. v Murray*, 208 AD3d 924, 927 [2d Dept 2022]; *Cox*, 189 AD3d at 1170; *GJF Const. Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006]).

Turning to the merits of Sutphin's motion as against plaintiff, the Court finds that Sutphin failed to show that, as an out-of-possession landlord, it was relieved of any duty to *repair* the paved areas of the site in which the pothole was located. Sutphin's no-duty argument overbroadly interprets the scope of the lease which required that SCIT merely *maintain* (rather than repair) the paved areas of the site.[9] SCIT's obligation to "maintain"

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[8] Sutphin's Supporting Memorandum of Law, dated May 27, 2025, page 3 (NYSCEF Doc No. 92).

[9] Lease, ¶ 14.01 provides, in relevant part, that "[Sutphin] shall be responsible for the foundations, bearing walls, exterior walls other than painting, power washing and minor repairs and structural elements of the building; and shall maintain the roof and all gutters, leaders, downspouts, weepholes and drains relating thereto[.] [SCIT] shall *maintain* all windows and glass; the sidewalks, pump islands, curbs, *drives and*

the paved areas of the site did not (without more) impose an obligation on SCIT to "repair" those areas (*Cast Iron Co., LLC v Cast Iron Corp.*, 177 AD3d 492, 493 [1st Dept 2019]).[10] Moreover, given that the provisions of the lease (in ¶¶ 14.01 and 14.02 thereof) distinguished between Sutphin's obligation to be responsible for the structural elements of the gas station/C-store on the one hand and SCIT's obligation to "maintain . . . drives and pathways on the [site]" and to make "minor repairs" to the interior of the gas station/C-store (such as doors and related hardware, locks and security systems, etc.) on the other hand, the words "maintain" and "repair" (as used in the lease) cannot be conflated and treated as synonyms (*Cast Iron Co., LLC*, 177 AD3d at 493). Accordingly, Sutphin is *not* entitled to summary judgment, *irrespective* of whether SCIT is (or is not) Sutphin's holdover tenant.

Nor is Sutphin entitled to summary judgment as against plaintiff on its "open-and-obvious" defense. "[T]o obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous" (*Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]). "A condition

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pathways on the [site] and the perimeter; and all paved area together with the surrounding fences, landscaping, and gates." Unlike the preceding provision, Lease, ¶ 14.02 addresses SCIT's obligation to *repair* (as opposed to maintain). In particular, Lease, ¶ 14.02 provides, in relevant part, that "[SCIT] shall also be responsible for making all *minor repairs* to doors and related hardware, locks and security systems, windows and glass, ceiling tiles, electrical fixtures and lights, overhead doors and motors, air compressors, window air-conditioners and HVAC systems, electrical conduit, plumbing, heating, and toilet fixtures (the 'minor repairs') as necessary and at its own cost and expense without limit."

[10] *See Freeman v CMJ Realty Co., LLC*, 2023 NY Slip Op 33606[U], *3 (Sup Ct, Kings County 2023, Rothenberg, J.) ("The lease provision requiring [the tenant] to 'maintain' the driveway/parking lot, without more, does not impose an obligation on [the tenant] to make structural repairs."); *Langston v Gonzalez*, 39 Misc 3d 371, 383 (Sup Ct, Kings County 2013, Silber, J.) ("[U]nless a lease specifically obligates a commercial tenant to be responsible for structural repairs, and identifies what structural repairs are covered, such an obligation will not be implied nor imposed by the courts.").

that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (*Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2d Dept 2011]). Here, Sutphin failed to establish, prima facie, that the pothole was open and obvious, as well as not inherently dangerous, given the surrounding circumstances at the time of the accident[11] (*Evans v Fields*, 217 AD3d 656, 657 [2d Dept 2023]; *Karpel v National Grid Generation, LLC*, 174 AD3d 695, 697 [2d Dept 2019]).

