Davis v Catsimatidis
2013 NY Slip Op 33923(U)
June 21, 2013
Supreme Court, Kings County
Docket Number: 24661/05
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of June, 2013

PRESENT:

HON. DEBRA SILBER,
Justice.

----------X

ANGELLA DAVIS,

PLAINTIFF,

-AGAINST -

JOHN CATSIMATIDIS,

DEFENDANT

----------X

JOHN CATSIMATIDIS,

THIRD-PARTY PLAINTIFF,

- AGAINST -

KFC U.S. PROPERTIES, INC. D/B/A KENTUCKY FRIED CHICKEN ("KFC"), KFC NATIONAL MANAGEMENT COMPANY D/B/A KENTUCKY FRIED CHICKEN ("KFC"), KENTUCKY FRIED CHICKEN ("KFC"),

THIRD-PARTY DEFENDANTS.

----------X

DECISION/ORDER

INDEX NO. 24661/05

FILED
2013 JUN 26 AM 9:21

The following papers numbered 1 to 22 read on these motions:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3, 4-5, 6-8, 9-10
Opposing Affidavits (Affirmations)	11, 12-13, 14
Reply Affidavits (Affirmations)	15, 16, 17, 18-19
Affidavit (Affirmation)	
Other Papers Memoranda of Law	20, 21, 22

Upon the foregoing papers, defendant/third-party plaintiff John Catsimatidis (Catsimatidis) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Angella Davis (plaintiff) and any and all cross claims insofar as asserted against him. Catsimatidis also moves, pursuant to CPLR 3042 and 22 NYCRR 202.21(e), to strike the action from the trial calendar and to vacate the note of issue and, pursuant to CPLR 3041, 3042, and 3043, to strike plaintiff's amended bill of particulars. Defendant/third-party defendant[1] KFC U.S. Properties, Inc. and KFC Corporation, as successor in interest to KFC National Management Company (KFC) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the third-party action. KFC also moves, pursuant to CPLR 3402 and 22 NYCRR 202.21 (e), to strike the action from the trial calendar, to vacate the note of issue and, pursuant to CPLR 3041, 3042, and 3043, to strike plaintiff's amended bill of particulars.

Facts and Procedural History

This is an action by plaintiff seeking damages for injuries she allegedly sustained in a slip and fall accident due to an icy condition on the sidewalk in front of a recently closed Kentucky Fried Chicken restaurant located at 218 Myrtle Avenue in Brooklyn.

Plaintiff testified that on January 28, 2004, she left her apartment in Brooklyn at 6:00 P.M. to meet her friends near Brooklyn Hospital to go to a fashion show in Manhattan. She said it was cold that morning, that there had been a snowstorm that day, that the snow had stopped falling around lunchtime, and that it was clear in the evening. At approximately 7:00 P.M., after traveling approximately 45 minutes on the subway and walking "some blocks," plaintiff met her friend, Vanetta Greene, on Myrtle Avenue. As plaintiff and Greene were

[1]KFC was added by plaintiff as a direct first-party defendant in plaintiff's amended complaint but the caption has not yet been amended (*see* below).

walking on the sidewalk in front of the drive-through of a closed Kentucky Fried Chicken restaurant, plaintiff slipped on ice and fell backward onto the sidewalk. Plaintiff said the sidewalk and "everything" was covered with approximately one-half inch to an inch of snow. Plaintiff was unable to get up, felt ice beneath her, and had pain in her right leg. Greene called an ambulance with her cell phone, which arrived 10 minutes later. Plaintiff testified that the Kentucky Fried Chicken restaurant was closed when she fell but she did not know if it had been closed for the day or if it had been closed permanently.

In August, 2005, plaintiff commenced the instant action against Catsimatidis, owner of the real property which was leased to the Kentucky Fried Chicken restaurant, alleging that her fall and the injuries she sustained were caused by the negligence of Catsimatidis in the ownership, operation, management, maintenance and control of the sidewalk where she fell, that Catsimatidis was otherwise "reckless and grossly negligent," and that he had had actual notice of the "defective condition" for at least fifteen days prior to the accident. In October, 2005, Catsimatidis interposed his answer, generally denying the allegations of the complaint, and asserting various affirmative defenses. On December 23, 2008, three years later, Catsimatidis commenced a third-party action for contribution and common-law and contractual indemnification against KFC, the lessee of the Kentucky Fried Chicken restaurant. On February 6, 2009, KFC interposed its answer to the third-party complaint, generally denying the allegations and asserting numerous affirmative defenses. Their answer to the third-party complaint was served upon plaintiff's attorney that same day. On or about February 18, 2009, plaintiff amended her complaint to add a cause of action sounding in negligence and recklessness against KFC. However, based on court records, the caption was never amended to add KFC as a named first-party defendant.

