Pagan v Brooke Garage, Inc.
2013 NY Slip Op 33403(U)
December 6, 2013
Supreme Court, New York County
Docket Number: 111554/2009
Judge: Saliann Scarpulla
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SCANNED ON 1/2/2014

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA PART 19
Justice

Index Number : 111554/2009
PAGAN, JOHNNY
vs.
BROOKE GARAGE, INC.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____

The following papers, numbered 1 to ____ , were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

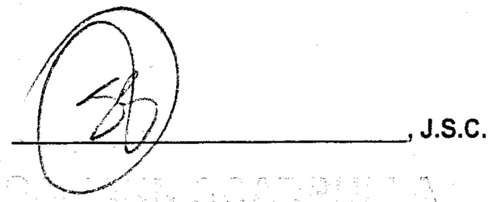
Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying Memorandum decision.

FILED
DEC - 9 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/10/13



____, J.S.C.

1. CHECK ONE: .... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
--X
JOHNNY PAGAN,

Plaintiff,

-against-

BROOKE GARAGE, INC., CHELNIK PARKING CORP., WEST SIDE 95 MANOR ASSOCIATES, WEST SIDE MANOR ASSOCIATES, L.P., WEST SIDE MANOR, INC., ESEL CONSTRUCTION CORP. and WEST 95 HOUSING CORP.,

Defendants.

Index No.: 111554/2009
Submission Date: 8/14/13

DECISION AND ORDER
--X
WEST SIDE 95 MANOR ASSOCIATES, WEST SIDE MANOR ASSOCIATES, L.P., WEST SIDE MANOR, INC., WEST 95 HOUSING CORP., and LEXINGTON INSURANCE COMPANY,

Plaintiffs,

-against-

BROOKE GARAGE, INC., CHELNIK PARKING CORP., and GREATER NEW YORK MUTUAL INSURANCE COMPANY,

Defendants.

Index No.: 101985/2011
--X

HON. SALIANN SCARPULLA, J.:

This personal injury action arises out of plaintiff Johnny Pagan's ("Pagan" or "plaintiff") alleged trip and fall over a hose lying next to his car in a parking garage.

Plaintiff commenced this action against defendants Brooke Garage, Inc. ("Brooke Garage"), Chelnik Parking Corp. ("Chelnik Parking"), West Side 95 Manor Associates, West Side 95 Manor Associates, L.P., West Side Manor Inc., and West 95 Housing Corp. (collectively "West Side"), and Esel Construction Corp. ("Esel"). West Side, together with Lexington Insurance Company ("Lexington") commenced a third-party declaratory judgment action against Brooke Garage, Chelnik Parking (collectively the "parking garage defendants") and Greater New York Mutual Insurance Company ("Greater New York Mutual"), seeking contractual indemnification. The actions were consolidated by order of this Court, dated June 8, 2012.

West Side now moves for an order, pursuant to CPLR 3212, granting West Side summary judgment dismissing plaintiff's complaint and all cross claims. West Side also seeks partial summary judgment on its declaratory judgment action for contractual defense and indemnity and for breach of contract as against the parking garage defendants.

Background

Pagan alleges that, at approximately 8:30 a.m. on August 14, 2006, he sustained personal injuries in a parking garage when he fell after getting his feet entangled in a hose that was allegedly left on the floor next to his car door. West Side owns the building, located at 70 West 95th Street, New York, N.Y., and the attached subject garage, operated

by Brooke Garage. The garage consists of two levels, one on the street level and one below.

Brooke Garage is a tenant of the building and has a standard lease with West 95 Housing Corp. Pursuant to the lease, Brooke Garage is to provide staff to operate the garage 24 hours a day. It is Brooke Garage's responsibility and expense to keep the garage in a "clean and uncluttered, neat and sanitary manner." West Side's exhibit G, rider to the lease at 5. Additionally, pursuant to the lease, Brooke Garage is required to obtain a comprehensive garage liability policy, adding the landlord as an additional insured.