Sutphin's further contention that plaintiff was unable to identify the cause of his fall is unavailing. Although "a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Ash v City of New York, Trump Vil. Section 3, Inc.*, 109 AD3d 854, 855 [2d Dept 2013]), this is not such a case. Under the circumstances,[12] Sutphin failed to meet its prima facie burden of demonstrating that plaintiff could not establish, without resorting to speculation, that he tripped and fell as a result of the pothole (*Rene v Livingston Gardens, Inc.*, 241 AD3d 1487, 1488 [2d Dept 2025]; *Paraskevopoulos v Voun Corp.*, 216 AD3d 983, 984 [2d Dept 2023]). Accordingly,

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[11] Plaintiff was unfamiliar with the area, as it was his first time on the site. The accident occurred at nighttime at approximately 11 p.m., with no streetlights in the area, and with only dim lighting inside the C-store. Plaintiff described the pothole as measuring approximately two inches deep and three feet wide. His description of the pothole was consistent with the post-accident photographs (plaintiff's EBT tr at page 29, line 5; page 38, lines 2-9; page 136, lines 3-17).

[12] While on the ground, plaintiff observed the damaged concrete that caused his trip-and-fall, confirmed that the photographs (as shown to him at his deposition) fairly depicted the accident location, identified the pothole and marked its location in the photographs, and described how he tripped and fell (plaintiff's EBT tr at page 135, lines 4-9; page 133, lines 12-18; page 136, lines 18-24; page 137, lines 7-18; page 46, lines 2-25).

the branch of Sutphin's motion for summary judgment dismissing plaintiff's claim against it is denied.

III. Plaintiff's Claim Against SCIT (Purported Holdover Tenant)

As noted, plaintiff cross-moves for partial summary judgment on the issue of liability against SCIT,[13] whereas SCIT moves for summary judgment dismissing plaintiff's claim against it. The threshold issue is whether SCIT is Sutphin's tenant, given the undisputed fact that the underlying lease expired on September 30, 2021, or approximately 21 months before the accident. "Generally, when a tenant remains in possession [of the leased premises] after the expiration of a lease, pursuant to common law, there is implied a continuance of the tenancy on the same terms and subject to the same covenants as those contained in the original instrument" (*Henderson v Gyrodyne Co. of Am., Inc.*, 123 AD3d 1091, 1093 [2d Dept 2014] [internal quotation marks omitted]). Real Property Law § 232-c provides that "[w]here a tenant whose term is longer than one month holds over after the expiration of such term, such holding over shall not give to the landlord the option to hold the tenant for a new term solely by virtue of the tenant's holding over." Instead, a landlord facing a holdover tenant can *either* commence a proceeding to remove the tenant *or* accept rent for any period after the expiration of the lease, thereby creating a month-to-month tenancy "unless an agreement either express or implied is made providing otherwise" (Real

[13] Contrary to SCIT's contention, "[a]n untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds" (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]). Here, plaintiff's cross-motion was made on nearly identical grounds as the timely motion of SCIT (*Sammy Props., Inc. v Al Saleh Assoc., LLC*, 225 AD3d 815, 818 [2d Dept 2024]; *Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

Property Law § 232-c). In this regard, Lease, ¶ 7.01 provides that "[u]pon the expiration or termination of the term of this Lease, in the event Landlord shall accept rent payment for a period beyond such termination or expiration, the acceptance of such rent shall be on account of use and occupancy, and shall not be deemed to create any tenancy other than a month to month tenancy; and the use and occupancy therefore shall be three times the last monthly rent in effect."