After the parties engaged in discovery, plaintiff filed the note of issue on June 22, 2012. Shortly thereafter, defendants made the instant motions for summary judgment and to strike the note of issue and plaintiff's amended bill of particulars, which are presently before the court.

Arguments

Catsimatidis moves for summary judgment dismissing the complaint insofar as asserted against him. In support of this branch of his motion, Catsimatidis argues that there is no evidence that he created the icy condition because the record is devoid of any evidence as to how the ice developed on the sidewalk. Further, relying upon the affidavit and deposition testimony of Mr. Louis P. Palermo, Vice President of R.A. (Red Apple) Real Estate, Inc. (Red Apple Real Estate), the management company for his properties, and the lease he entered into with KFC, Catsimatidis argues that he was not responsible for removing snow from the sidewalk, as it was the obligation of KFC to do so. In this regard, Catsimatidis asserts that the lease termination agreement that he entered into with KFC did not become effective until February 29, 2004, and that Catsimatidis only released KFC from liability for events occurring after that date.

Catsimatidis further argues that there is no evidence that he had actual or constructive notice of the ice on the sidewalk. With respect to whether he had actual notice, Mr. Palermo, the "contact person regarding any communications involving snow and ice" for Catsimatidis, states in his affidavit that Catsimatidis did not receive any complaints of ice on the sidewalk before the accident occurred and that had there been any complaints, they would have been forwarded to him. Mr. Palermo also avers that Catsimatidis was not advised on the day of the accident that there was ice on the sidewalk, and that KFC failed to remove the snow and ice.

Catsimatidis also argues that there is no evidence in the record that he had constructive notice of the icy condition, again asserting that the record is devoid of any evidence as to how the icy condition developed on the sidewalk. In this regard, Catsimatidis points out that plaintiff did not see the ice on the sidewalk until *after* she fell.

KFC also moves for summary judgment dismissing the first-party complaint insofar as asserted against it. In support of this branch of its motion, KFC has annexed the affidavit from Ms. Donna L. Phillips, an Assistant Secretary for KFC, who avers that on December 24, 2003, the KFC restaurant at the subject location ceased operating and that KFC began negotiating a termination of the subject lease with Catsimatidis. Ms. Phillips also annexes a letter from Red Apple Real Estate to KFC, which discusses the termination of the lease, as well as a copy of a proposed termination agreement. In addition, KFC submits a memorandum of law, in which it represents that a formal agreement terminating the lease was executed on February 6, 2004. In this memorandum of law, with respect to dismissal of the complaint, KFC argues that the claims made against it by plaintiff are time-barred because plaintiff filed her amended complaint in or about February, 2009, more than three years after the applicable three-year statute of limitations expired.

KFC also moves to dismiss the third-party action. In this regard, KFC argues that it had no obligation under the lease to maintain the public sidewalk abutting the subject property, and that pursuant to New York City Administrative Code (Administrative Code) § 7-210, Catsimatidis, as the owner of the property, had a non-delegable duty to maintain the sidewalk, including an obligation to remove the snow and ice. KFC also asserts that the indemnification provision in the lease does not obligate it to indemnify Catsimatidis for plaintiff's accident because the accident did not "aris[e] out of [KFC's] use and occupancy" of the premises, the accident having occurred when the KFC restaurant had ceased operating and was closed.

In opposition to defendants' motions, plaintiff argues that there are unresolved questions of fact which warrant a trial because both defendants deny responsibility for removal of the snow and ice on the sidewalk where she fell. Plaintiff notes that since over 10 inches of snow fell on the day of the accident, defendants had constructive notice that snow and ice existed where she fell. Plaintiff also points out that KFC does not deny that it was still in legal possession of the property as a tenant when the accident occurred. On the other hand, plaintiff notes that Catsimatidis was aware that KFC was no longer operating at the premises when the accident occurred, and that as property owner, he had a duty to clear the snow and ice condition to prevent slip and fall "incidents." Plaintiff also points out that Administrative Code § 7-210 imposes a non-delegable duty on property owners to keep sidewalks safe for pedestrians, yet also notes that a tenant could be liable for damages that result from a violation of a lease provision to remove snow and ice. In any event, plaintiff annexes pages from the National Oceanic and Atmospheric Administration (NOAA) website and states that the website indicates that the snow had stopped falling at approximately 11:15 A.M. on the day of her accident (in fact, the pages annexed do not indicate when the snow stopped falling), and asserts that both defendants created the hazardous condition by failing to remove the snow and ice from the property within a reasonable time after the snowstorm ended.

