Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

STANISLAW POLUBOCZEK	Index No. 16411/10
Plaintiff(s),	Motion Date April 10, 2012
- against-	
P.C. RICHARD & SON, LLC, 7 HORIZON CORP. and KING KULLEN GROCERY CO., INC.	Motion Cal. No. 14
Defendant(s).	Motion Seq. No. 4

The following papers numbered 1 to 21 read on this motion by P.C. Richard & Son, LLC (PC Richard), to vacate plaintiff's notice to admit and grant a protective order pertaining thereto; and motion by King Kullen Grocery Co., Inc. (King Kullen), for summary judgment in its favor dismissing the complaint insofar as asserted against it pursuant to CPLR § 3212, and, alternatively, for summary judgment in favor of King Kullen against P.C. Richard.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1 - 8
Answering Affidavits - Exhibits	9 - 17
Reply Affidavits	18 - 21

Upon the foregoing papers it is ordered that the motions are decided as follows:

This is a negligence action by plaintiff to recover for personal injuries sustained on May 5, 2009, when he allegedly was caused to slip, trip and or fall due to an alleged defect in the sidewalk in front of 3518 Steinway Street, Astoria, New York. The property is owned by King Kullen and subleased to PC Richard. PC Richard moves to vacate a Notice to Admit and for a protective order as to the same. King Kullen moves for summary judgment in its

favor or, alternatively, for summary judgment on its claim for contractual indemnification from PC Richard. Plaintiff opposes the motions.

Facts

Plaintiff testified upon his examination before trial as follows: on the date of the accident, he went to the PC Richard store to shop for a washing machine. After parking his car on Steinway Street, he exited the vehicle and began to walk toward the entrance to the PC Richard store. Before reaching the store's entrance, however, he tripped on a raised/cracked/broken sidewalk flag and fell to the ground.

John Bogdanos testified on behalf of PC Richard as follows: he is the general manager of the PC Richard store in Astoria. At the time of the accident, a portion of the sidewalk abutting the premises was raised and cracked. This condition developed over a period of years due to the growth of a nearby tree. Bogdanos stated that he was aware of the condition of the sidewalk before the accident and reported the condition to PC Richard's headquarters as early as 2006 or 2007. He was advised by his superior that, because repair of the condition would require the removal of tree roots, the repairs would have to be performed by the City of New York. Bogdanos testified that he made several telephone calls to the City of New York regarding the condition of the sidewalk and was repeatedly told that it would be corrected. It was not until after the accident, however, that the City addressed the condition by removing sidewalk flags. This increased the size of the nearby tree well to accommodate the tree.

Nancy Freire testified on behalf of King Kullen as follows: she is employed as a real estate administrator for King Kullen. She confirmed that the Astoria building adjacent to the accident location is owned by King Kullen. King Kullen leases the premises to 7 Horizon Corp., which subleases the premises back to King Kullen. PC Richard occupies the premises pursuant to a "net sub-sublease" with King Kullen which requires PC Richard to maintain the entire premises. As such, King Kullen performs no inspections of the property. In fact, Freire testified, King Kullen did not even learn of the defective condition of the sidewalk until after the accident. At that time, a representative of PC Richard advised King Kullen that PC Richard was waiting for the City of New York to repair the sidewalk.

Motion by defendant PC Richard

PC Richard moves to vacate and grant a protective order as to a Notice to Admit served by plaintiff on or about June 1, 2011, as noted below. The motion is granted in part (paragraphs 3-8), and denied in part (paragraphs 1, 2 and 9), as noted below.

CPLR § 3123 provides, in relevant part, that "a party may serve upon any other party a written request for admission by the latter ... of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR § 3123[a]). If the requested admission is not denied or otherwise explained "within twenty days after service thereof or within such further time as the court may allow," then the requested admission will be deemed admitted (*id.*). "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial" (*DeSilva v Rosenberg,* 236 AD2d 508, 508 [2d Dept 1997]*; see Rosenfeld v Vorsanger,* 5 AD3d 462, 462 [2d Dept 2004]). "It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*DeSilva v Rosenberg,* 236 AD2d at 508). "Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial" (*id.* at 509).

Based upon these guidelines, defendant's request to vacate the Notice to Admit the following, to wit, paragraphs one and two, is denied. The first paragraph of the Notice to Admit seeks admission that PC Richard had entered into a lease agreement to occupy the subject premises before the date of the accident. The second paragraph of the notice to admit seeks admission that PC Richard occupied the premises prior to May 5, 2009. Specifically, the two paragraphs are as follows:

> "That prior to May 5, 2009, defendant PC Richard had entered into a lease agreement to occupy the premises located at 35-18 Steinway Street, in Astoria, New York."(paragraph 1); and
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> That prior to and on May 5, 2009, defendant PC Richard occupied the premises located at 35-18 Steinway Street, in Astoria, New York (paragraph 2)."

These are simple facts that could be easily ascertained and admitted or denied.