In its moving papers, SCIT failed to establish, as a matter of law, its contention that it did not occupy the premises as a holdover tenant. Although the record shows that SCIT remained in possession after the lease expired and continued to operate the convenience store with its employees at the time of plaintiff's accident (see facts reflected in SCIT President Ying Tang's own admissions [NYSCEF Doc No. 132, Tang aff, ¶¶ 10–11] and in Mr. Chawla's deposition testimony [Chawla EBT tr at 21-23]), SCIT nonetheless asserts, without evidentiary or legal support, that its tenancy ended before the accident occurred. These submissions do not eliminate unresolved factual issues concerning whether SCIT continued as a holdover tenant, whether its tenancy became month-to-month by operation of law, or whether an implied agreement or ongoing negotiations with Sutphin modified or extended the lease.

In any event, the Court need not resolve the threshold issue of whether SCIT is (or is not) a holdover tenant. A review of the information on the New York State Unified Court System E-Courts public website, of which the Court is permitted to take judicial notice (*see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009]), reveals

that: (1) Sutphin (by Verified Petition, dated August 8, 2025) commenced an ejectment proceeding against SCIT in Queens County Supreme Court on August 14, 2025 (the "ejectment proceeding"); (2) Sutphin moved, by order to show cause, dated August 15, 2025, for a writ of possession, an award of rental arrears in the approximate amount of $400,000, and a further award of use and occupancy charges of at least $25,000 per month; (3) SCIT answered Sutphin's petition, denying the material allegations therein, and asserting numerous affirmative defenses; (4) SCIT opposed Sutphin's order to show cause; (5) the justice presiding over the ejectment proceeding took the matter on submission on November 12, 2025; and (6) no decision/order on Sutphin's petition and order to show cause have been issued to date in the ejectment proceeding.[14] The outcome of the pending ejectment proceeding would necessarily determine whether SCIT is (or is not) a holdover tenant.

"To impose liability upon a defendant in possession of real property in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Coates v Brooklyn Hosp. Ctr.*, 241 AD3d 1526, 1526 [2d Dept 2025]). Here, the record contains conflicting evidence as to whether (at a minimum) SCIT had actual or constructive notice of the pothole. Accordingly,

[14] See *97-44 Sutphin Realty LLC v SC & IT Corp., "XYZ Corp.,"* index No. 723571/25 (Sup Ct, Queens County) (NYSCEF Doc Nos. 1, 6, 10, 11, and 13).

summary judgment either to plaintiff or to SCIT is inappropriate (*Galette v 1488 Flatbush Ave., LLC*, 241 AD3d 512, 513 [2d Dept 2025]

IV. Plaintiff's Claim Against Shell (Trademark Licensor)

As part of Sutphin's joint motion, Shell seeks summary judgment dismissing plaintiff's claim against it. Shell demonstrated, by way of Martino's pretrial testimony (NYSCEF Doc. No. 105, at page 44, lines 2-7), that its periodic inspections of the site related only to appearance, lighting, and branding standards. In opposition, plaintiff failed to raise a triable issue of fact. Dismissal of plaintiff's claim against Shell is therefore warranted.

V. Sutphin's Cross-claims Against SCIT

As noted, Sutphin moves for summary judgment on its cross-claims against SCIT, whereas SCIT moves for summary judgment dismissing Sutphin's cross-claims against it. As for Sutphin's contractual indemnification cross-claim against SCIT, whether the expired lease containing these provisions governed the parties' relationship at the time of the accident is a disputed issue of material fact. "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Bleich v Metro. Mgt., LLC*, 132 AD3d 933, 934 [2d Dept 2015]). Moreover, to obtain summary judgment on a contractual indemnification claim, the moving party must submit admissible proof that it is free from negligence (*Bleich,* 132 AD3d at 934; *Bellefleur v Newark Beth Israel Med. Ctr.,* 66 AD3d 807, 808 [2d Dept 2009]). The right to contractual indemnification, in particular, depends

on the express language of the contract, purpose of the entire agreement, and surrounding circumstances (*Tonking v Port Auth. of NY & NJ*, 3 NY3d 486, 490 [2004]; *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-492 [1989]).

