[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

MICHELLE STEVENS,

Plaintiff,

- against -

NORDIC CLEANERS, INC., WEST BRIDGE REALTY CORP., and WEST BRIDGE ASSOCIATES, L.P.,

Defendants.

INDEX NO. 112349/09

MOTION SEQ. NO. 001

WEST BRIDGE REALTY CORP. and WEST BRIDGE ASSOCIATES, L.P.,

Third-Party Plaintiffs,

- against -

BROADWAY NORDIC CLEANERS, INC.,

Third-Party Defendant.

THIRD-PARTY INDEX NO. 112349/09

The following papers were read on this motion by defendants/third-party plaintiffs West Bridge Realty Corp. and West Bridge Associates L.P. for summary judgment.

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

Cross-Motion: ☐ Yes ☒ No

In this personal injury case, Michelle Stevens (plaintiff) alleges that she was injured when she tripped and fell on a sidewalk defect in front of a building located at 3656 Broadway, New York, NY (the building).[1] Defendants/third-party plaintiffs West Bridge Realty Corp. and

[1] The building is also known as 566 Broadway, New York, NY and 566 West 151st Street, New York, NY (see Verified Complaint ¶ 14).

West Bridge Associates L.P. (together, West Bridge or the landlord) are the building manager and owner, respectively. Defendant Nordic Cleaners, Inc. (Nordic Cleaners) or third-party defendant Broadway Nordic Cleaners, Inc. (Broadway Nordic) (collectively, Nordic or the tenant) is the street floor tenant in the building. Now before the Court is a motion by West Bridge for summary judgment, pursuant to CPLR 3212, dismissing the complaint and for judgment in its favor against Nordic Cleaners on its cross-claims and against Broadway Nordic on its third-party complaint for breach of contract and contractual indemnification.

BACKGROUND

Plaintiff alleges that she tripped and fell in front of Nordic's business on November 18, 2008. Plaintiff described the sidewalk defect that caused her to fall as a divot. During her deposition, she stated that the divot was circular, half the size of a basketball. She could not estimate how deep it was, and she testified that her "foot went down in it," she fell to the ground, and was taken to the hospital where she had surgery for a dislocated knee (Plaintiff Examination Before Trial [EBT] at 47).

Duk Won Kim (Kim) owned stock in Nordic and was its manager. He testified that he first observed the sidewalk "unevenness," that allegedly caused plaintiff's accident in 2003, when he started working at Nordic (Kim EBT at 32). Kim did not tell the landlord or anyone else about the alleged defect. In 2009, after Kim found out about the accident, he repaired the condition himself, using cement to fill in the space. He testified that he did not repair the sidewalk before then, because he did not think that there was a problem.

The president of the management company and a partner in the company which owns the building, Allan Heussinger (Heussinger), testified that the management company managed six properties at the time of the accident. The company's job was to oversee the properties' day-to-day operations. The company visited the building in which Nordic was situated and checked the boiler, the roof, the lighting and cleanliness in the hallways, and the sidewalks

around the building. Heussinger testified that the building was inspected more frequently than once every three months, maybe not more frequently than once a month. He testified that the superintendent of the building did not have any responsibility to clear and clean the sidewalks. According to the lease, the commercial tenant had to remove rubbish and clear ice and snow. Heussinger testified that, if "we" had made repairs to the sidewalk, there would be a record of it (Heussinger transcript at 20). He further stated that he did not know if there were any records showing whether repairs had been made to the sidewalk, nor did he know if West Bridge had made any repairs to the sidewalk before the accident.

STANDARD

"The 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" (*Santiago v Filstein,* 35 AD3d 184, 185–186 [1st Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art,* 27 AD3d 227, 228 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

It is well established that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*Smith v Costco Wholesale Corp.,* 50 AD3d 499, 500 [1st Dept 2008]). It is well-established that an abutting landowner will not be liable to a pedestrian injured by a defect in a public sidewalk unless the landowner created the defective condition, caused the defect to occur because of some special use, or has a statutory duty to maintain the sidewalk (*see McGee by McGee v City of New York*, 252 AD2d 483, 483-84 [2d Dept 1998]).

New York City Administrative Code (Admin. Code) § 7-210 imposes such a duty on abutting landowners to "maintain [the] sidewalk in a reasonably safe condition" and further provides that the owner "shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk" (NYC Admin. Code §7-210). The First Department has interpreted Admin. Code § 7-210 as imposing liability "when it is established that the owner of said property created the condition alleged" or "failed to remedy the condition, despite having prior actual or constructive notice of it" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-61 [1st Dept 2010]).

