Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Vivian Leslie,

Plaintiff,

- against -

Shanik Bros. Inc. And One More Food Corp. d/b/a Food World,

Defendants.

----------X

Index Number: 23981/10

Motion Date: 5/22/12

Motion Cal. Number: 21

Motion Seq. No.: 2

The following papers numbered 1 to 17 read on this motion by defendant, Shanik Bros Inc., for summary judgment; and cross-motion by defendant, One More Food Corp. d /b/a Food World, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-8
Affirmation in Opposition	9-10
Affirmation in Partial Opposition to Cross-Motion	11-12
Affirmation in Opposition to Cross-Motion-Exhibit	13-15
Reply	16-17

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

As a preliminary matter, this Court is deciding the instant motion since it was re-assigned to this Court on June 8, 2012. The papers were received in chambers on June 13, 2012. Pursuant to the stipulation of counsel for the parties dated June 15, 2012, the parties agreed to extend this Court's time to issue a decision on the instant motion and cross-motion for 60 days from June 15, 2012.

That branch of the motion by Shanik for summary judgment dismissing the complaint against it is denied. That branch of the motion for summary judgment on its cross-claims for contractual and common law indemnification against One More Food is granted to the extent that Shanik is entitled to contractual indemnification in

the event a verdict on liability and damages is awarded in favor of plaintiff against Shanik. That branch of the motion for summary judgment on its cross-claim for common law indemnification is denied. That branch of the motion for summary judgment on its cross-claim against One More Food for indemnification for its failure to provide insurance in favor of Shanik, pursuant to their lease agreement, is granted. That branch of Shanik's motion for summary judgment on its cross-claim against One More Food for indemnification for failing to provide insurance in favor of Shanik pursuant to their lease agreements is granted solely to the extent that should the jury render a verdict for plaintiff against Shanik on liability and make an award of damages, then Shanik, in addition to full contractual indemnification, shall also be entitled to recovery of its out-of-pocket expenses in purchasing its own liability insurance policy.

Plaintiff allegedly sustained injuries as a result of tripping and falling over a gas valve box protruding from the sidewalk in front of 30-11 36th Avenue in Queens County on April 30, 2009. Said abutting premises are owned by Shanik and leased by it to One More Food as a food market. Plaintiff testified in her deposition that she was walking to the 36th Avenue subway station when she tripped over a square piece sticking out of the sidewalk in front of the subway steps. The photographs marked as defendant's exhibits "A"-"G" at her deposition, and which are annexed to the moving papers as Exhibit "D", show two square valve boxes in the sidewalk in front of the steps to the 36th Street N and W elevated subway station. The valve box cover on the left is marked "Gas". This is the box plaintiff identified as the box over which she tripped and fell. She also testified that the sidewalk was in a broken condition.

Yitzchok Shanik, Vice President of Shanik, testified in his deposition that pursuant to the lease between Shanik and One More Food, a copy of which is annexed to the moving papers as Exhibit "F", One More Food was responsible for maintaining the sidewalk, including repairs thereto and removal of snow and ice. He also testified that Shanik did not perform any repairs to the sidewalk.

Shanik moves for summary judgment dismissing the complaint against it upon the grounds that it did not own, and therefore, had no duty to maintain, the fixture or casting in the sidewalk and that it did not create the defective condition or make a special use of the casting or sidewalk. It also contends that it is entitled to summary judgment because it is an out-of-possession landlord that contracted for all repairs to be the responsibility of the tenant and, as such, is not responsible for the condition of its premises and sidewalk.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the property owner created the defective condition or caused it through some special use, or unless a statute charges the owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Shanik has failed to demonstrate that the box installed in the sidewalk was owned by the utility company, Con Edison, and that it did not confer a special benefit to Shanik's abutting premises. The mere designation on the valve box cover "Gas", pointed out by Shanik's counsel, in and of itself, does not establish that this hardware was not owned by Shanik but by a utility, and no competent, admissible evidence has been proffered that the valve box was owned by Con Edison as Shanik's counsel contends. The uncertified copy of a street opening permit issued to Con Edison to construct/alter a manhole and/or casting and regrade a casting at the intersection of 31st Street and 36th Avenue is not in admissible form and may not be considered. But even were it in admissible form, it does not identify the valve box in question and, therefore, does not constitute any evidence that Con Edison, rather than Shanik, owned this hardware. Yitzchok Shanik's testimony is completely devoid of any mention of this valve box, and absent from the opposition papers is any affidavit of Shanik averring that it neither owned nor derived a special benefit from this box.