Paragraphs three through seven of the notice to admit seeks admissions concerning PC Richard's responsibility for the maintenance, inspection and repair of the abutting sidewalk. "A notice to admit which goes to the heart of the matters at issue is improper" (*id.* at 508; *see Tolchin v Glaser,* 47 AD3d 922 [2d Dept 2008]; *Glasser v City of New York,* 265 AD2d 526 [2d Dept 1999]). Here, plaintiff could not have reasonably believe that the admissions which he seeks on the issues of, *inter alia*, the duty of PC Richard to maintain the sidewalk and whether PC Richard had prior notice of the defect in the sidewalk, would not be in "substantial dispute at the trial" as they were identical to certain allegations in his complaint and were denied by PC Richard in its answer (CPLR § 3123[a]; *see Washington v Alco Auto*

Sales, 199 AD2d 165 [1st Dept 1993]; *cf. Villa v New York City Hous. Auth.,* 107 AD2d 619 [1st Dept 1985]). Furthermore, the admissions sought on the issues of duty and notice are "at the heart of the controversy" in this case (*Rosario v City of New York,* 261 AD2d 380, 381 [2d Dept 1999]; *see Riner v Texaco, Inc.,* 222 AD2d 571, 571–572 [2d Dept 1995]) and therefore are improper (*see Morreale v Serrano,* 67 AD3d 655, 655–656 [2d Dept 2009]; *Tolchin v Glaser,* 47 AD3d at 922 [2d Dept 2008]; *Lolly v Brookdale Univ. Hosp. & Med. Ctr.,* 45 AD3d 537, 537 [2d Dept 2007]; *Sagiv v Gamache,* 26 AD3d 368, 369 [2d Dept 2006]). Thus, the following allegations contained in plaintiff's notice to admit are vacated:

> "That under the lease agreement under which PC Richard occupied the premises . . on or before May 5, 2009, defendant PC Richard had assumed the responsibility to maintain and repair the sidewalk abutting the premises in a reasonably safe condition for pedestrian traffic (paragraph 3)
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> That prior to and on May 4, 2009, it was the responsibility of the defendant PC Richard to inspect the sidewalk abutting the premises . . . (paragraph 4);
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> That prior to and on May 4, 2009, it was the responsibility of the defendant PC Richard to maintain the sidewalk abutting the premises . . . in a reasonably safe condition for pedestrian traffic (paragraph 5);
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> That prior to and on May 4, 2009, defendant PC Richard maintained the sidewalk abutting the premises (paragraph 6);
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> That prior to and on May 4, 2009, it was the responsibility of the defendant PC Richard to repair the dangerous, defective, hazardous and unsafe conditions existing on the sidewalk abutting the premises (paragraph 7); and
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> That prior to May 5, 2009, for at least two years prior thereto, the defendant PC Richard had knowledge of the sidewalk conditions abutting the premises located at 35-18 Steinway Street between 35th and 36th Avenues, in Astoria, New York (paragraph 8)"

Allegations in a notice to admit which go to the heart of the matter at issue are improper (*Glasser v City of New York*, 265 AD2d 526 [2d Dept 1999]).

Finally, paragraph 9 of plaintiff's notice to admit, which concerns whether or not PC Richard repaired the alleged defective sidewalk condition and seeks admission of post-accident repair records, is improper in the context of a notice to admit. Whether PC Richard performed repair work to the subject sidewalk after the date of plaintiff's alleged accident

concerns an issue more properly pursued through other disclosure devices, and notices to admit may not be used to obtain information in lieu of other disclosure devices *(Berg v Flower Fifth Avenue Hospital*, 102 AD2d 760 [1st Dept 1984]).

Motion by King Kullen

King Kullen moves for summary judgment dismissing the complaint or, alternatively, for summary judgment on its claim for contractual indemnification from PC Richard.

As it relates to the summary judgment motion, King Kullen argues that it was an out-of-possession landlord with no duty to repair the sidewalk. Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land (*see Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]). However, liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk (*see Ellman v Village of Rhinebeck*, 41 AD3d 635, 637 [2d Dept 2007]; *Sverdlin v Gruber*, 289 AD2d 475, 476 [2d Dept 2001]). Here, the plaintiff alleged, *inter alia*, that the accident occurred as a result of the defendant's violation of a particular ordinance requiring a commercial landowner to maintain the sidewalk abutting the land and expressly imposing liability on the landowner for injuries caused as a result of a failure to maintain the sidewalk (*see* Administrative Code of City of NY § 7-210 [a], [b]; § 19-152 [a] [2], [6] [I]; *see also Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-521 [2008]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]). On its motion for summary judgment, the defendant failed to provide any evidence showing that it 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. Although the defendant argued that it was an out-of-possession landlord, under these circumstances, this did not constitute a defense (*cf. Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d at 448). Thus, the defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law. Accordingly, the motion for summary judgment is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The branch of the motion which seeks contractual indemnification from PC Richard is also denied. King Kullen failed to meet its burden of establishing that the lease shifted responsibility for the structurally defective concrete slab on the sidewalk from King Kullen to PC Richard (*see* Administrative Code of the City of New York § 7–210). PC Richard was not required under the lease to repair the alleged defect, a raised sidewalk slab, as such a defect is structural (*see Salzberg v Futernick,* 281 AD2d 467 [2d Dept 2001]; *see also Margolin v New*

York Life Ins. Co., 32 NY2d 149, 153 [1973]). Under the lease, PC Richard is only required to make nonstructural repairs. Moreover, the record does not raise any triable issues of fact with respect to whether the condition of the sidewalk was due to any acts of negligence on PC Richard's part (*Berkowitz v Dayton Constr.,* 2 AD3d 764 [2d Dept 2003]; cf. *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 154 [1973]). King Kullen is therefore not entitled to summary judgment on its claims for contractual indemnification against PC Richard insofar as those claims are premised on the indemnification provision of the lease (*see Berkowitz* at 765–766).

Conclusion

The branch of the motion by PC Richard which is to vacate paragraphs 1, 2 and 9 of the Notice to Admit is denied. The branch of the motion by PC Richard which is to vacate paragraphs 3 through 8 of the Notice to Admit is granted.

The branch of the motion by King Kullen which is for summary judgment dismissing the complaint insofar as asserted against it is denied. The branch of the motion by King Kullen which is for contractual indemnification from PC Richard is denied.

Dated: June 7, 2012

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DARRELL L. GAVRIN, J.S.C.