Here, Sutphin failed to establish its prima facie entitlement to judgment as a matter of law on the issue of contractual indemnification. The indemnification provision in the underlying lease contains the limitation that SCIT is not required to indemnify Sutphin when the actions or conduct are "solely caused by [Sutphin]" or if Sutphin is otherwise "solely responsible." Given the exception for occurrences arising from its own negligence, Sutphin was required to demonstrate that no question of fact existed as to whether the pothole was due to any negligence on its own part. Sutphin failed to make such a showing in its moving papers. Likewise, SCIT failed to make its own prima facie showing of the absence of triable issues of fact regarding Sutphin's contractual indemnification claim against it.

Further, Sutphin failed to make a prima facie showing of entitlement to summary judgment on its cross-claims for common-law indemnification and contribution against SCIT because it failed to eliminate triable issues of fact as to its freedom from negligence. Likewise, SCIT failed to make a prima facie showing of entitlement to summary judgment dismissing Sutphin's common-law indemnification and contribution cross-claims against it. SCIT failed to affirmatively demonstrate that it was free from negligence, as there are triable issues of fact as to whether it had actual or constructive notice of the pothole (*Zong Wang Yang v City of New York*, 207 AD3d 791, 797-798 [2d Dept 2022]).

VI. Sutphin's and SCIT's Affirmative Defenses of Plaintiff's Comparative Fault

"[A] plaintiff moving for summary judgment dismissing a defendant's affirmative defense of comparative negligence may seek to establish freedom from comparative fault as a matter of law" (*Pezzolla v Family Fruit 2, Inc.*, 220 AD3d 897, 898 [2d Dept 2023]). Here, plaintiff submitted a transcript of his deposition testimony, which established that the pothole was a hazardous condition, that he knew the cause of fall, and that he was not in any way culpable for the happening of the accident. In opposition, Sutphin and SCIT failed to raise a triable issue of fact. Accordingly, Sutphin's and SCIT's affirmative defenses of comparative fault/culpable conduct are stricken.

Conclusion

Accordingly, it is hereby

ORDERED, that plaintiff's motion (Seq. 05) for an order, pursuant to CPLR § 3212, granting him partial summary judgment on the issue of liability against Sutphin and for a further order, pursuant to CPLR §§ 3211 and/or 3212, striking Sutphin's affirmative defense of plaintiff's alleged comparative fault/culpable conduct is granted to the extent that Sutphin's affirmative defense of plaintiff's alleged comparative fault/culpable conduct is stricken; and the balance of his motion is denied; and it is further

ORDERED, that Sutphin and Shell's joint motion (Seq. 04) for an order, pursuant to CPLR § 3212, granting them: (1) summary judgment dismissing the amended complaint against them and all cross-claims against them insofar as such cross-claims are based on common-law negligence; and (2) summary judgment on their cross-claims against SCIT

for contractual and common-law indemnification, is granted to the extent that plaintiff's claims against Shell USA, Inc. and Shell Oil Products Company LLC are dismissed in their entirety; the action is severed and continued against the remaining defendants; and the balance of their motion is denied; and it is further

ORDERED, that plaintiff's cross-motion (Seq. 06) for an order, pursuant to CPLR § 3212, granting him partial summary judgment on the issue of liability against SCIT and for a further order, pursuant to CPLR §§ 3211 and/or 3212, striking SCIT's affirmative defense of plaintiff's alleged comparative fault/culpable conduct is granted to the extent that SCIT's affirmative defense of plaintiff's alleged comparative fault/culpable conduct is stricken; and the balance of plaintiff's cross-motion is denied; and it is further

ORDERED, that SCIT's motion (Seq. 03) for an order, pursuant to CPLR § 3212, granting it summary judgment dismissing the amended complaint and all cross-claims against it is denied in its entirety.

Any relief not expressly granted herein has been considered and is denied.

This constitutes the decision and order of this Court.

E N T E R

J.S.C.

HON. WAVNY TOUSSAINT
J. S. C.