Although Shanik has proffered evidence that it did not create the hazardous condition of the sidewalk through the deposition testimony of Yitzchok Shanik that Shanik never had any work performed on the sidewalk, Shanik has also failed to proffer any evidence that it did not make a special use of the box in question. It was Shanik's prima facie burden on its motion for summary judgment of establishing that it did not make a special use of the hardware installed in the sidewalk abutting its premises upon which plaintiff tripped and fell (see Seaman v Three Village Garden Club, Inc., 67 AD 3d 889 [2nd Dept 2009]; Colonna v Allen, 35 AD 3d 517 [2nd Dept 2006]). It has failed to meet its initial burden.

Since Shanik has failed to demonstrate that it neither owned nor made a special use of the subject valve box, it has also failed to demonstrate that §7-210 of the New York City Administrative Code does not apply to hold it liable for the dangerous condition of the valve box.

Property owners in the City of New York have a non-delegable duty to repair and maintain at their own expense the public

sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to the property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to shift tort liability from the City to the property owner who breaches the duty to repair imposed by §19-152. The scope of an adjacent property owner's liability regarding the repair and maintenance of sidewalks imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with §19-152.

With regard to the duty to repair, §19-152 provides that a property owner is required to repair "those sidewalk flags which contain a substantial defect." It also provides as follows:

> a. [A] substantial defect shall include any of the following:
> . . . .
> 6. hardware defects which shall mean (i) hardware or other appurtenances not flush within ½" of the sidewalk surface or (ii) cellar doors that deflect greater than one inch when walked on, are not skid resistant or are otherwise in a dangerous or unsafe condition.
>
> (Emphasis added)

Therefore, the obligation to repair is not limited to defects in the actual masonry material of the flag, but may include defects in hardware installed in the masonry that are appurtenant to the owner's property.

This Court interprets §7-210 and §19-152 as imposing a duty upon the adjacent property owner to repair hardware appurtenances that are installed in the sidewalk for the exclusive benefit of the property, in other words, hardware

that is appurtenant to the property and, thus, constitutes a special use of the sidewalk by the property. Since Shanik has failed to meet its prima facie burden of demonstrating that the valve box in question did not constitute a special benefit to its abutting property and, therefore, that it was not an appurtenance, it has also failed to meet its prima facie burden of showing that it was not statutorily liable under §7-210 of the Administrative Code.

Shanik's argument that it cannot be held liable to plaintiff since it was an out-of-possession landlord that transferred possession of the premises to a tenant is without merit. An out-of-possession landlord is not liable for injuries sustained by third parties on its premises unless it retained control of the premises or was contractually obligated to perform repairs or maintenance to the premises (see Roveto v. VHT Enterprises, Inc., 17 AD 3d 341 [2nd Dept 2005]). However, in the present matter, the condition at issue is not a condition of Shanik's premises but of the public sidewalk which Shanik, as the owner, had a non-delegable statutory duty to maintain. Since §7-210 of the Administrative Code imposes a non-delegable duty upon the owner of the abutting property and since Shanik has failed to demonstrate that §7-210 was inapplicable under the facts of this case, whether or not it was an out-of possession landlord is irrelevant with respect to its statutory liability for failing to maintain the public sidewalk in a safe condition.

Although it has proffered evidence that it did not create the defective condition at issue via the unrebutted testimony of Yitzchok Shanik that Shanik never performed any work to the sidewalk, and that it did not have actual notice of the condition, again, through Yitzchok Shanik's deposition testimony, it has failed to demonstrate that it did not have constructive notice of the condition. In order for it to be deemed to have had constructive notice, the condition must have been visible and have existed for a sufficient length of time prior to the accident to permit it to have discovered and remedied it (see Gordon v. American Museum of Natural History, 67 NY 2d 836 [1986]). The record on this motion does not establish that the condition was not visible or that it did not exist for a sufficient length of time prior to the accident to have afforded the opportunity to have discovered and remedied it (see Gordon v. American Museum of Natural History, 67 NY 2d 836 [1986]).