Lastly, plaintiff argues that her claim against KFC is not time-barred because she amended the complaint twenty days after the answer to the third-party complaint was served on her attorney, pursuant to CPLR 1009. Plaintiff also asserts that even if the amended complaint is "technically time-barred," her claim against KFC is timely since it relates back to her claim against Catsimatidis.

In opposition to KFC's motion for summary judgment, Catsimatidis provides a copy of the signed lease termination agreement, which by its terms became effective February 29,

2004. Catsimatidis reiterates that he did not release KFC from any responsibility regarding plaintiff's accident, which occurred before the termination agreement became effective, and that therefore KFC was still responsible for clearing snow and ice from the premises until February 29, 2004. In a related argument, Catsimatidis asserts that KFC was responsible for the premises regardless of whether its business was open on the date of the accident. In this regard, Catsimatidis contends that KFC has not provided any evidence to indicate that its business was closed, or that it was not responsible for the premises prior to the effective date of the termination agreement.

Catsimatidis also asserts that pursuant to Article 20 of the lease agreement, KFC was responsible for the premises, including maintenance of the sidewalk; that he (Catsimatidis) was never responsible for snow and ice removal at the property; and that pursuant to Article 18 of the lease, KFC is obligated to indemnify him. Moreover, although Catsimatidis appears to concede that he has a duty to the plaintiff as an owner, he asserts that he and KFC, by agreement, allocated the risk of liability to third parties to KFC where, as here, the net lease agreement was negotiated between two sophisticated parties and the indemnification provision obligated KFC to procure insurance. Catsimatidis also asserts that "[i]t was the clear intention of the parties that KFC was responsible for the maintenance of the sidewalk where [p]laintiff allegedly fell;" that based on Mr. Palmero's statement in his affidavit, KFC always undertook this task; and that despite Administrative Code §7-210, KFC is still liable for damages resulting from a violation of the lease.

In reply to plaintiff's opposition, KFC argues that the "relation back" doctrine does not render plaintiff's amended complaint timely with respect to her claim against it because plaintiff has failed to demonstrate that Catsimatidis and KFC are united in interest, each defendant having a different defense in this case. KFC argues that even assuming that the doctrine is applicable, it would still be entitled to summary judgment because responsibility

for maintenance of the public sidewalks rests with the property owner pursuant to Administrative Code § 7-210, and there is no evidence that it took any affirmative action to create the allegedly dangerous condition on the sidewalk.

In reply to Catsimatidis' opposition to its motion, KFC reiterates that Catsimatidis has a non-delegable duty under Administrative Code § 7-210 to remove the snow and ice; that it has no duty to indemnify Catsimatidis because plaintiff's accident had no connection to its "use and occupancy" of the premises; and that there are no provisions in the lease which impose liability upon it to maintain the public sidewalk, nor is the lease "so comprehensive and exclusive" as to its obligation to maintain the public sidewalk "as to entirely displace the landowner's duty to maintain the sidewalk" (*Nahar v Socci,* 35 Misc 3d 1218[A] * 5, 2012 NY Slip Op 50738 [U] [2012], quoting *Abramson v Eden Farm, Inc.*, 70 AD3d 514 [2010]). KFC also asserts that the fact that it may have engaged in sidewalk maintenance "for its own purposes" does not mean it was legally obligated to do so.

In reply to plaintiff's opposition to his motion for summary judgment, Catsimatidis reiterates that there is no evidence that he created the ice condition or had actual or constructive notice of it, and that it was KFC's responsibility to remove the snow.

Discussion

I. Amendment of Caption

As noted above, although plaintiff asserted a claim against KFC in her amended complaint, the caption was never amended. Accordingly, the caption is hereby amended to include KFC as a first-party defendant. The caption will now appear as follows:

----------X
Angella Davis,

Plaintiff,

- against -

John Catsimatidis and KFC U.S. Properties, Inc. d/b/a Kentucky Fried Chicken ("KFC"), KFC National Management Company d/b/a Kentucky Fried Chicken ("KFC"), Kentucky Fried Chicken ("KFC"),

Defendants.
----------X
John Catsimatidis,

Third-Party Plaintiff,

- against -

KFC U.S. Properties, Inc. d/b/a Kentucky Fried Chicken ("KFC"), KFC National Management Company d/b/a Kentucky Fried Chicken ("KFC"), Kentucky Fried Chicken ("KFC"),

Third-Party Defendant.
----------X

II. Motion of Catsimatidis to Dismiss Plaintiff's Claims Against Him

"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" (*James v Blackmon,* 58 AD3d 808, 808 [2009]). "The exceptions to this rule are when the landowner actually created the dangerous condition, made negligent repairs that caused the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk" (*Gyokchyan v City of New York,* _ AD3d _, 2013 NY Slip Op 3302, *1 [2d Dept 2013]). "Section 7-210 of the Administrative Code of the City of New York, which became effective September 14, 2003, shifted tort liability from the City to the property owner for

personal injuries proximately caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition (including the negligent failure to remove snow, ice, or other material from the sidewalk), with several exceptions not relevant here" (*id.*, citing, *inter alia,* Administrative Code of the City of New York § 7-210[a], [b]; *see also James,* 58 AD3d at 808-809; PJI 2:111A.1). "Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable" (*Gyokchyan,* 2013 NY Slip Op 3302, *1).