DISCUSSION

West Bridge maintains it is entitled to summary judgment, dismissing plaintiff's claims asserted against it as plaintiff has no evidence that West Bridge created the defect on the sidewalk or had actual or constructive notice of it. However, the moving party cannot obtain summary judgment by noting the deficiencies in the other side's evidence (*Torres v Industrial Container,* 305 AD2d 136, 136 [1st Dept 2003]). In its papers West Bridge focuses on constructive notice, however the Court finds that West Bridge fails to demonstrate that the defect was not visible or that it did not exist long enough to be discovered and fixed. This is especially true in light of Kim's testimony that the defect which caused plaintiff's accident existed in 2003, approximately five years prior to plaintiff's accident. As such, West Bridge's motion to dismiss plaintiff's complaint as asserted against it must be denied, as there are triable issues of fact as to whether West Bridge had actual notice of the defect in the sidewalk.

West Bridge has asserted cross-claims against Nordic for contribution, common-law and contractual indemnification, and breach of contract based on failure to repair. The third-party complaint contains the same causes of action. West Bridge seeks summary judgment on its claims for contractual indemnification, breach of promise to repair the sidewalk, and breach of promise to procure insurance, although there is no specific cross-claim or third-party claim for

failure to procure insurance. In its reply, West Bridge also argues for summary judgment based on common-law indemnification, but arguments raised for the first time in reply papers are not considered (*see Wal-Mart Stores, Inc. v U.S. Fid. & Guar. Co.*, 11 AD3d 300, 301 [1st Dept 2004]).

Section 4 of the lease between West Bridge and Nordic (Michelle Cleaners, Inc.) requires the owner "to maintain and repair the public portions of the building, both exterior and interior" however it also requires that the tenant take good care of the demised premises and the adjacent sidewalks, and to make all non-structural repairs in order to preserve them in good working order (*see* Notice of Motion, exhibit K). Section 30 of the lease states that, if the tenant's premises are on the first floor, it shall at its own expense "make all repairs and replacements to the sidewalks and curbs adjacent thereto, and keep said sidewalks and curbs free from snow, ice, dirt and rubbish" (*id.*). Section 69 of the rider to the lease, states that the tenant must keep the sidewalk in front of its store free from garbage, obstructions, snow, and ice (Notice of Motion, exhibit K at Rider, p. 19).

Pursuant to section 8 of the lease, the tenant agrees to maintain insurance in favor of the owner and the tenant for bodily injury occurring in or upon the demised premises (Notice of Motion, exhibit K). Under section 8.1 of the rider, the tenant shall maintain insurance against claims for bodily injury occurring upon, in, on, or about the demised premises of not less than $500,000.00, and the owner and the tenant are to be named as insured parties in the policy (Notice of Motion, exhibit K at Rider, p. 1).

Section 8 of the lease provides that the tenant shall indemnify the owner against all claims and liabilities, including reasonable attorney's fees, for which the owner "shall not be reimbursed by insurance," incurred as a result of the tenant's breach of the lease, negligence, or improper conduct (Notice of Motion, exhibit K). Section 8 further provides that, if an action is brought against the owner because of the tenant's conduct, the tenant will, upon demand,

provide counsel to defend the owner (*id.*). Section 42 of the rider to the lease, entitled "Hold Harmless," states that the tenant agrees to indemnify the owner against all claims resulting from personal injury in or about the demised premises or the adjacent sidewalks (Notice of Motion, exhibit K at Rider, p. 8). Section 42 further states that "[t]he maintenance or existence of an insurance policy shall not be deemed to relieve Tenant of any obligations under this Article" (*id.*). Section 52 of the rider provides that, in case the owner is made a party to any litigation against the tenant, except between the owner and the tenant, the tenant will pay all expenses, costs and reasonable attorney's fees "incurred by or imposed on the Owner by in connection with such litigation, and any judgment resulting from such action which may be incurred or paid by the Owner in enforcing the covenants and agreements of this lease . . . ." (*id.* at 12). Lastly, section 83 of the rider states that, if the printed portion of the lease contradicts or is inconsistent with the rider, the provisions of the rider prevail (*id.* at 22).