Moreover, since Shanik had a non-delegable statutory duty to repair and maintain the sidewalk abutting its premises,

Shanik's counsel's argument that Shanik cannot be held liable to plaintiff as a matter of law because the lease between it and One More Food provided that the tenant agreed to maintain the sidewalk in good condition is without merit.

Therefore, Shanik has failed to establish a prima facie entitlement to summary judgment dismissing the complaint against it.

However, Shanik has established its entitlement to summary judgment on its cross-claim for contractual indemnification against One More Food. In its lease with Shanik, a copy of which is annexed to the moving papers, One More Food agreed to be responsible for maintaining the sidewalk in good condition and to indemnify and hold harmless Shanik against all suits and claims for injuries or damage sustained as a result of, inter alia, the condition or maintenance of the premises.

Since no evidence has been presented, on this record, that the valve box in question was not an appurtenance of the property, and, therefore, that Shanik was not statutorily responsible for its condition pursuant to §7-210 of the Administrative Code, if Shanik is found liable for plaintiff's alleged injuries sustained as a result of tripping and falling over the valve box, then Shanik is entitled to contractual indemnification from One More Food.

However, that branch of Shanik's motion for summary judgment against One More Food on its cross-claim for common law indemnification must be denied, since such cause of action would only be available if Shanik were exposed to liability solely on a vicarious basis (see Storms v. Dominican College of Blauvelt, 308 AD 2d 575 [2nd Dept 2003]). Shanik has not alleged or demonstrated in its cross-claim or on this record any facts showing that it would only be vicariously liable for the negligence of One More Food in the maintenance of the sidewalk.

The argument of One More Food's counsel that summary judgment is precluded because there is a question of fact as to whether plaintiff tripped on the subway steps or the sidewalk is without merit. Plaintiff's uncontradicted testimony was that she tripped on a valve box in the sidewalk in front of the subway steps.

The remaining branch of Shanik's motion for summary judgment on its cross-claim against One More Food Corporation

for indemnification for failing to provide insurance in favor of Shanik pursuant to their lease agreement is granted solely to the extent that should the jury render a verdict for plaintiff against Shanik on liability and make an award of damages, then Shanik, in addition to full contractual indemnification, shall also be entitled to recovery of its out-of-pocket expenses in purchasing its own liability insurance policy.

Pursuant to the lease, One More Food was obligated to maintain a liability insurance policy protecting Shanik with limits of $1,000,000 per person/ $1,000,000 per occurrence and $100,000 for property damage. Shanik contends that One More Food failed to procure any insurance protecting Shanik. Indeed, One More Food does not deny that it failed to purchase any insurance naming Shanik as an additional insured. However, in its cross-moving papers, One More Food's counsel annexes a copy of Shanik's attorney's response to the preliminary conference order, dated December 21, 2010, wherein Shanik's counsel represents that Shanik has a policy of insurance with Travelers Insurance Company with a limit of $1,000,000 and an umbrella policy with Travelers with a limit of $2,000,000. Shanik does not dispute that it was covered by such insurance.

"A landlord who has no knowledge of a tenant's failure to acquire the requisite insurance and is left uninsured may recover the full amount of the underlying tort liability and defense costs from the tenant . . . [Where], however [t]he landlord obtained its own insurance and therefore sustained no loss beyond its out-of-pocket costs . . . it may not now look to the tenant for the full amount of the settlement and defense costs in the underlying tort claim" (Inchaustegui v. 666 5th Avenue Limited Partnership, 96 NY 2d 111, 114-116 [2001] [citations omitted]). Therefore, since there is no dispute that it was covered by its own insurance for the same limits as those One More Food contracted to provide, Shanik is not entitled to full indemnification by reason of One More Food's failure to procure insurance covering Shanik, but is only entitled to recovery of its out-of-pocket costs related to the policy of insurance that it purchased.

That branch of the cross-motion by One More Food for summary judgment dismissing the complaint against it is granted.

Sections 19-152 and 7-210 of the Administrative Code do not impose liability upon tenants for failing to maintain sidewalks. Those sections expressly state that responsibility

to repair and maintain the public sidewalk and liability for the breach of that duty rest upon the owner of the abutting real property. Since §7-210 imposes a nondelegable duty upon the owner, no liability may be imposed upon a tenant under that statute (see Collado v Cruz, 81 AD 3d 542 (1st Dept 2011]). Therefore, no cause of action lies against One More Food based upon §7-210 of the Administrative Code.