There are two sections in the lease which reference indemnification. The first, entitled "indemnification," requires the tenant to indemnify the landlord for all claims that are brought as a result of any accident whatsoever in the garage. Brooke Garage is also required to indemnify West Side for claims that are brought as a result of accidents that occur outside of the garage, but which are due to Brooke Garage's negligence. The second section requires Brooke Garage to indemnify West Side for any claims that are brought as a result of Brooke Garage's actions. The contract provides the following with regard to indemnification:

> Tenant hereby agrees that Tenant shall and will indemnify and save harmless Landlord from and against all claims for damages of whatever nature arising from any accident, injury or damage whatsoever caused to any person or to the property of any person occurring during the terms of this Lease in, and on the Demised Premises. Tenant likewise shall and will indemnify and save harmless Landlord from and against all claims for

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> damages of whatever nature arising from any accident, injury or damage occurring outside of the Demised Premises where such accident, damage or injury results or is claimed to have resulted from any action or omission on the part of the Tenant or Tenant's contractors, licensees, agents, invitees, visitors, servants or employees . . . Tenant shall have a right to defend any claim against Landlord for which Tenant must indemnify Landlord in accordance with the terms hereof . . . .

West Side's exhibit G, rider to the lease at 8.

As additionally set forth in the lease in the tenant's additional covenants section,

> Tenant covenants that, at all times during the term of this Lease, it will employ competent and experienced employees and that it will indemnify and save harmless Landlord from any and all liability, damage, loss or expense of any kind, including counsel fees incurred in defense of any action brought against Landlord, arising out of any claim or demand made upon the act or deed of any agent or employee of Tenant, whether such act or deed be performed or committed in the performance of his agency or employment by Tenant or acting on behalf of Tenant.

Id. at 3.

Pagan, a resident of the apartment building, parked his car in the garage in the same spot for at least 10 years prior to the accident. He testified at his deposition that he used his car approximately four times a week. Pagan testified that there was a faucet for water on the wall next to his parking space. As he backed into his parking spot, the faucet was on his left side. Pagan claims that just prior to the accident, he and his wife took the elevator down to the parking garage and walked to his car. He then saw a dark brown hose on the ground next to his car. As he was opening up his door to enter his car, his "feet became entangled" with the hose. West Side's exhibit K, tr of plaintiff at 14. He mentioned that there are lights only by the entrance of the parking garage, and that he

could only see the front of the car when approaching it. *Id.* at 15. When questioned if plaintiff saw the hose before he opened the car door he testified, "[w]ell I suppose yes, because I got my feet tangled in the very hose. I couldn't remove it from there . . . . Yes, I saw it." *Id.* at 17-18.

Plaintiff testified that he did not know who owned the hose, what the hose was used for, or who had placed the hose by his car. He continued that he had seen the hose in the same spot for at least a month and a half.

Plaintiff testified that he complained about the hose to "the garage manager, to the superintendents of the building and also the assistant to the garage attendant, so the garage attendant's assistant." *Id.* at 34. Specifically, he claims to have complained at least three times to the garage manager, Neyro Guerrero ("Guerrero").[1] He did not show Guerrero the hose, but complained about it. Guerrero told Pagan that the hose "belonged to the other guys – that it belonged to the other guys that were maintenance for the building." *Id.* at 35.

Pagan further testified that he complained to "George," the "super" of the building.[2] According to plaintiff, Gaviria did not tell plaintiff what the hose was used for. Pagan allegedly also complained about the hose to another garage attendant who no longer works for the garage. Plaintiff did not attempt to remove the hose prior to his

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[1] Referred to as "Negro" by plaintiff in his deposition.

[2] The building's superintendent is named Jorge Gaviria ("Gaviria").

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accident. He stated that "[i]t's not my job, it's their job . . . I didn't have anything about [the hose] that bothered me, it was fine." *Id.* at 41. He would drive over the hose on most days.

The garage previously washed cars for the tenants, but plaintiff testified that the car washing area was not near his car. Pagan maintained that there was one other hose in the middle of the garage where cars were washed. He also explained that there was a storage area in the garage, fenced off, near his car. The building stored things in that area that were used when it snowed, such as sand. He never saw anyone using the hose next to his car.