A landowner's duty to keep the sidewalk safe is nondelegable, and as such, a lease obligating a tenant to repair the sidewalk does not impose on the tenant a duty to a third party, such as an injured plaintiff (*Collado*, 81 AD3d at 542, citing *Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003]). The effect of such a provision is to make the tenant assume a duty to the owner (*Leslie v Shanik Bros. Inc.*, 2012 NY Slip Op 31986[U], *10-11, 2012 WL 3113386, 2012 NY Misc LEXIS 3598 [Sup Ct, Queens County 2012]; *see also Cucinotta v City of New York*, 68 AD3d 682 [1st Dept 2009]). The tenant's duty to the injured third party depends upon the traditional indicia of negligence, that is, creation and notice, or making special use of the sidewalk (*Leary v Dallas BBQ*, 91 AD3d 519, 519 [1st Dept 2012]; *Berkowitz v Dayton Constr.*, 2 AD3d 764, 765 [2d Dept 2003]).

The question is whether Nordic assumed a duty to West Bridge to repair the sidewalk. Section 4 of the lease requires the tenant to perform only nonstructural repairs, whereas Section 30 of the lease requires the tenant to make "all repairs" (Notice of Motion, exhibit K).

The law regards repairs to sidewalks as structural repairs (*Langston v Gonzalez,* 39 Misc3d 371, 383 [Sup Ct, Kings County 2013]; *Wolfe v Gallery Partners, LLC,* 2012 NY Slip Op 32301[U], *10, 2012 WL 4029790, 2012 NY Misc LEXIS 4299 [Sup Ct, NY County 2012]). West Bridge argues that Nordic is responsible for all repairs to the sidewalks, while Nordic argues that it is responsible only for nonstructural repairs, and that the divot was a structural defect.

The case of *Nunziata v City of New York* (2013 NY Slip Op 31455[U], *7-8 [Sup Ct, NY County 2013]) concerned a lease in which Sections 4 and 30 had similar language regarding which type of repairs the tenant is obligated to make, and the same meaning as the corresponding provisions in this case. In *Nunziata,* the court found that Sections 4 and 30 in the lease before it were identical to the same articles in the lease in *Collado* (81 AD3d 542). The *Nunziata* court followed the First Department's determination in *Collado* that Section 30 controlled article 4, which meant that the tenant assumed the duty to make all repairs to the sidewalk, not just non-structural repairs (*Nunziata,* 2013 NY Slip Op 31455[U] at *7-8). Likewise, the conclusion here is that Section 30, which states that the tenant must make all repairs and replacements to the sidewalks and curbs adjacent thereto, controls Section 4, which states that the tenant must make all non-structural repairs. As such, Nordic was obligated under the lease to make all repairs to the sidewalk, structural and nonstructural. Accordingly, Nordic may be held liable to the owner for damages resulting from a violation of its contractual obligation to repair the sidewalk in front of its business. However, West Bridge's motion for summary judgment for failure to repair cannot be granted because there are factual issues as to whether the divot was a dangerous condition that caused plaintiff's accident and actual notice by West Bridge.

As to West Bridge's claims for indemnification, Nordic argues that section 42 of the rider to the lease violates General Obligations Law (GOL) § 5–321, which provides that a lease

provision which purports to exempt a lessor from liability for its own acts of negligence is void and unenforceable. On its face, section 42 of the rider violates the statute, because it shifts to the tenant the entire responsibility for any damages, regardless of the landlord's own negligence (*see Langston*, 39 Misc 3d at 381-382; Notice of Motion, exhibit K, p. 8). An exception to GOL § 5-321 arises, where the lease was negotiated at arms' length between sophisticated parties, and the indemnification clause evinces a clear intent to indemnify and is "coupled with an insurance procurement requirement" (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]; *Port Parties, Ltd. v Merchandise Mart Props., Inc.*, 102 AD3d 539, 540 [1st Dept 2013]). Under this exception the landlord can be indemnified for its own negligence. However, it is not clear whether this exception applies to the case at bar for West Bridge, as West Bridge raises this argument for the first time in reply. As the Court discusses above, arguments raised for the first time in reply papers are not considered (*Wal-Mart Stores, Inc.*, 11 AD3d at 301). Further, West Bridge does not address the elements of negotiation or sophistication of the parties to the lease.

