SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

PATRICIA O'REILLY,

Plaintiff,

- against-

THE CITY OF NEW YORK, FC BATTERY PARK ASSOCIATES, LLC, APPLE-METRO, INC., BPC HOTEL, LLC, PROMUS HOTELS, INC., BPC SITE 25 ASSOCIATES, LLC, FOREST CITY RATNER COMPANIES, LLC, FOREST CITY ENTERPRISES, INC., FCR CONSTRUCTION SERVICES, LLC, FCDT-BPC CORP., and RRG BATTERY PARK, LLC,

Defendants.

INDEX NO. 105405/07

MOTION SEQ. NO. 009

The following papers were read on this motion for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Motion Sequences 009 and 010 are hereby consolidated for purposes of disposition.

In this personal injury action, the following two motions are made: (1) the motion of defendants FC Battery Park Associates, LLC, BPC Hotel, LLC, BPC Site 25 Associates, LLC, Forest City Ratner Companies, LLC, Forest City Enterprises, Inc., FCR Construction Services, LLC, FCDT-BPC Corp., and RRG Battery Park LLC (together, Battery Park defendants), pursuant to CPLR 3212, for (a) summary judgment dismissing the complaint and all cross claims as against these defendants, (b) conditional summary judgment on their cross claims for contractual indemnification against defendant Apple-Metro, Inc., and (c) summary judgment on their cross-claim for contractual attorneys' fees and disbursements against Apple-Metro, Inc. (Motion Sequence 009); and (2) the motion of defendant Apple-Metro, Inc. (Apple-Metro),

pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it (Motion Sequence 010).

BACKGROUND

Patricia O'Reilly (plaintiff) maintains that she tripped and fell in front of premises located at 102 Northend Avenue, New York, New York, leased by Apple-Metro from FC Battery Park Associates,[1] pursuant to a written lease (Lease)(Aff. in Support of Battery Park defendants' motion, Ex. I), to be operated as a restaurant by Apple-Metro,[2] and called Chevy's Restaurant (restaurant). The restaurant includes a legal outdoor seating area cordoned off by ropes and stanchions. The cordoned off area takes up a portion of the sidewalk directly in front of the restaurant, leaving a section of sidewalk, and then a section of cobblestones, containing at least one tree well, between the cordoned-off area and the curb.

On the evening of August 8, 2006, plaintiff maintains that she was walking past the restaurant when her foot slipped into a tree well, where the soil level was, allegedly, six inches below the level of the sidewalk, causing her to fall and seriously injure herself. Plaintiff maintains that the sidewalk was crowded with "a lot" of people (Plaintiff Examination Before Trial [EBT] at 38), or at least 25 people (*id.* at 133), which forced her to have to swerve around the crowd, and fall into the tree well. Plaintiff alleges both that the tree well was defective, in that the level of the soil was so much lower than the sidewalk, and that defendants were negligent in allowing a large crowd to gather in front of the restaurant, blocking access to the sidewalk, and compromising plaintiff's safety.

Plaintiff produces two photographs depicting the sidewalk in front of the restaurant (Aff. in Support of Battery Park defendants' motion, exhibit M), taken some unspecified date after the

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[1] All of the Battery Park defendants are parties having an ownership or leasehold interest in the premises.

[2] Apple-Metro is known as Battery Park Fresh, LLC on the Lease.

accident, showing the restaurant's seating area, ropes and stanchions, a person seated on a chair on the sidewalk, apparently outside the line of the stanchions (although it cannot be determined whether the person is sitting in front of another restaurant further on down the block), and what appears to be a covered motor bike, and a small food cart, on the cobbled part of the sidewalk, near the curb. Plaintiff, however, never describes seeing a motor bike at the scene of her accident, and, while she mentions the presence of "hot dog stands" (Plaintiff's EBT at 105), she never claims that a cart or motor bike had anything to do with the circumstances of her accident.

It has already been determined by a Justice of this Court that defendant the City of New York (City), not the owners or lessees of the property, was responsible for the condition of the tree well. In a decision dated August 17, 2010 (Aff. in Support of Battery Park defendants' motion, exhibit F), Justice Barbara Jaffe noted that the City's representative had testified that, where the soil level in a tree well is "significantly below" the level of the sidewalk, a "tripping hazard results" (*id.* at 2). However, despite the City's responsibility for the allegedly defective condition, the City had not received notice of the defect, pursuant to New York City Administrative Code § 7-201. Consequently, Justice Jaffe dismissed the complaint as against the City.

Plaintiff argues that, despite the City's responsibility for maintaining tree wells, defendants' special use of the area in and around where plaintiff fell makes defendants liable for accidents, such as occurred here, where the alleged existence of a crowd in front of the restaurant was, allegedly, the cause of plaintiff's injury. Plaintiff also speculates that the defendants' actions in hosing down the sidewalks in order to clean them might have caused erosion in the tree wells, contributing to the accident.