As a result of his fall, Pagan allegedly sustained injuries to his hand, wrist and shoulder.

Guerrero, Brooke Garage's manager, testified at a deposition on behalf of the parking garage defendants. He testified that Chelnik Parking manages and owns Brooke Garage. Guerrero explained that some of the tenants self-parked and others had their cars valet parked by attendants. The garage had monthly and daily parking spots available. According to Guerrero, plaintiff's parking spot was the closest one to the opening of the garage, on the street level. There was a storage area near plaintiff's car, fenced off, that stored snow removal equipment for the building.

Guerrero testified that it was Brooke Garage's responsibility to clean the garage area and that the attendants did not use any water when doing so. He explained that the

attendants used brooms and other items, such as sand, to clean up oil spills. Guerrero stated that the garage did use the faucets in the garage to wash cars, but that the attendants used buckets. There were drains in the back area of the garage for the excess water after a car wash. He maintained that none of the employees used hoses and that Pagan's car had never been washed.

Although he saw Pagan's car and Pagan many times in the garage, Guerrero testified that he never saw a hose in or around his car. He saw a faucet near Pagan's car, but stated that the employees of Brooke Garage never used that faucet. Guerrero had never seen anyone use the faucet.

According to Guerrero, plaintiff never made any complaints to him about the hose. When looking at a photograph of the hose during his testimony, Guerrero did not know who owned the hose.

Marc Chelnik ("Chelnik"), vice president of Chelnik Parking and the president of Brooke Garage, also testified on behalf of the parking garage defendants. Chelnik Parking operates and manages garages, such as Brooke Garage. Chelnik testified that Brooke Garage maintained an insurance policy and, pursuant to the lease, West 95 Housing Corp was an additional insured on the policy. He agreed that Brooke Garage was supposed to maintain the garage premises in a clean and uncluttered manner. Tr of Chelnik at 26. Inspectors from Brooke Garage would inspect the premises several times a month. He was unaware of any hose left on the ground inside the garage.

Chelnik testified that he went to Brooke Garage approximately six times a month to "check on the operation of the garage." *Id.* at 17. He stated that Brooke Garage employees never used the faucet near Pagan's car. When shown photographs of plaintiff, plaintiff's car and the alleged hose, Chelnik did not "definitively recognize it to be" a depiction of the parking space inside Brooke Garage. He continued, "it could be anywhere." *Id.* at 52. He described a storage area that belonged to building where the snow removal equipment was stored.

Gaviria, the building's superintendent, testified on behalf of the building. In addition to the parking garage, there are other commercial units in the building, such as a dry cleaners and a supermarket. He testified that the porters in the building would not use water to clean the sidewalks or garbage. He explained that there was an area in the basement, which was separate from the garage, in which the porters would store their cleaning equipment. They would use spigots on the outside of the building when they wanted to water the plants. He did not remember the color of the hoses used in 2006. The plants were at least 40 feet from the garage entrance. When the hoses for the plants were not being used, they were stored in the basement.

Gaviria stated that the building maintained a storage area where it stored snow removal equipment, and that it was kept behind a chained fence area. He believed that, in 2006, there were salt, salt spreaders and snow blowers kept in the area. He continued that there was a small hose used to clean off the snow blowers. However the snow removal

equipment was not cleaned in the summer months. He described the hose as being dark green and could not remember if the building staff used that one in 2006. The hose was put back in the gate area with the snow removal equipment. He testified that, prior to owning snow blowers, the building would just have shovels, which did not need to be hosed off. He did not remember when the building bought the snow blowers.[3]

Gaviria testified that no one reported Pagan's accident to him. He did not recognize the hose in the picture near Pagan's car, and said it was not the hose used by the building for plants because "the hose is always on the hose reel." West Side's exhibit N, tr of Gaviria at 67. According to Gaviria, the hose in the picture appeared to have been cut. He stated that he had never seen a hose next to plaintiff's car. Additionally, plaintiff had never complained to him about a hose.

