SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

BHANMATTIE RAJKUMAR KUMAR, Index No.: 26568/11

Plaintiff, Motion Date: 6/13/13

- against - Motion No.: 76

PI ASSOCIATES LLC, CAPITAL ONE BANK AND PRETTY GIRL, Motion Seq.: 6

Defendants.

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The following papers numbered 1 to 14 read on this motion by defendant Pi Associates LLC for an order granting summary judgment against co-defendant Pretty Girl on its cross claims for common law indemnification and contractual indemnification.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Opposing Affirmation-Exhibit	5-7
Opposing Affirmation-Exhibit	8-10
Reply Affirmation	11
Reply Affirmation	12-14

Upon the foregoing papers the motion is determined as follows:

Plaintiff Bhanmattie Rajkumar Kumar alleges that she sustained personal injuries on November 19, 2011, when she tripped and fell on the sidewalk abutting the premises known as 136-21, Roosevelt Avenue, Flushing, New York. Defendant Pi Associates LLC is the owner of the adjoining real property, and Capital One Bank and Pretty Girl each occupied separate premises which have the single address of 136-21 Roosevelt Avenue, Flushing, New York.

Pi Associates LLC entered into a lease agreement with White Plains Sportswear Corp., dated April 18, 2000, for the period of April18, 2000 to April 30, 2010, whereby it leased a portion of the first floor and a part of the basement of the premises located at 136-21 Roosevelt Avenue, Flushing, New York. White Plains Sportswear Corp. assigned the lease to Roosevelt Fashion Corp. on June 29, 2000. Pi Associates LLC renewed Roosevelt Fashion Corp.'s lease on March 17, 2010, for the period of May 1, 2010 to April 30, 2015. It is undisputed that the premises leased by Roosevelt Fashion [sic] Corp. was occupied by Pretty Girl at the time of the plaintiff's accident, and that Roosevelt Fashions Corp. was doing business at that location as Pretty Girl.

Plaintiff commenced the within action against Pi Associates LLC, Capital One Bank and Pretty Girl on November 23, 2011, and alleges in the verified complaint a single cause of action for negligence. Defendant Pi Associates LLC served an answer and interposed eight affirmative defenses and cross claims against the co-defendants for common law indemnification, contractual indemnification, and breach of contract based upon the alleged failure to procure insurance. Capital One Bank served a verified answer and interposed six affirmative defenses and cross claims against the co-defendants for common law indemnification, contribution, contractual indemnification, and for insurance coverage. Roosevelt Fashions Corp., d/b/a Pretty Girl served a verified answer and interposed seven affirmative defenses and cross claims against the co-defendants for contribution, common law indemnification, contractual indemnification, and for breach of contract based upon an alleged failure to procure insurance.

Ms. Kumar stated at her deposition that she was walking to the Capital One Bank, and was looking straight ahead of her, when the toes of her left foot became caught in hole in the sidewalk causing her to fall. Ms. Kumar stated that she fell before she got to the bank, that was were Capital One Bank and Pretty Girl [a clothing store] "kind of meet". (Tr 43) When asked if she finished "walking past Pretty Girl and then fell just where the Pretty Girl property line met up with the Capital One Bank", she stated that she "wouldn't be able to say" (Tr. 44). She stated that two individuals picked her up, and a chair was brought out for her to sit on, while she waited for her son, and an ambulance to arrive. She stated that while she was sitting on a chair she noticed that a triangular piece of the sidewalk, approximately 6" x 6" was broken and missing. As a result of the fall Ms. Kumar sustained a broken femur and had emergency surgery. Photographs of the broken sidewalk were submitted at the deposition and Ms. Kumar identified the area where she fell.