Thus, to prevail on a motion for summary judgment, the owner must "demonstrate, as a matter of law, that [he] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Martinez v Khaimov*, 74 AD3d 1031, 1033 [2010]). "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Willis v Galileo Cortlandt, LLC*, __ AD3d ___, 2013 NY Slip Op 3087, *2 [2013]). "This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case" (*Martinez,* 74 AD3d at 1033; *Baines v G & D Ventures, Inc.*, 64 AD3d 528, 529 [2009]; *South v K-Mart Corp.*, 24 AD3d 748, 748 [2005]).

Here, plaintiff testified that there was a snowstorm earlier in the day, that it had stopped snowing at lunchtime, and that she fell at approximately 7:00 P.M. Moreover, Catsimatidis does not dispute that over 10 inches of snow had fallen earlier that day. In light of the heavy snowstorm which occurred seven hours before plaintiff's accident, the affidavit of Catsimatidis' property manager, who avers that he did not receive any complaints of ice on the sidewalk before plaintiff fell, is insufficient to make a prima facie showing that Catsimatidis did not have actual or constructive notice of the snow and ice on the sidewalk.

In addition, Catsimatidis has not "provide[d] any testimony as to when he last inspected the subject sidewalk prior to the accident or what it looked like when he last inspected it" to make this showing (*Martinez,* 74 AD3d at 1033-1034; *see also Baines,* 64 AD3d at 529; *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [2011]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [2010]), nor has he provided any evidence that he properly maintained the sidewalk, as required by Administrative Code § 7-210, or that any failure to properly maintain the sidewalk was not a proximate cause of plaintiff's injuries (*cf. James*, 58 AD3d at 809). In addition, Catsimatidis does not raise the "storm in progress" rule in his efforts to make a prima facie showing that he is not liable for the injuries sustained by plaintiff as a result of the ice condition (*see Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839, 840 [2012]), nor does he argue that he did not have a statutory duty to remove the snow and ice pursuant to Administrative Code § 16-123, which obligates building owners to remove snow and ice from abutting sidewalks four hours after a snowfall stops, excluding the hours between 9:00 P.M. and 7:00 A.M. (*Rodriguez v New York City Hous. Auth.*, 52 AD3d 299, 300 [2008]). In any event, plaintiff testified that the snowstorm ended at lunchtime and that she fell approximately seven hours after later. Thus, under the facts of this case, neither Administrative Code § 16-123 nor the storm in progress doctrine would provide Catsimatidis with a defense. Finally, Catsimatidis' argument that there is no evidence in the record that he had constructive notice of the icy condition because there is no evidence as to how the ice condition developed merely points to gaps in the plaintiff's case, which is insufficient to make a prima facie showing (*see Martinez,* 74 AD3d at 1033; *Baines,* 64 AD3d at 529; *South*, 24 AD3d at 748). Having failed to make a prima facie showing establishing that he is entitled to summary judgment, the court need not consider the sufficiency of plaintiff's opposition (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, the motion of Catsimatidis for summary judgment is denied.

III. *Motion of KFC*

A. To Dismiss Plaintiff's Complaint Against It

KFC has made a prima facie showing entitling it to summary judgment dismissing the first-party complaint insofar as asserted against it. "The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so" (*Bruzzo v County of Nassau*, 50 AD3d 720, 721 [2008]). "In the absence of such a statute or ordinance, the owner or lessee can be held liable only if he or she, or someone on his or her behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" (*id.*, citing *Crudo v City of New York*, 42 AD3d 479 [2007]; *Klotz v City of New York*, 9 AD3d 392 [2004]; *Booth v City of New York*, 272 AD2d 357 [2000]; *see also Bi Chan Lin v Po Ying Yam,* 62 AD3d 740 [2009]).