In the absence of any statute imposing liability upon One More Food for failing to repair and maintain the sidewalk abutting the demised property, the only grounds for liability against it would be if it actually created the defective condition or caused it through a special use. Plaintiff has failed to proffer any evidence in opposition to rebut One More Food's evidence that it did no work to the sidewalk and, thus, did not create the defect.

With respect to the issue of special use, although Shanik and One More Food have failed to proffer evidence so as to eliminate any issue of fact as to whether the valve box was an appurtenance of the property and, thus, whether the property derived a special benefit from it, plaintiff does not allege, and no evidence is otherwise presented, that the tenant, One More Food, had this valve box installed for its own special use or that it otherwise caused the dangerous protruding condition of the box and the deterioration of the surrounding sidewalk by virtue of, and in the manner of, its use of the box. Indeed, the only contention by One More Food's counsel in his affirmation in opposition to the cross-motion is that the deterioration of the sidewalk surrounding the gas box caused the box to protrude above the sidewalk and, therefore, that plaintiff's accident was the result of defendants' failure to maintain the sidewalk. Therefore, even though there is a question of fact as to whether the valve box exclusively serviced the abutting property so as to raise an issue as to whether Shanik, as the owner of the abutting property, was liable for its condition as a sidewalk appurtenance under §7-210 of the Administrative Code, no issue of fact is raised as to whether One More Food, as the tenant, was in control of the box or caused the dangerous condition by its use of the box (see e.g. Kaufman v Silver, 90 NY 2d 204, 209 [1997]).

Finally, One More Food owed no duty to plaintiff by virtue of its agreement with Shanik in the lease to be responsible to maintain and repair the sidewalk. "Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff" (Collado, supra at 542).

A contractual obligation may give rise to tort liability on behalf of a third party only where the contracting party 1) "launches a force or instrument of harm"; 2) where plaintiff detrimentally relies upon the contracting party's continued performance of its duties or 3) where the contracting party has "entirely displaced the other party's duty to maintain the premises safely" (Espinal v. Melville Snow Contractors, Inc., 98 NY 2d 136, 140 [2002]).

In order to establish that the contracting defendant launched a force or instrument of harm, which would expose it to liability in tort to a third party, plaintiff is required to show that defendant "either created or exacerbated a dangerous condition" (see Salvati v. Professional Security Bureau, Ltd., 40 AD 3d 735 [2nd Dept 2007]). One More Food has established a prima facie entitlement to summary judgment by proffering evidence that it neither created nor contributed to the defective condition of the sidewalk. Indeed, plaintiff provides no evidence that the allegedly defective sidewalk condition was created by One More Food. In fact, it is plaintiff's position that the condition resulted from defendants' mere neglect in allowing the sidewalk to deteriorate.

With respect to the second basis for tort liability, to wit, where plaintiff detrimentally relies upon the contracting party's continued performance of its duties, plaintiff failed to allege in her complaint, and the record on this motion does not establish, that she detrimentally relied upon One More Food's continued performance of any of its contractual obligations.

The third possible basis for liability, namely, where the contracting party has "entirely displaced the other party's duty to maintain the premises safely", does not apply to the facts of this case. The limited scope of One More Food's contractual undertaking to maintain and repair the sidewalk is not the type of "comprehensive and exclusive" property maintenance obligation which would "entirely displace" the owner's duty to maintain the demised premises (see Espinal v. Melville Snow Contractors, Inc., supra). There is nothing to indicate that Shanik did not at all times retain its duty as the owner of the premises to inspect and maintain it (see id).

Therefore, on this record, there is no basis for liability against One More Food.

Finally, that branch of the cross-motion for summary

judgment dismissing all cross-claims against One More Food is granted solely to the extent that Shanik's cross-claim against it for indemnification based upon its failure to procure liability insurance covering Shanik is dismissed, except with respect to recovery of its out-of-pocket expenses in purchasing its own liability insurance policy in the event the jury renders a verdict of liability against Shanik and awards damages, and is denied in all other respects, for the reasons heretofore stated.

Dated: June 29, 2012

_____
KEVIN J. KERRIGAN, J.S.C.