Vera Penn, appeared at a deposition on behalf of Pi Associates LLC. Ms. Penn stated that she was a bookkeeper employed by Pi Capital Partners, the management office for Pi Associates LLC, and that she negotiated leases with tenants on behalf of Pi Associates LLC. She stated that Pi Associates LLC is the owner of the building know as 136-21 Roosevelt Avenue, and that she visited the premises a "couple of times a year" (Tr 14); that she did not know who from Pi Associates LLC or Pi Capital Partners was responsible for inspecting the real property; that she did not know if any work was done to the abutting sidewalk prior to the plaintiff's accident; that Pi Capital Partners employed five doorman or building supers who performed daily cleaning in front of the bank, but not in front of the portion occupied by Pretty Girl. She stated that predecessor banks to Capital One Bank was a tenant at the subject property prior to its purchase by Pi Associates LLC. Photographs were submitted at the deposition and Ms. Penn identified the "chipped out", "uneven" sidewalk. She stated that she had never paid any attention to that portion of the sidewalk during any walks around the exterior of the building prior to the date of plaintiff's accident. Ms. Penn stated that she had never been specifically notified as to where the accident occurred. She and stated that if the location where the accident occurred "belongs to the bank, then as landlord we are responsible. If it belongs to Pretty Girl, then Pretty Girl is responsible for it" based upon the lease (Tr 34). Ms. Penn stated that she did not receive any complaints from the bank about the condition of the sidewalk; that she did not have any personal knowledge that the sidewalk was caused by Pretty Girl; that she did not ask Pretty Girl's principal's to make any repairs to the sidewalk abutting their premises; and that one of the doormen informed her sometime in 2012 that Pretty Girl had fixed the sidewalk.

Victor Lavy, Pretty Girl's district manager, testified at his deposition that at the time of the accident, the Pretty Girl store was operated by Roosevelt Fashion; that he went to the store location once a week, every two weeks; that merchandise may have been placed outside the store on the sidewalk; that the employees at the store were responsible for cleaning the sidewalk in front of the store; that he did not know who was responsible for repairing the sidewalk in front of the store; that Pretty Girl was responsible for removing snow from the sidewalk in front of the store; that he did not remember if any complaints had been made in connection with the sidewalk in front of the store and that if complaints had been made they would not have been documented in any way; that Pretty Girl did not make any repairs to the sidewalk prior to the date of the accident; that merchandise was delivered to the store by truck which would be

unloaded in front of the store and brought in by either a hand truck or dolly; and that deliveries were made three or four times a week. Photographs depicting the broken sidewalk were presented at the deposition. Mr. Lavy stated the he did not know if the broken sidewalk was" in front of Pretty Girl or someplace else (Tr 30) and that he didn't who would be responsible for fixing the sidewalk. He stated that he did not know how the sidewalk came to be in the condition depicted in the photograph (Tr 31). and did not know if it had been repaired or patched (Tr 41) or who performed the repair (Tr 45). Mr. Lavy stated that he did not pay attention to the condition of the sidewalk when he visited the premises.

Velinda Miranda, an assistant manager at the subject Pretty Girl store, testified that the crack in the sidewalk was located in between Pretty Girl and Capital One Bank; that she was aware of the crack in the sidewalk but did not report it to anyone; that she did not witness the plaintiff's accident; that Pretty Girl placed clothing racks on the sidewalk but did not place anything in the area of the cracked sidewalk; that at the time of her January 25, 2013 deposition she had worked at Pretty Girl for approximately four years and that the crack was there when she first started working; and that the crack has been repaired since the previous summer, but that she did not know who had performed the repair.

Pretty Girl, in response to a notice to admit, admitted that it had repaired the portion of the subject sidewalk sometime after November 19, 2011; denied that it had hired an entity to repair the sidewalk; and stated that did not have any knowledge or information sufficient to form a belief as to the truth, as to the third item which pertains to whether Pretty Girl paid for the repair of the sidewalk.

The lease agreement between Roosevelt Fashions Corp. and Pi Associates LLC. provides, in pertinent part that: "Repairs: 4. ...Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty excepted."

Paragraph 30 of the Lease provides that "Tenant shall at Tenant's expense, keep demised premises clean and in order, to the satisfaction to Owner, and if the demises premises are situated on the street floor, Tenant shall at its own expense,

make all repairs and replacements to the sidewalks and curbs adjacent thereto...".

Paragraph 70 of the Rider to said lease, dated April 18, 2000, provides as follows: "Sidewalks: The Tenant is aware that the Landlord is renting the Demised Premises to the Tenant conditioned on the fact that the Tenant will continuously keep the sidewalk in front of the Demised Premises clean and free from garbage and debris. The Tenant agrees to arrange to sweep the sidewalk when reasonably necessary. The Tenant further agrees, at its sole cost and expense, to be responsible for the clearance and removal of snow which may accumulate on the sidewalk in front of the Demised Premises".