Here, it is undisputed that no statute or ordinance imposes tort liability upon KFC for failing to clear ice and snow from the subject sidewalk. Moreover, through the affidavit of Ms. Donna L. Phillips, KFC's Assisant Secretary, KFC has made a prima facie showing that it had ceased operating its restaurant on December 23, 2004, more than one month before the accident occurred, and that therefore KFC did not make the condition of the sidewalk more hazardous through negligent or improper snow removal efforts (*id.*, at 721-722).

Plaintiff has failed to rebut KFC's prima facie showing. In this regard, plaintiff concedes that Administrative Code § 7-210 only imposes a non-delegable duty to keep sidewalks safe upon property owners. Moreover, although plaintiff argues that "a tenant could be liable for damages that result from a violation of a lease provision to remove snow and ice," plaintiff does not point to any provision in the lease obligating KFC to remove snow and ice from the abutting sidewalk. In fact, the case upon which plaintiff relies for this proposition holds that "[p]rovisions 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 v Cruz*, 81 AD3d 542, 542 [2011]). Finally, plaintiff has failed to raise an issue of fact as to whether KFC created or exacerbated the icy condition which caused her to fall.

KFC has also established that plaintiff's claims against it are time-barred. In this regard, plaintiff filed her amended complaint on February 9, 2009, adding a cause of action against KFC. However, pursuant to CPLR 214, the statute of limitations to recover damages for personal injury is three years. Inasmuch as plaintiff did not file the amended complaint until two years after the statute of limitations expired, her claim against KFC is time-barred.

Plaintiff's argument that her amended complaint as to KFC is timely because she filed it pursuant to CPLR 1009 is without merit. In this regard, "CPLR 1009, which permits a plaintiff to amend his complaint without leave of the court to assert against a third-party defendant any claim the plaintiff has against him within 20 days of service of the answer to the third-party complaint upon the plaintiff's attorney, does not relieve a plaintiff from the operation of the Statute of Limitations otherwise applicable to the claims asserted" (*Zaveta v Portelli*, 127 AD2d 760, 761 [1987]). McKinney's CPLR Commentaries C203:11, *Duffy v Horton Memorial Hosp.*, 66 NY2d 473 (1985).

Plaintiff' second argument that her proposed claim against KFC relates back to the date that the claim was timely interposed against Catsimatidis is without merit. "'In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of [the] same conduct, transaction, or occurrence, (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits, and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against

him as well'" (*Arsell v Mass One LLC*, 73 AD3d 668, 669 [2010], quoting *Boodoo v Albee Dental Care*, 67 AD3d 717, 718 [2009]). "'Defendants are united in interest with one another only when their relationship with each other is such that their interest 'in the subject-matter [of the action] is such that [the defendants] stand or fall together and that judgment against one will similarly affect the other'"(*LeBlanc v Skinner*, 103 AD3d 202, 210 [2012], quoting *Prudential Ins. Co. v Stone*, 270 NY 154, 159 [1936]). In this regard, "'[t]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff'" (*id.*, quoting *Connell v Hayden*, 83 AD2d 30, 42-43 [1981]). "However, defendants are not united in interest if there is the mere possibility that the new party could have a different defense than the original party" (*id.*). "Accordingly, joint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable" (*id.*).

Here, plaintiff has failed to demonstrate that KFC, the new defendant, is united in interest with Catsimatidis, the original defendant "since they have manifestly different defenses to the plaintiff's claims and would not stand or fall together" (*Arsell,* 73 AD3d at 669). Both defendants argue that they are not obligated to perform snow and ice removal on the sidewalk, and both are seeking to show that it is the other who is liable. Therefore, this branch of the motion of KFC to dismiss the first-party complaint insofar as asserted against it is granted.

B. To Dismiss Catsimatidis' Claim for Contribution and Common-law Indemnification

This branch of the motion of KFC for summary judgment dismissing the third-party action seeking contribution and common-law indemnification is also granted. KFC has established, via the affidavit of Ms. Phillips, an Assistant Secretary at KFC, that KFC ceased

operating the restaurant more than one month before the accident occurred. As such, KFC has established that it did not create the condition by negligently removing the snow and ice on the sidewalk. Further, KFC has made a prima facie showing that it did not have any obligation under the lease to remove snow and ice from the sidewalk.

Catsimatidis has failed to rebut KFC's prima facie showing. Catsimatidis argues that KFC was responsible for clearing away the snow and ice on the sidewalk until February 29, 2004, the effective date of the lease termination agreement, regardless of whether the restaurant was open or closed on the day of the accident. Catsimatidis relies on Article 20 of the lease to demonstrate that KFC was required to remove snow and ice from the sidewalk. Article 20 provides that:

> "Landlord covenants that Landlord will put the Tenant into complete and exclusive possession of the premises as hereinbefore provided, and that, if the Tenant shall pay the rental and perform all the covenants and provisions of this lease to be performed by the Tenant, the Tenant shall during the term demised, freely, peaceably and quietly occupy and enjoy the full possession of the premises hereby leased, and the tenements, hereditaments and appurtenances thereto belonging and the rights and privileges herein granted without molestation or hindrance, lawful or otherwise, and if at any time during the term hereby demised the title of the Landlord shall fall or be discovered not to enable Landlord to grant the term hereby demised and same is not corrected by Landlord, the Tenant shall have the option, at Landlord's expense, to correct any material default or annul and void this lease."