Pagan commenced this action against West Side and the parking garage defendants in August 2009. He alleges that the defendants had constructive and actual notice of the defective condition and that they failed to warn him of such a condition. He further maintains that the "occurrence and plaintiff's injuries were caused wholly and solely through the carelessness, negligence, and recklessness of the defendants, its employees, servants, agents and contractors without any fault on the plaintiff's part contributing thereto." West Side's exhibit B, complaint, ¶ 40. Additionally, defendants failed to provide plaintiff with a "safe means of ingress and egress ... ." *Id.*, ¶ 49.

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[3] Counsel for West Side states that Gaviria testified that the building did not own snow blowing equipment until after 2006, but there is no such testimony in the record.

West Side and Lexington then commenced a declaratory judgment action seeking an order of contractual indemnification. The first two causes of action were against the parking garage defendants, alleging that the parking garage by failing to provide additional insurance to West Side and by failing to indemnify for defense costs. The second two causes of action are against Greater New York Mutual, the parking garage defendants' insurer, for an order to reimburse West Side for defense costs and disbursements.

Greater New York Mutual previously brought a motion to dismiss the complaint as against it. This Court granted that motion, and stated that Greater New York Mutual was justified in denying the insurance claim. West Side delayed in notifying Greater New York Mutual about the underlying action for three months, and offered no excuse for the delay.

West Side's current motion for summary judgment seeks to dismiss plaintiff's complaint and all cross claims as against it, and also seeks partial summary judgment on its third-party declaratory judgment action, as against the parking garage defendants for contractual indemnification.

West Side assets that it should be granted summary judgment because Pagan cannot establish a claim of negligence against West Side. According to West Side, it had no duty to warn plaintiff about the hose because it was an "open and obvious condition." It contends that it did not create the alleged condition and that it had no duty to ensure

that the hose was not in plaintiff's way. Furthermore, West Side argues that it is Brooke Garage's responsibility to keep the garage safe, not West Side's.

West Side reiterates that it had no responsibility with respect to garage maintenance. As such, West Side maintains that it is entitled to contractual indemnification from Brooke Garage.

Pagan contends that the hose was not open and obvious and, regardless, that West Side cannot be relieved from its liability.

The parking garage defendants, while adopting West Side's "open and obvious" arguments in support of dismissing plaintiff's complaint, oppose West Side's claim for contractual indemnification on the premise that the indemnification clause is void as a matter of law.

Discussion

"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 A.D.3d 303, 306 (1st Dep't 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In

considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Grasso,* 50 A.D.3d at 544, citing *Marine Midland Bank v. Dino and Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dep't 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v. American Lung* Assn., 90 N.Y.2d 623, 630 (1997).

West Side moves for summary judgment to dismiss all Pagan's complaint and all cross-claims against it, contending that Pagan cannot sustain a cause of action for negligence against it because there is no evidence that West Side was negligent, violated some duty of care or was the proximate cause of the accident. West Side argues that it is entitled to judgment as a matter of law because the hose constituted an "open and obvious" condition. As such, West Side maintains that it had no duty to warn plaintiff of this condition as it was not inherently dangerous and could be reasonably seen.

It is well settled that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk." *Perez v. Bronx Park S. Assoc.*, 285 A.D.2d 402, 403 (1st Dep't 2001). "In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition which precipitated the injury." *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499, 500 (1st Dep't 2008).

As the moving party, West Side has the initial burden of providing evidentiary facts in support of the position that it "neither created the hazardous condition, nor had actual or constructive notice of its existence." *Id.* at 500.

The underlying premise of the open and obvious doctrine is that

> [w]here a danger is readily apparent as a matter of common sense, there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided. Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning [internal citations and quotation marks omitted].

Westbrook v. WR Activities-Cabrera Mkts., 5 A.D.3d 69, 71 (1st Dep't 2004) (citations omitted). However, this standard only applies to the duty to warn of a dangerous condition. It does not displace the property owner's duty to maintain the premises in a safe condition. *Id.* at 73.

