| **Blanco v Avenue A Realty Corp.** |
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| 2013 NY Slip Op 32351(U) |
| September 27, 2013 |
| Sup Ct, NY County |
| Docket Number: 150245/2011 |
| Judge: Barbara Jaffe |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 12
Justice

Index Number : 150245/2011
BLANCO, MARCIA
vs.
AVENUE A REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 150245/11
MOTION DATE
MOTION SEQ. NO. 001

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

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
ACCOMPANYING DECISION / ORDER

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

Dated: 9/27/13

BJ, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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MARCIA BLANCO,

Plaintiff,

- against -

AVENUE A REALTY CORP., 118 EAST 1ST STREET, LLC, and NGE, INC. d/b/a NICE GUY EDDIE'S,

Defendants.

----------x

Index No. 150245/2011

Mot. seq. no. 001

**DECISION AND ORDER**

BARBARA JAFFE, J.:

| **For plaintiff:** | **For Avenue A Realty:** | **For NGE:** |
|---|---|---|
| David Tolchin, Esq. | Ross B. Barbour, Esq. | John O. Fronce, Esq. |
| Jaroslawicz & Jaros, LLC | Wilson, Elser, *et al.* | Abrams, Gorelick, *et al.* |
| 225 Broadway | 150 East 42nd St. | One Battery Park Plaza |
| New York, NY 10007 | New York, NY 10017 | New York, NY 10004 |
| 212-227-2780 | 212-490-3000 | 212-422-1200 |

Defendant NGE, Inc., d/b/a Nice Guy Eddie's (NGE) moves pursuant to CPLR 3212 for an order dismissing the complaint. Defendant Avenue A Realty Corp. (Ave. A) opposes. Ave. A also cross-moves pursuant to CPLR 3212 for an order of indemnification against NGE. NGE opposes.

## I. BACKGROUND

Ave. A owns the mixed-use building located at the corner of Avenue A and East First Street in Manhattan. The building has two addresses, 5 Avenue A and 120 East First Street. An entrance to 5 Avenue A leads to the building's commercial unit, whereas the entrance to 120 East First Street leads to the residential portion which, as seen from the exterior, borders a building to its east at 118 East First Street. The residential entrance leads immediately to the residential lobby. (NYSCEF 23, 24).

On November 1, 2005, NGE leased the commercial unit for a restaurant and bar. The

lease requires it to maintain the demised premises as well as the adjacent sidewalks and curbs, and to indemnify Ave. A for injuries occurring anywhere "within or about" the demised premises. (NYSCEF 25, 26).

Following the signing of the lease, a blue mural with the words "KISS" and "NICE GUY EDDIE'S" appeared on the exterior wall of the East First Street side, extending from the commercial portion of the property to the residential portion. (NYSCEF 24, 27).

On May 18, 2011, plaintiff tripped and fell on a broken and inclined portion of sidewalk near the residential entrance. On or about July 21, 2011, plaintiff commenced the instant action against Ave. A, NGE and 118 East First Street, LLC, owner of the building at 118 East First Street. (NYSCEF 1, 18).

At an examination before trial (EBT) held on March 26, 2012, plaintiff marked on a photograph the sidewalk crack where she fell which is immediately east of the residential entrance (NYSCEF 19, 20), which location is corroborated by a non-party witness to the incident (NYSCEF 21, 22).

At an EBT held on June 6, 2012, Kam Wong, president of Ave. A, testified that the premises leased to NGE end west of the residential entrance, that the entrance was used exclusively by Ave. A and its residents, that he had previously repaired uneven portions of the sidewalk in front of the entrance, that he had never asked NGE to make any sidewalk repairs, and that the building superintendent dutifully removes snow from the sidewalk. However, he maintains that it was NGE's responsibility under the lease to maintain the sidewalk along the entire block. (NYSCEF 23).

By affidavits dated October 4, 2012, NGE's manager and president state that the demised premises end approximately at the vertical line of the "K" in the word "KISS," and that the crack

is six to seven feet beyond the area maintained by NGE. They deny that NGE created the dangerous condition, repaired the sidewalk in front of the residential entrance or that NGE used that portion of the sidewalk in any manner other than as a member of the general public. (NYSCEF 28, 29).

On May 31, 2013, following oral argument, plaintiff settled with Ave. A and 118 East First Street, but not with NGE. (NYSCEF 61, 62).

## II. NGE'S MOTION

### 1. Contentions

NGE maintains that as the sidewalk was not part of, adjacent to, or abutting the demised premises, it had no duty to keep it in good repair. (NYSCEF 14, 39). Ave. A does not dispute that the commercial unit excludes the residential entrance, but nonetheless argues that NGE was responsible for maintaining its sidewalk, as it was adjacent to the demised premises, or at the very least, its responsibility constitutes a question of fact. (NYSCEF 32).

### 2. Analysis

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d

365, 366 [2d Dept 2005]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forrest*, 3 NY3d 314). Moreover, to sustain its burden, a movant cannot simply reveal gaps in its opponent's case, rather it must "affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

Negligence arises from a duty, a breach thereof, and an injury proximately caused thereby. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). Liability for a dangerous condition on premises may arise from the duty owed by virtue of ownership, occupancy, control, or special use of the premises. (*Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]). Whether a duty exists is a legal question to be addressed by the courts. (*Eiseman v State*, 70 NY2d 175, 187 [1987]).