Apple-Metro claims that it made no special use of the tree wells, and is not liable as a matter of law for an accident which occurred on property outside the sidewalk, merely because

there was a crowd of people on the sidewalk.

The Battery Park defendants also argue for the dismissal of the complaint and all cross - claims as against them, but also seek judgment on their claim that the Lease requires Apple-Metro to indemnify them for any liability applying to them which arises from a crowding condition on the premises. The Lease contains a provision which provides that Apple-Metro shall not:

> obstruct, encumber or use or allow or permit any of its employees, agents, licensees, or invitees to congregate in or on the sidewalks, driveways, passageways, courts, arcades, esplanade areas, plazas, elevators, vestibules, stairways, corridors or halls of the Building, outside the Premises, or use any of them for purposes other than ingress and egress to and from the Premises, in a manner that does not interfere with access to other tenant's premises, and in accordance with all Legal Requirements (Lease, exhibit G, § I [1]).

The Lease also contains a "Mutual Indemnification" clause which reads:

> Tenant shall defend, indemnify and save Landlord, Superior Lessors, Superior Mortgagees and the owner and/or operator of the Hotel Unit and its respective partners, directors, officers, agents and employees harmless from legal action, damages, loss, liability and other expenses (including reasonable attorney fees and disbursements) in connection with loss of life, bodily or personal injury or property damage arising from or out of all acts, failures, omissions, or negligence of Tenant, its agents, employees or contractors which occur in or about the Premises, unless such legal action, damage, loss, liability or other expense (including reasonable attorney fees and disbursements) results from the sole act, omission or neglect of Landlord, its respective agents, contractors, employees or persons claiming it (Lease at 33, § 9.01).

Battery Park defendants argue that, even if the complaint is completely dismissed, they are still entitled to indemnification from Apple-Metro, in the form of reasonable attorneys' fees and disbursements, because the claim arose out of persons congregating in front of the restaurant, in alleged violation of the provision requiring Apple-Metro to refrain from allowing crowds to assemble.

DISCUSSION

It is often noted that summary judgment is a "drastic remedy" (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). "[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law,

tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If there is any doubt as to the existence of triable issues of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224 [1st Dept 2002]).

A property owner's obligations to a passerby confronted with a crowd of people on the sidewalk in front of the premises has been addressed by the courts of this State, most prominently in *MacLeod v Pete's Tavern* (87 NY2d 912 [1996]). However, *MacLeod* was decided before the enactment of New York City Administrative Code § 7-210, which placed the responsibility for the maintenance of public sidewalks on the adjacent premises owner or lessee. Prior to section 7-210, the City was responsible for defects on public sidewalks, unless it could be shown that the property owner made "special use" of the sidewalk (*see Gyokchyan v City of New York*, 106 AD3d 780, 781 [2d Dept 2013]).

In *MacLeod*, the plaintiff felt compelled to walk around employees and patrons of a restaurant who were standing outside a legal café seating area, which was separated from the public sidewalk by a guard rail. The Court found that the plaintiff was not entitled to recover for injuries which she sustained when she fell on a defect in the sidewalk. The Court framed the question as being "whether the special use of the sidewalk represented by the outdoor café extended beyond the guardrail to include the public sidewalk area in which plaintiff fell" (*MacLeod*, 87 NY2d at 914). The Court concluded that "[n]either the existence of the crowd nor

the fact that one of defendant's employees was seen on the sidewalk outside the rail create[d] a triable issue of fact" as to the defendant's liability (*id*).

Similarly, in *Tabenfeld v Starbucks Corp.* (48 AD3d 310 [1st Dept 2008]), decided after Administrative Code section 7-210 was enacted, the Court found that a plaintiff who tripped over a protruding root in a tree well, while swerving to avoid a crowd in front of defendant's establishment, could not recover against the defendant in negligence. The Court found that the use that defendant made of the sidewalk by placing tables and chairs outside "did not extend beyond the tables and chairs to the tree well where plaintiff fell, or to the people on the crowded sidewalk, some walking and others standing around [defendant's] tables chatting, and around whom, plaintiff asserts, she had to walk, diverting her path to the tree well" (*id.* at 311). Where the tree well was not the defendant property owner's responsibility, no liability attached to the defendant as a result of the crowd on the sidewalk, and the property owner's use of part of the sidewalk.

It has already been determined by a Justice of this Court that the City was responsible for maintaining the tree wells. Nothing in plaintiff's evidence establishes that any defendant made "special use" of the tree wells, as might trigger liability. The evidence shows that a motor bike and a cart were parked on the cobblestones in front of the restaurant at some later point in time after the accident. However, despite the suggestion of both plaintiff and Battery Park defendants, there is no evidence that anything was ever parked in the tree well, at any time, which might constitute a special use of the tree well. There is also no evidence that the level of the soil in the tree well was due to erosion at all, much less erosion caused by any activity of any defendant, as plaintiff speculates. Liability cannot attach to the moving defendants due to the allegedly defective condition of the tree well. This leaves as the cause of the accident, the crowding on the sidewalk in front of the restaurant.