West Side argues that the hose was open and obvious because the plaintiff saw the hose for at least the past six weeks, and also saw it on the date of his accident as he approached his car. However, the question of whether a condition is open and obvious is "generally a jury question," *id.* at 72, because, "even visible hazards do not necessarily qualify as open and obvious." *Id.* For instance, in *Mauriello v. Port Auth. of N.Y. & N.J.*, 8 A.D.3d 200, 201 (1st Dep't 2004), the Appellate Division, First Department, found that a metal track raised ten inches from the ground used to hold luggage carts at the airport was not open and obvious when the plaintiff maintained that there were no carts in the

track to make him notice the track and that his view was obscured by the crowds at the terminal. The Court noted that "[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff's attention is otherwise distracted." *Id.* at 200 (internal citations omitted).

Likewise, although the plaintiff saw the hose as he was about to get into his car, it is still a question of fact as to whether or not this alleged defect was open and obvious. Plaintiff states that he and his wife were walking to the car together and that there was not much lighting. Given the circumstances, West Side has not demonstrated that this alleged defect is open and obvious. As such, West Side is not relieved from liability on the duty to warn, and summary judgment is denied.

Moreover, even if the condition was open and obvious, summary judgment is still denied, because plaintiff is not only claiming a failure to warn but also a failure of West Side to maintain the premises in a safe manner. As previously noted, a landowner's duty to maintaining the premises in a safe manner is a distinct duty from a duty to warn. *See Lawson v. Riverbay Corp.*, 64 A.D.3d 445, 446 (1st Dep't 2009); *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d at 73. Plaintiff alleges that the garage was not reasonably safe because a hose was allowed to remain by the side of his car for at least six weeks. Although West Side also argues that it did not create the alleged defective

condition, there is a disputed issue of fact as to whether the hose belonged to the building and if the building was supposed to remove the hose after using it in some manner. Moreover, regardless of the ownership of the hose, West Side may have had an obligation to remove the hose, to satisfy its obligation to maintain safety.

Accordingly, because issues of fact remain whether the hose was an open and obvious condition and whether West Side breached its duty to maintain the premises in a reasonably safe condition resulting in foreseeable injury to plaintiff, summary judgment is denied.

Additionally, West Side, claiming to be an out-of-possession landlord, alleges that the area where the accident occurred was in the complete control of Brooke Garage. As such, according to West Side, only the parking garage defendants can be liable for plaintiff's alleged injuries. In support of its claims, West Side provides the lease agreement, which indicates that Brooke Garage is responsible for keeping the garage safe.

West Side's alternative argument is also without merit. West Side, as the building owner, still has nondelegable duties to maintain a safe premises. "[W]henever the general public is invited into stores, [and] office buildings . . . [t]he owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises . . . ." *Thomassen v. J & K Diner*, 152 A.D.2d 421, 424 (2d Dep't 1989).

Here, while the lease agreement indicated that Brooke Garage was responsible to keep the garage clean, the garage was not in the exclusive control of the parking garage defendants.

> When a landlord retains control over a portion of the premises, he or she is liable for injuries resulting from faulty condition of those premises. Control of the premises may be established . . . by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises.

Cherubini v. Testa, 130 A.D.2d 380, 382 (1st Dep't 1987).

West Side owned a storage unit located in the garage, right by plaintiff's car. It used the water faucet near plaintiff's car to wash its snow removal equipment. Even though it was August and the snow removal equipment was not being used, a question of fact remains as to whether or not the hose belongs to West Side, and was used during the course of West Side's business.

Although West Side maintains that the hose was not West Side's, credibility issues are "properly left for the trier of fact." *Yaziciyan v. Blancato*, 267 A.D.2d 152, 152 (1st Dep't 1999). Under the circumstances of this case, West Side has failed to meet its burden demonstrating that it had no control over the premises, so as to avoid liability for a dangerous condition on the premises. Accordingly, because questions of fact remain with respect to the parties' negligence, West Side's motion for summary judgment dismissing plaintiff's complaint and all cross claims is denied.

As for its motion for summary judgment against the parking garage defendants, West Side argues that, pursuant to its lease, Brooke Garage agreed to indemnify and defend West Side against any claims. West Side is seeking to be reimbursed for all fees and expenses in connection to this action.