Moreover, apparently, Nordic did not obtain the required insurance. Nordic does not respond to West Bridge's claims that it did not secure the requisite insurance. On a summary judgment motion, "uncontradicted facts are deemed admitted" (*Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 1999] [internal quotation marks and citation omitted]). If West Bridge is liable, it cannot be indemnified for its own negligence in the absence of the required insurance (*see Port Parties*, 100 AD3d at 540-541 [licensee never obtained the contractually requisite insurance, and enforcement of the indemnification provision in absence of insurance would permit the contractor to avoid responsibility for its own negligence], *but see Santamaria v 1125 Park Ave. Corp.*, 238 AD2d 259, 260 [1st Dept 1997]).

GOL permits partial indemnification to insulate the indemnitee from liability to the extent that it is not negligent (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008]; *see also*

GOL § 5-322.1]). Thus, a lease provision that purports to exempt a lessor from its own negligence may allow the lessor to be indemnified for another party's negligence, even where the lessor is partially negligent. This partial indemnification is allowed where the indemnification provision allows indemnification "'to the fullest extent permitted by law"' or contains a similar phrase (*id.* at 210; *DiGirolamo v ABM Janitorial Servs., Inc.*, 30 Misc 3d 1208[A], 2011 NY Slip Op 50012[U], *6 n 2 [Sup Ct, NY County 2011]; *see also Spector v Cushman & Wakefield, Inc.*, 34 Misc 3d 1204[A], 2011 NY Slip Op 52426[U], *6-7 [Sup Ct, NY County 2011], *affd* 100 AD3d 575 [1st Dept 2012]). In addition, an indemnification provision that purports to indemnify a party for its own negligence may provide full indemnification for that party, when the indemnified party is proven free of any active negligence, even if the provision does not include the "savings language" (*Spector,* 2011 NY Slip Op 52426[U] at *6; *see also Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 884 [1st Dept 2012]; *Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306, 306 [1st Dept 2002]).

Section 42 of the lease agreement does not have any savings language (*see* Notice of Motion, exhibit K). Thus West Bridge is not entitled to partial indemnification. West Bridge wants Nordic to assume its defense, but not being an insurer, Nordic's duty to defend is no broader than its duty to indemnify (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]). If Nordic does not have to indemnify West Bridge, it has no duty to defend it (*see DiBuono v Abbey, LLC,* 83 AD3d 650, 653 [2d Dept 2011]). If the trial demonstrates that West Bridge's liability is only vicarious or statutory and not due to its fault to any degree, it is entitled to indemnification from Nordic. The broad language of section 42 encompasses attorneys' fees and costs (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 415 [1st Dept 2009]; *DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 271 [1st Dept 1994]). The principles applicable to section 42 apply to section 52 of the rider, another provision requiring Nordic to indemnify West Bridge.

Section 8 of the lease is also an indemnification provision. It states that the tenant must indemnify the owner against claims resulting from the tenant's misconduct which will not be reimbursed by insurance. This provision, which is enforceable, means that the tenant must "reimburse the owner only for damages not covered by any insurance policy, including insurance obtained by the owner" (*Collado,* 81 AD3d at 543, citing *Diaz v Lexington Exclusive Corp.,* 59 AD3d 341, 342-343 [1st Dept 2009]). Under article 8, if West Bridge, due to Nordic's fault, incurs losses which are not reimbursed by insurance, including insurance obtained by West Bridge, Nordic will have to pay those losses.

While article 8 in the lease requires Nordic to indemnify West Bridge only if Nordic is at fault and only to the extent that West Bridge is not reimbursed by insurance, article 42 in the rider requires indemnification regardless of Nordic's fault and any reimbursement to West Bridge. If there is any inconsistency between the rider and the lease, the former governs. The impact of any inconsistency or contradiction will be determined in the light of a determination as to West Bridge's and Nordic's relative liability or lack of liability. That is more efficient than presently conjecturing how possible outcomes will be effected by the different provisions of the lease.

Accordingly, the portion of West Bridge's motion for summary judgment on its claim against Nordic for contractual indemnification is denied. In addition, where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature (*Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469, 470 [1st Dept 2008]). A question of fact exists as to West Bridge's liability. The portion of West Bridge's motion seeking judgment for failure to procure insurance is denied, as West Bridge does not specifically set forth a cause of action for such relief.

CONCLUSION

Upon the foregoing, it is

ORDERED that West Bridge's motion is denied; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 12/6/13

PAUL WOOTEN J.S.C.

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

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