Contrary to Catsimatidis' claim, this provision does not obligate KFC to remove snow and ice from the sidewalk where plaintiff fell. Catsimatidis also argues that Article 5 obligated KFC to remove snow and ice from the sidewalk where plaintiff fell, but this claim must also be rejected. Article 5 merely provides that "[a]ll improvements constructed or located upon the above described real estate shall be at Tenant's expense and shall become the property

of the Landlord upon the termination of this lease, or, if renewed as herein permitted, at the termination of the last such renewal term as may be exercised." Catsimatidis also points to the statement made by Mr. Palmero in his affidavit that KFC had always undertaken the task of removing snow and ice from the sidewalk near the parking lot for the premises. However, this statement does not raise a question of fact rebutting KFC's prima facie showing because KFC ceased operating one month before the accident occurred, a fact which Catsimatidis fails to rebut. Nor does it establish that KFC removed snow and ice before or on the day of plaintiff's accident. Because there are no triable issues of fact with respect to any negligence on the part of KFC, and because KFC has established that it had no duty to remove snow and ice from the sidewalk, KFC cannot be held liable to Catsimatidis for contribution and/or common-law indemnification (*Mikelatos v Theofilaktidis,* 105 AD3d 822, 825 [2013]; *Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700 [2012], *lv dismissed* 21 NY3d 894 [2013]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1104 [2010]).

C. To Dismiss Catsimatidis' Claim for Contractual Indemnification

This branch of the motion of KFC for summary judgment dismissing Catsimatidis' claim for contractual indemnification is denied. "[T]he right to contractual indemnification depends upon the specific language of the contract" (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2009][internal quotation marks and citations omitted]). "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 circumstances" (*id.*). Moreover "[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" (*id.*).

The indemnification provision in the lease, Article 18, provides that:

> . . . Tenant agrees to indemnify Landlord against and save harmless from all demands, claims, causes of action or judgments for injury *to person, loss of life, or damage to*

property occurring on said premises and arising out of the Tenant's use and occupancy" (emphasis added).

Here, KFC argues that this clause does not provide any basis for indemnification against it because at the time of the accident, the KFC restaurant had ceased operating and was closed, plaintiff was not a patron of the restaurant, and her injuries therefore did not arise out of KFC's "use and occupancy" of the property. KFC also argues that there is no other provision in the lease on which Catsimatidis can sustain his third-party complaint (i.e. the claim for contractual indemnification) as the lease does not contain any provision obligating it to maintain the property in any regard, let alone to undertake the non-delegable duty of Catsimatidis under NYC Administrative Code § 7-210 to maintain the public sidewalk. In support of this branch of its motion, KFC relies upon *Ali v Sequins Intl., Inc.* (31 Misc 3d 1244 [A], 2011 NY Slip Op 51106 [U], *8-9 [2011]), a case where the tenant was entitled to summary judgment dismissing the landlord's claim for contractual indemnification where the contractual indemnification clause required the tenant to indemnify the landlord from any and all liability "arising out of or based upon, related to or in any way connected with the use or occupancy of the premises or the conduct or operation of tenant's business" . . . and where plaintiff was just walking past the premises when he tripped and fell on a uneven, raised sidewalk. Specifically, the court held that "as the accident had no relation to the use or occupancy or the conduct of [the tenant's] business, the contractual indemnity provision is inapplicable" (*id.*). To hold otherwise would have required a lease provision that the tenant maintain and repair the sidewalk and keep it free of defects, a provision not in the lease.