A lessee is liable for those conditions which exist within area leased, but is not liable for conditions outside the demised premises over which it does not posses, maintain, or control. (*Hoberman v Kids R Us, Inc.*, 187 AD2d 187, 190 [1st Dept 1993]). Owners, not tenants, have a nondelegable duty to maintain abutting sidewalks in "reasonably safe condition." (Administrative Code § 7-210; *see also Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *Cook v Consol. Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]). And a tenant's obligation under the lease to maintain the sidewalk does not, by itself, create a duty grounded in tort owed to the public. (*Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]; *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003]; *Langston v Gonzalez*, 2013 NY Slip Op 23031, 39 Misc3d 371, 377-78 [Sup Ct, Kings County 2013]). Therefore, in an action for personal injuries arising from

a dangerous sidewalk condition, a tenant demonstrates its entitlement to summary judgment by submitting evidence that it neither negligently repaired the sidewalk nor caused the dangerous condition by some special use of the sidewalk or otherwise. (*Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311 [1st Dept 2008]).

Here, the dangerous condition was east of the residential entrance and it is undisputed that NGE neither repaired the sidewalk nor created the defect. Thus, NGE has established, *prima facie*, that it owes no duty to plaintiff. (*See Leary v Dallas BBQ*, 91 AD3d 519 [1st Dept 2012] [tenant entitled to summary judgment upon showing, among other things, that it was not abutting owner and consequently owed no duty to plaintiff to maintain sidewalk, and that it did not create the dangerous condition]; *Hines v City of New York*, 43 AD3d 869, 870 [2d Dept 2007] [defendants established *prima facie* entitlement to summary judgment by submitting evidence showing they were not owners of property abutting subject sidewalk, and that they did not negligently repair sidewalk or otherwise create defective condition, or cause defect to occur by some special use of the sidewalk]; *Rodgers v City of New York*, 34 AD3d 555, 556 [2d Dept 2006] [defendant established *prima facie* that she owed no duty to plaintiff by submitting affidavit that she only owned property neighboring dangerous sidewalk condition, that she derived no special uses of the sidewalk, and that she did not create condition]).

Although NGE may be obliged under the lease to maintain the sidewalk, its contractual duty is not pertinent to a determination of whether NGE owes a duty to plaintiff. (*See Torres v Visto Realty Corp.*, 106 AD3d 645 [1st Dept 2013] [rejecting defendant owner's contention that tenant was necessary party; lease provision obligating tenant to maintain sidewalk cannot be enforced in main action]; *Collado*, 81 AD3d at 542 [tenant's breach of sidewalk-repair lease provision does not give rise to liability in favor of plaintiff, although tenant may be required to

indemnify owner]; *Berkowitz v Dayton Const., Inc.*, 2 AD3d 764, 765 [2d Dept 2003] [same]; *Tucciarone*, 306 AD2d at 163 [same]; *Langston*, 2103 NY Slip Op 23031, 39 Misc 3d at 377-38 [same; tenant could only be liable to plaintiff if it actually created the dangerous condition].

As it is undisputed that the residential entrance is not part of the demised premises, the encroachment of the blue mural, is immaterial. As such, NGE does not owe a duty to plaintiff. (*See Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624 [1st Dept 2012] [duty to maintain sidewalk pursuant to Administrative Code of City of NY § 7-210 applies only to owners]; *Spreiregen v. New York City Transit*, 2013 NY Slip Op 31149 [Sup Ct NY County 2013] [§ 7-210 does not impose duty upon lessees]; *Boxer v Metro. Transp. Auth.*, 2007 WL 5884065 [Sup Ct Queens County 2007] ["If the City Council had intended to include lessees or tenants . . . it would have specifically so provided."]).

III. AVE. A'S CROSS-MOTION

A party voluntarily settling a claim and seeking indemnification must establish that it was liable to the party it paid and that the settlement amount is reasonable. (*Alberto v Nassau Sling Co.*, 11 AD3d 571, 572 [2d Dept 2004]; *Natl. Union Fire Ins. Co. of Pittsburgh, Pa v Red Apple Group*, 309 AD2d 657 [1st Dept 2003]; *Mount Vernon Fire Ins. Co. v Trans World Maintenance Serv.*, 169 AD2d 519 [1st Dept 1991]). Neither NGE's motion nor Ave. A's cross motion directly address Ave. A's liability to plaintiff. And, while the court was advised of Ave. A's settlement with plaintiff after submission of the motion, the details of the settlement have not been disclosed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant NGE, INC. d/b/a NICE GUY EDDIE'S motion for summary

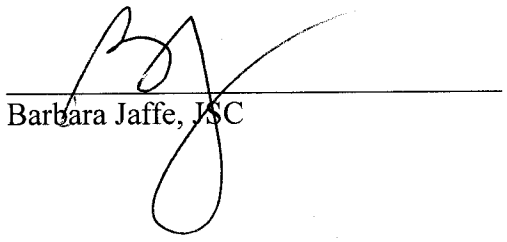
judgment is granted and the complaint and cross claims against it are severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that defendant AVENUE A REALTY CORP.'s cross motion for summary judgment against NGE, INC. d/b/a NICE GUY EDDIE'S is denied without prejudice to renew; it is further

ORDERED, that the cross claim is deemed a third-party action, and that this third-party action be severed and continued under its own index number which must be acquired within 20 days of the date of entry of this order; and it is further

ORDERED, that counsel for NGE, INC. d/b/a NICE GUY EDDIE'S shall serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158).

ENTER:



Barbara Jaffe, JSC

DATED: September 27, 2013
New York, New York