The parking garage defendants argue that the indemnification provision should be viewed as a full exculpatory clause, and that it runs afoul of public policy. However, as set forth below, the indemnification provision is valid. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" *Drzewinski v. Atlantic Scaffold & Ladder Co., Inc.*, 70 N.Y.2d 774, 777 (1987) (citation omitted).

Although one section of the indemnification provision requires Brooke Garage to indemnify West Side for any action, even one grounded in West Side's negligence, the other section of the lease referencing indemnity, limits the claims to those stemming from Brooke Garage's negligence. There is also language regarding indemnification for accidents which occur outside the premises as a result of Brooke's Garage negligence. As such, taking all of the indemnification language into consideration, the indemnification provision is valid.

Moreover, an indemnification provision allegedly indemnifying a party for its own negligence may also be enforced if the party is found to be "free of any negligence, and

its liability is merely imputed or vicarious." *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 671 (2d Dep't 2007) (internal citation omitted). Thus, if West Side is not found to be actively negligent, but only vicariously liable for dangerous conditions as the building owner, and Brooke Garage is found negligent or in breach of the lease, then West Side will be indemnified.

Brooke Garage was contractually obligated to maintain the premises in a "clean and uncluttered, neat and sanitary manner . . . ." The parking garage defendants testified that they were responsible to inspect and keep the garage free from debris. According to the contract, West Side is entitled to indemnification if the parking garage's negligence was a cause of plaintiff's accident.

At this point, a question of fact remains as to whether or not the parking garage's negligence in performing its duties to keep the garage safe was a cause of plaintiff's accident.

Likewise, questions remain as to any negligence on West Side's part. It is well settled, and acknowledged by West Side in their memorandum of law that a "party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 808 (2d Dep't 2009) (internal citations and quotation marks omitted).

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As such, issues of fact remain with respect to the parties' negligence. Accordingly, it would be premature to grant summary judgment on West Side's claim for contractual indemnification. *See e.g. Cuevas v City of New York*, 32 A.D.3d 372, 374 (1st Dep't 2006) (holding that conditional indemnification was premature as party did not establish its own "freedom from negligence").

In its declaratory action for indemnification, West Side alleges that the parking garage defendants are required to provide additional insurance as reimbursement for West Side's expenses. They argue, in this motion, that the parking garage defendants breached their obligation to procure insurance naming West Side as an additional insured.

The lease indicated that Brooke Garage was to provide general liability insurance coverage naming the landlord as an additional insured. Although this claim was not addressed by the parking garage defendants, as conceded by West Side, the parking garage defendants did obtain the requisite insurance. However, the claim submitted by the parking garage defendants was denied by the insurer. In a decision dated October 11, 2011, this Court found that because West Side waited three months to notify Greater New York Mutual, Greater New York Mutual was justified in disclaiming coverage. As such, West Side's claim that the parking garage defendants breached its contract by failing to procure insurance is not supported. As previously mentioned, summary judgment on West Side's contractual indemnification claim is denied.

In accordance with the foregoing, it is

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ORDERED that the motion by West Side 95 Manor Associates, West Side 95 Manor Associates, L.P., West Side Manor Inc., and West 95 Housing Corp. for summary judgment dismissing plaintiff's action and any cross claims as against them is denied; and it is further

ORDERED that motion for partial summary judgment by West Side 95 Manor Associates, West Side 95 Manor Associates, L.P., West Side Manor Inc. and West 95 Housing Corp.'s on its declaratory action for contractual indemnification is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 6, 2013

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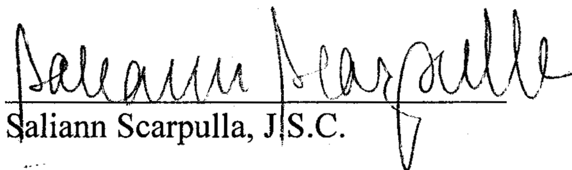

Saliann Scarpulla, J.S.C.

FILED

DEC - 9 2013

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