Paragraph 77 of said Rider provides as follows: "Indemnity: The Tenant hereby agrees that the Tenant shall and will indemnify and save harmless the 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 any property of any person occurring during the term of this Lease in, on, or about the Demised Premises. The Tenant likewise shall and will indemnify and save harmless the Landlord from and against all claims for damages of whatever nature arising from any accident, injury or damage, occurring outside of the Demised Premises but within the Building, or on the sidewalks and area adjacent to the Building where such accident, damage or injury results from or is claimed to have resulted from any action or omission on the part of the Tenant or the Tenant's contractors, licensees, agents, invitees, visitors, servants or employees. The Tenant shall and will, on written demand, repay to the Landlord, as Additional Rent, any amount that the Landlord may be obligated to pay for such damages and the cost and expense of any action or legal proceedings brought against the Landlord by reason of, or in respect to any claim for such damages, including, but not limited to, reasonable attorneys' fees expended in connection therewith".

The law concerning liability for injury caused by a dangerous condition on a sidewalk changed in New York City during the time 136-21 Roosevelt Avenue was occupied by Pretty Girl and owned by Pi Associates. Prior to September 14, 2003, the effective date of §7-210 of the Administrative Code of the City of New York ("the New Sidewalk Law"), the City had an "obligation to maintain sidewalks in a reasonably safe condition." *(see Garricks v City of New York*, 1 NY3d 22, 27 [2003]; *see also Rodriguez v City of New York*, 12 AD3d 282, 282 [2d Dept 2004].) At the same time, the owner of the property abutting the sidewalk could also be liable for damage or injury caused by a dangerous

condition on the sidewalk "where the sidewalk was constructed in a special manner for the benefit of the abutting owner . . . , where the abutting owner affirmatively caused the defect, . . . where the abutting landowner negligently constructed or repaired the sidewalk . . . [,] and where a local ordinance or statute specifically charges an abutting landowner with a duty to repair the sidewalk and imposes liability for injuries resulting from the breach of that duty." (*see Hausser v Giunta*, 88 NY2d 449, 453 [1996].) Where both the City and the abutting landowner breached their respective duties to members of the public, both could be "made to respond in damages to those injured by the defective condition." *(see D'Ambrosio v City of New York*, 55 NY2d 454, 463 [1982].)

Effective September 14, 2003, the New Sidewalk Law imposes upon the owner of real property abutting any sidewalk "the duty . . . to maintain such sidewalk in a reasonably safe condition," and provides that the owner " shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." (*see* Administrative Code of the City of New York §7-210 [a], [b].) There is an exception to owner liability for "one-, two-, or three family residential real property that is . . . in whole or in part, owner occupied, and . . . used exclusively for residential premises." (*see* Administrative Code of the City of New York §7-210 [b].) The City "shall not be liable for any injury to property or personal injury . . . proximately caused by the failure to maintain sidewalks," except for sidewalks abutting owner-occupied residential properties with three or fewer units, or where the City itself is the owner of the abutting property. (*see* Administrative Code of the City of New York §7-210 [c].) There is nothing in the New Sidewalk Law, however, that suggests that the City would not be liable where its liability would not be based on a failure to maintain, but rather a breach of its duty not to create a dangerous condition on a sidewalk, whether it creates the condition with its own employees or a contractor. (*see Tumminia v Cruz Constr. Corp.*, 41 AD3d 585, 586 [2d Dept 2007]; *see also Harakidas v City of New York*, 86 AD3d 624, 627, [2d Dept 2011].)