KFC, however, has failed to make a prima facie showing entitling it to dismissal of Catsimatidis' claim for contractual indemnification. KFC has failed to demonstrate that the "demised premises" did not include the abutting sidewalk. Review of the net lease reveals that the leased property is described as "218E [sic]Myrtle Avenue, Brooklyn, N.Y. *as more*

particularly described on Exhibit A attached hereto and incorporated as a part hereof" (emphasis added). KFC has not included Exhibit A in its opposition papers nor is this exhibit annexed to the copy of the lease submitted by Catsimatidis. Although there is a copy of a map attached to the lease submitted by Catsimatidis, it is not denoted as Exhibit A and, in any event, does not provide any elucidation as to whether the abutting sidewalk is or is not a part of the leased premises. Nor does KFC provide the court with any building plans to demonstrate that the abutting sidewalk is not part of the demised premises, or whether it installed the sidewalk where plaintiff fell. In any event, the court notes that the net lease grants permission to KFC to "improve[] the premises with a restaurant building and other site improvements" (Article 22), and to "occupy said premises for the purpose of constructing buildings and improvements during its occupancy and such other improvements as it may elect" (Article 4). In addition, the lease provides that:

> "[t]he Tenant shall at all times during the term of this lease, subject to the terms and provisions of this lease, have the sole and exclusive right to erect, build, rebuild, repair, change, demolish buildings, provided, however, Tenant replaces same with buildings of comparable value, alter or otherwise construct such buildings, appurtenances, or other improvements for use as the Tenant in its sole discretion may determine so long as same are used for lawful purposes and in accordance with zoning regulations" (Article 10).

In view of these lease provisions, and in the absence of a full copy of the lease which would enable to court to determine whether the abutting sidewalk is part of the demised premises, KFC has failed to make a prima facie showing that the indemnification provision is not applicable here. Having failed to do so, the court need not address the sufficiency of Catsimatidis' opposition.

It should be noted that the parties first entered into this lease on July 1, 1984, for a period of 15 years, with a renewal option. On or about August 17, 2000, KFC exercised the renewal option, with the lease to terminate on December 31, 2005. As noted above,

Administrative Code § 7-210 went into effect on September 14, 2003, and thus was not in effect when the lease was originally negotiated or when it was renewed. NYC Administrative Code § 7-210 "shifted tort liability from the City to the property owner for personal injuries caused by the owner's failure to maintain the sidewalk abutting its premises in a reasonably safe condition" (*Gyokchyan,* 2013 NY Slip Op 3302, *1), thus abrogating the common-law. Despite the change in the law, the lease was not amended to address the issue of which party is responsible for maintenance of the sidewalk, nor is there any provision in the lease obligating the tenant to remove snow and ice therefrom. The court notes that had Administrative Code § 7-210 been in effect when the lease was negotiated, the parties likely would have addressed this issue in the lease.

Although New York City Administrative Code § 7-210, which imposes a duty to keep sidewalks safe for pedestrians, applies only to landlords and is non-delegable, a tenant could be liable for damages that result from a violation of a lease provision. *Siuzdak v Killowen, Inc.*, 36 Misc. 3d 1237(A), 1237A (Kings Co. Sup. Ct. 2012) citing *Collado v Cruz*, 81AD3d 542, 542-43, 917 N.Y.S.2d 178 (1st Dept 2011). With Administrative Code § 7-210, the City Council transferred the City's potential liability for failure to clear snow and ice from the public sidewalks (see Garricks v City of New York, 1 NY3d 22, 26-27, 801 N.E.2d 372, 769 N.Y.S.2d 152 [2003]) to the adjoining property owners, with language that "mirrors the duties and obligations of property owners" with respect to the removal of snow and ice that previously only resulted in a fine. (See Vucetovic v Epsom Downs, Inc., 10 NY3d at 521; Braun v Weissman, 68 AD3d 797, 798, 890 N.Y.S.2d 615 [2d Dept 2009] [owner-occupied residential premises exempt from § 7-210]; Falchook v J & M Kingsley, Ltd., 67 AD3d 632, 633, 888 N.Y.S.2d 569 [2d Dept 2009] [Town of Huntington ordinance]; *Simon v. Astoria Fed. Sav.*, 27 Misc. 3d 1206(A), 1206A (N.Y. Sup. Ct. 2010).

Based upon the record before the court, KFC has failed to make a prima facie showing

that the abutting sidewalk is not a part of the leased premises, and that plaintiff's injuries did not arise from KFC's "use and occupancy" of the property. Thus, this branch of KFC's motion for summary judgment dismissing Catsimatidis' claim for contractual indemnification is denied.

IV. *Motions to Strike*

Catsimatidis moves and KFC cross-moves to strike the action from the trial calendar, to vacate the note of issue and to strike plaintiff's amended bill of particulars. As to the branches of the motion and cross motion to strike, defendants argue that the deposition of Catsimatidis is not complete, and that the depositions of plaintiff's witness, Vanetta Greene, and of KFC, are outstanding. Catsimatidis argues that on June 1, 2012, plaintiff emailed the affidavit of Vanetta Greene, the witness to the accident, to all parties, and that on June 4 and 5, 2012, Catsimatidis and KFC indicated their intention to take Greene's deposition, but that plaintiff did not respond and instead filed the note of issue. Catsimatidis has also annexed two letters KFC sent to plaintiff, dated August 16, 2011 and April 27, 2012, indicating that there was outstanding discovery, including outstanding depositions, which Catsimatidis states plaintiff ignored. Catsimatidis asserts that he is prejudiced by plaintiff's inaction and should not be forced to defend himself at trial when discovery has not been completed and the time to complete such discovery has not lapsed. KFC adopts the arguments made by Catsimatidis.