It should first be noted that there is no actual evidence that any restaurant property or

personnel were located on the sidewalk outside of the boundaries of the area allowed for the restaurant's use by law at the time of plaintiff's accident. Battery Park defendants produce the affidavit of plaintiff's witness, Joan Colucci (Colucci) (Aff. in Support of Battery Park defendants' motion, exhibit P), in which she states that "[t]he chairs/tables had been pushed so far out into the sidewalk that it forced us to make a single file line," that "[t]here was not a lot of pedestrian traffic," and "[t]he sidewalk was narrow to a point that I needed to move my duffle bag in front of me in order to proceed" (*id*). Colucci does not say if she saw the ropes and stanchions, or whether the chairs and tables were located outside the ropes and stanchions, and Battery Park's characterization of this witness's testimony does not show that the tables and chairs were farther out into the sidewalk than allowed by law. The photograph provided on this motion does not prove otherwise.

Diametrically opposite to Colucci's testimony is plaintiff's own testimony that, immediately prior to her accident, people were walking towards her "three abreast" (Plaintiff's EBT, at 97) admitting that there was more room to walk in front of the restaurant than Colucci suggests, and that, in plaintiff's memory, people were not walking in single file in front of the restaurant.

MacLeod (87 NY2d 912) and *Tabenfeld* (48 AD3d 310), define the situation in the present matter. Liability does not attach to Apple-Metro or Battery Park defendants as a result of their alleged special use of the sidewalk, or the crowd outside the restaurant, where plaintiff fell in a tree well which was not the responsibility of Apple-Metro or Battery Park defendants to maintain. Additionally, plaintiff also cannot claim to have sustained injuries caused by the alleged overcrowding itself, as it is well established that liability for damages from overcrowding will only attach where the plaintiff shows that she "'was unable to find a place of safety or that [her] free movement was restricted due to the alleged overcrowding conditions'" (*Greenberg v Sterling Doubleday Enterprises*, 240 AD2d 702, 703 [2d Dept 1997]), quoting *Palmieri v*

Ringling Brothers & Barnum & Bailey Combined Shows, 237 AD2d 589, 590 [2d Dept 1997]). This is not the situation in the present matter.

As a result of the foregoing, the complaint must be dismissed as to all moving defendants. There is no evidence that any moving defendant was responsible for the allegedly defective tree well, and these parties are not liable merely because plaintiff encountered a crowd outside the restaurant, allegedly directing her into the tree well.

Despite the fact that the action must be dismissed as to Battery Park defendants, these parties still seek indemnification from Apple-Metro, in the form of attorneys' fees and disbursements, under the two provisions in the Lease: that which requires that Apple-Metro not permit crowds to form on the sidewalk, and the indemnification provision. However, Battery Park defendants incurred no liability for the accident, and so, cannot claim that the overcrowding caused them to incur damages. That is, this Court has found that no act of Apple-Metro caused plaintiff injury. This Court does not believe that the Lease requires Apple-Metro to indemnify Battery Park defendants for their attorneys' fees under these circumstances.

As the action and all cross-claims must be dismissed as to all moving parties, it is not necessary to address the parties' other arguments, including Battery Park's argument that Apple-Metro's cross-claims are barred by the anti-subrogation doctrine.

CONCLUSION

Accordingly, it is

ORDERED that the portion of the motion (motion sequence 009) brought by defendants FC Battery Park Associates, LLC, BPC Hotel, LLC, BPC Site 25 Associates, LLC, Forest City Ratner Companies, LLC, Forest City Enterprises, Inc., FCR Construction Services, LLC, FCDT-BPC Corp., and RRG Battery Park LLC for summary judgment dismissing the complaint and all cross-claims against them is granted; and it is further,

ORDERED that the complaint is dismissed as to FC Battery Park Associates, LLC, BPC

Hotel, LLC, BPC Site 25 Associates, LLC, Forest City Ratner Companies, LLC, Forest City Enterprises, Inc., FCR Construction Services, LLC, FCDT-BPC Corp., and RRG Battery Park LLC, with costs and disbursements to these parties as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further,

ORDERED that the portion of the motion (motion sequence 009) brought by defendants FC Battery Park Associates, LLC, BPC Hotel, LLC, BPC Site 25 Associates, LLC, Forest City Ratner Companies, LLC, Forest City Enterprises, Inc., FCR Construction Services, LLC, FCDT-BPC Corp., and RRG Battery Park LLC seeking summary judgment on their cross-claims against defendant Apple-Metro, Inc. is denied; and it is further,

ORDERED that the motion brought by defendant Apple-Metro, Inc. (motion sequence 010), for summary judgment dismissing the complaint and all cross-claims as to it, is granted; and it is further,

ORDERED that the complaint is dismissed as to Apple-Metro, Inc., with costs and disbursements to this party as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further,

ORDERED that FC Battery Park Associates, LLC is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

Dated: Oct. 17, 2013

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**