The potential liability of a lessee of property, however, has not changed by reason of the New Sidewalk Law. (*see Leary v Dallas BBQ*, 91 AD3d 519, 519 [1st Dept 2012].) In the absence of a lease that is "'so comprehensive and exclusive' as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk" (*see Abramson v Eden Farm, Inc.*, 70 AD3d 514, 514 [1st Dept 2010] [*quoting Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), the lessee will be liable

only if it "created the defective condition, negligently made repairs, or used the sidewalk for a special purpose" (*see Berkowitz v Dayton Constr., Inc.*, 2 AD3d 764, 765 [2d Dept 2003]; *see also Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *Biondi v County of Nassau*, 49 AD3d 580, 580-81 [2d Dept 2008]; *Zito v City of New York*, 293 AD2d 469, 469-70 [2d Dept 2002].) The "duty not to create a defective condition" is "independent" of any duty to maintain the sidewalk in a reasonably safe condition. (*see Kiernan v Thompson*, 73 NY2d 840, 841 [1988].) Moreover, an out-of-possession landlord is not relieved of its "nondelegable duty to maintain the sidewalk in a reasonably safe condition" (*see Reyderman v Meyer Berfond Trust No.1*, 90 AD3d 633, 634 [2d Dept 2011]; *see also James v Blackmon*, 58 AD3d 808, 809 [2d Dept 2011].)

As applied here, at the time of the plaintiff's accident on November 19, 2011, Pi Associates LLC was responsible for maintaining the sidewalk in a reasonably safe condition. Therefore, in order to prevail on its cross claim for common law indemnification, Pi Associates LLC is required to establish Pretty Girl's liability to the plaintiff. The lease between Pi Associates LLC and Pretty Girl does not create a duty which runs from Pretty Girl to the plaintiff, a pedestrian. (*see Collado v Cruz*, 81 AD3d 542 [2d Dept 2011]; *Otero v City of New York*, 213 AD2d 339, 339-40 [1st Dept 1995]; *Williams v Azeem*, 62 AD3d 988, 989 [2d Dept 2009].) Assuming arguendo that the accident occurred on the portion of sidewalk abutting the premises leased by Pretty Girl, this tenant could only be liable to plaintiff if it actually created the condition that caused plaintiff's injuries, made repairs to the sidewalk before the accident, or caused the defect to occur by some special use of the sidewalk. Here, the evidence presented is insufficient to establish that Pretty Girl created the defect in the sidewalk, or that the defect resulted from a special use on the part of Pretty Girl, or that the tenant had negligently constructed or repaired the sidewalk. Therefore, that branch of Pi Associates LLC's motion which seeks summary judgment on its cause of action against Pretty Girl for common law indemnification, is denied.

With respect to Pi Associates LLC's claim for contractual indemnification, Pretty Girl's reliance on General Obligations Law § 5-321 is misplaced. General Obligations Law § 5-321 deems void and unenforceable an agreement in lease "exempting the lessor from liability for damages or injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises . . . ." However, "[w]here, as here, a lessor and lessee freely enter into an indemnification

agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity". *(Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]; *Gary v Flair Beverage Corp.*, 60 AD3d 413, 414-415 [1st Dept 2009].)

Although Article 4 of the lease appears to require Pretty Girl to make only nonstructural repairs to the sidewalk, and paragraphs 68 and 70 of the Rider require Pretty Girl to keep the abutting side clean and free of debris and snow, Article 30 of the lease states, in pertinent part: "Tenant shall at Tenant's expense, keep the demised premises clean and in order, to the satisfaction to Owner, and if the demised premises are situated on the street floor, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent thereto . . . .". Pretty Girl's claim that it was only responsible for non-structural repairs, and therefore was not responsible for repairing the broken sidewalk, is rejected, as paragraph 30 of the lease, im poses on the tenant the obligation to repair or replace the sidewalk in front of its store. (*see Collado*, 81 AD3d at 542.)

However, as the plaintiff and Pi Associates LLC's deposition witness were unable to state with certainty that the broken sidewalk abutted the premises leased by Pretty Girl, and as the spaces occupied by Pretty Girl and Capital One Bank share a single address and no evidence has been offered as to the physical dimensions of the space leased to Pretty Girl, a triable issue of facts exists as to precise location of the plaintiff's accident. Therefore, that branch Pi Associates LLC's cross motion on its cause of action for contractual indemnification is denied.

Accordingly, defendant Pi Associates LLC's motion for summary judgment on its cross claims against for common law and contractual indemnification against co-defendant Pretty Girl, is denied.

Dated: Long Island City, NY
October 22, 2013

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ROBERT J. McDONALD
J.S.C.