In opposition, plaintiff asserts that the case is ready for trial, that she is not interested in deposing KFC or any other witnesses, that defendants had knowledge of Jaxon Vanetta Greene's existence years before she e-mailed Greene's affidavit in June, 2012 to the defendants, and that there is ample time to depose Greene before the case is called for trial.

As an initial matter, it should be noted that the court has been advised that the deposition of Jaxon Greene, the witness to plaintiff's accident, has been completed, and that

the court has been provided with a copy of Greene's deposition.[2] In any event, this action has been pending for eight years. Court records indicate that Catsimatidis was ordered to appear for a deposition on or before August 9, 2010 and that he was subsequently directed to conclude his deposition on or before May 27, 2011. Although Catsimatidis appeared for his deposition on August 10, 2010, he failed to appear again and complete his deposition. Similarly, KFC was served with the third-party complaint over five years ago, and has still failed to appear for a deposition, despite being directed to do so on or before June 15, 2011. Accordingly, in light of the defendants' failure to appear for and complete their depositions when the record indicates that they had ample time to do so, the court finds no basis upon which to grant their respective motions to strike the action from the trial calendar and to vacate the note of issue.

That branch of the motion and cross motion to strike the plaintiff's amended bill of particulars, to the extent it alleges new claims of gross negligence and punitive damages, is granted. "Leave to amend a complaint is to be freely granted, provided that the proposed amendment does not prejudice or surprise the defendant, is not patently devoid of merit, and is not palpably insufficient" (*Shovak v Lo Dmytryszyn v Herschman*, 78 AD3d 1108, 1109 [2010], citing CPLR 3025[b]). The amended bill of particulars alleges that Catsimatidis was:

> "reckless and demonstrated wonton disregard for the community and the public by not removing the snow from the front of the incident location. Mr. Catsimatidis personally owns miles of real estate in New York City and elsewhere and, upon information and belief, personally operates them as he did the incident location. Upon information and belief Mr. Catsimatidis needlessly endangered the public safety when he chose not to remove the snow from the incident location so that he could save money by not removing snow where his real estate was not producing an income. In 2004 and since that time, Defendant Catsimatidis was able to save money that should have been spent on snow removal to protect the public safety. Instead he unjustly kept those funds for himself and placed the public at

[2]It should be noted that at the time of the accident, Jaxon Greene was known as Ms. Vanetta Greene.

> risk, all resulting in harms [sic] and losses to Plaintiff Angella Davis. Angella Davis seeks punitive damages against the Defendant for his gross negligence, recklessness and behavior that is outside the bounds societal expectations related to safety [sic]."

Plaintiff asserts, in opposition to this branch of defendants' motion and cross motion, that the amended bill of particulars only amplifies her existing claims since she alleged in the complaint that Catsimatidis was grossly negligent. However, the complaint does not allege punitive damages, and thus it failed to alert Catsimatidis that plaintiff was in fact alleging gross recklessness or intentional, wanton or malicious conduct. Further, the record, including plaintiff's deposition testimony, reveals that this is a straightforward slip and fall case, and plaintiff has failed to allege "additional facts demonstrating that defendant [Catsimatidis] acted so recklessly or wantonly as to warrant an award of punitive damages" (*D'Angelo v Litterer*, 77 AD3d 1373, 1374 [2010][internal quotation marks and citations omitted]). Accordingly, this branch of the defendants' motion and cross motion to strike plaintiff's amended bill of particulars to the extent it alleges gross negligence and seeks punitive damages against Catsimatidis is granted.

In summary, the caption is amended as indicated above. The motion of Catsimatidis for summary judgment is denied. The motion of KFC for summary judgment dismissing the first-party complaint against it is granted. That branch of the motion of KFC to dismiss the third-party complaint is granted to the extent of dismissing Catsimatidis' claim for contribution and common-law indemnification, and is otherwise denied. The motion of Catsimatidis and the cross motion of KFC to strike the note of issue and plaintiff's amended bill of particulars is granted to the extent of striking plaintiff's amended bill of particulars to the extent it alleges gross negligence and seeks punitive damages against Catsimatidis, and is otherwise denied.

This constitutes the decision and order of the court.

E N T E R:

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

FILED
2013 JUN 26 AM 9:21