Lavia v City of New York
2014 NY Slip Op 33461(U)
January 7, 2014
Supreme Court, Bronx County
Docket Number: 308402/09
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CATHERINE LAVIA,

Plaintiff(s),

- against -

CITY OF NEW YORK, EASY STREET PLUMBING, EMPIRE CITY SUBWAY COMPANY (LIMITED), CEMUSA NY INC., NICO ASPHALT PAVING, INC., AND CONSOLIDATED EDISON COMPANY OF NY., INC.,

Defendant(s).

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DECISION AND ORDER

Index No: 308402/09

In this action for the alleged negligent maintenance and repair of the public roadway, defendant THE CITY OF NEW YORK (the City) moves for an order, *inter alia*, granting it summary judgment thereby dismissing the complaint and all cross-claims asserted against it. The City avers that because it had no prior written notice of the defect alleged to have caused plaintiff's accident, summary judgment in its favor is warranted. Plaintiff opposes the instant motion alleging that the City fails to establish the absence of prior written notice and thus fails to establish prima facie entitlement to summary judgment. Defendant EASY STREET PLUMBING, INC. (Easy Street) also moves for an order granting it summary judgment, thereby dismissing the complaint and all cross-claims asserted against it on grounds that because it performed no work on the portion of the roadway where plaintiff alleges to have fallen, it cannot be liable. To the extent that Easy Street seeks

summary judgment for the foregoing reason, its motion is unopposed. Defendant EMPIRE CITY SUBWAY COMPANY (LIMITED) (Empire City), also moves for an order granting it summary judgment over and against defendant NICO ASPHALT PAVING, INC. (Nico) on Empire City's cross-claim for contractual indemnification on grounds that the agreement between Nico and Empire City's subsidiary, Verizon, requires indemnification for any claims arising from Nico's negligence in connection with the work performed for Empire City. Plaintiff opposes Empire City's motion on grounds that it fails to negate its negligence in connection with the work performed at the location of plaintiff's accident. Nico also opposes Empire City's motion on grounds that Empire City was not a party to contract giving rise to indemnification.

For the reasons that follow hereinafter, the City's motion is granted, Easy Street's motion is also granted, and Empire City's motion is denied.

The instant action is for personal injuries allegedly sustained by plaintiff on October 22, 2009 while traversing the public roadway. Plaintiff's complaints[1] allege that on December 22, 2009, while traversing the roadway located on Eastchester

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[1] Plaintiff filed three complaints, two against different defendants, initiating two actions, which were subsequently consolidated under the this action by this Court's order dated June 21, 2012, and an amended complaint amending the allegations against one set of defendants.

Avenue near Bassett Avenue, Bronx, NY - more specifically, approximately 7 feet from the parking meter located approximately 114 feet south of the intersection of Eastchester Road and Bassett Avenue - she tripped and fell on a negligently repaired portion of the roadway. To the extent relevant, plaintiff alleges that the City owned and maintained the roadway herein and that it hired Easy Street and Empire City to perform work thereon. Plaintiff also alleges that defendant Nico performed work on the roadway. Plaintiff alleges that Nico's work was negligently performed, said negligence causing the defective condition alleged, and said condition causing plaintiff's injuries.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence,

generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The City's Motion

The City's motion for summary judgment is hereby granted insofar as the City establishes that it had no prior written notice of the defect alleged to have caused plaintiff's accident at least 15 days prior to her fall.

Pursuant to section 7-201(c)(2) of the New York City Administrative Code,

> [n]o civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days

> after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Accordingly, generally, a municipal defendant bears no liability under a defect falling within the ambit of section 7-201(c) "unless the injured party can demonstrate that a municipality failed or neglected to remedy a defect within a reasonable time after receipt of written notice" (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]). Even when there is evidence that the municipality had prior written notice of a defective condition, liability for the same is obviated upon evidence that the same was repaired prior to a plaintiff's accident (*Lopez v Gonzalez*, 44 AD3d 1012, 1013 [2d Dept. 2007] [Municipal defendant granted summary judgment because, *inter alia*, while it had prior written notice of the condition alleged, it had repaired it and no further written notice existed at least 15 days prior to plaintiff's accident]). An exception to the foregoing exists, however, where it is claimed that the municipal defendant affirmatively created the condition alleged to have caused plaintiff's accident, in which case, the absence of prior written notice is no barrier to liability (*Elstein v City of New York*, 209 AD2d 186, 186-187 [1st Dept 1994]; *Bisulco v City of New York*, 186 AD2d 85, 85 [1st Dept 1992]). A plaintiff seeking to proceed on a theory that the municipality created the defect alleged, however, must establish that the defective condition was improperly installed so as to bring the defect out of the ambit of

ordinary wear and tear (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]). Stated differently, the proponent of a claim that a municipal defendant created a dangerous condition must establish that work performed by the municipal defendant was negligently performed such that it "immediately result[ed] in the existence of [the] dangerous condition" alleged (*Yarborough* at 728 [internal quotation marks omitted]).

On a motion for summary judgment,

> [w]here the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality

(*Yarborough* at 726).

With respect to whether certain documents establish prior written notice, it is well settled that Big Apple Maps can establish prior written notice upon the City (*Katz v City of New York*, 87 NY2d 241, 243 [1995] ["Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon."]. While it is certainly

true that "[d]isputes as to whether the location and nature of the defect are sufficiently portrayed [on the map] so as to bring the condition to the municipality's attention involve factual questions appropriately resolved at trial" (*Sondervan v City of New York*, 84 AD3d 625, 625-626 [1st Dept 2011]), it is also true that where the symbol on the map has no corresponding symbol on the legend, the map does not provide notice as a matter of law (*D'Onofrio v City of New York*, 11 NY3d 581, 585 [2008] [Court set aside jury verdict where the symbol on the map did not correspond to any defect on the legend.]). Similarly, any documents created by the agency responsible for the repair of the defect reflected therein constitutes an acknowledgment under § 7-201(c)(3), and are sufficient to confer prior written notice in satisfaction of the statute (*Bruni v City of New York*, 2 NY3d 319, 326-327 [2004] ["That purpose is fulfilled by a written acknowledgment from the responsible agency showing that it had knowledge of the condition and the danger it presented."]; *cf. Laing v City of New York*, 133 AD2d 339, 340 [2d Dept 1987] [Court held that written acknowledgment by the Department of Parks and Recreation of a cracked sidewalk did not confer prior written notice upon the City since that agency was not the Department of Transportation to whom notice was to be given.]; *aff'd* 71 NY2d 912 [1988] [affirmed for different reasons, namely that the document evincing a cracked sidewalk was created in connection with tree pruning and not

sidewalk maintenance and thus "cannot be considered an expression of the City's awareness of an unsafe or defective sidewalk in need of repair." The court did not reach the question addressed by the Appellate Division, namely whether such acknowledgment had to come from the Department of Transportation.]).

However, it is well settled that citizen complaints (Lopez at 1012) or complaints to the City's 311 system do not provide prior written notice of a sidewalk defect (*Kapilevich v City of New York*, 103 AD3d 548, 549 [1st Dept 2013]). Similarly, telephonic complaints, even if reduced to writing do not satisfy the statute either (*Dalton v City of Saratoga Springs*, 12 AD3d 899, 901 [3d Dept 2004]; *Cenname v Town of Smithtown*, 303 AD2d 351, 352 [2d Dept 2003]). This of course makes sense since § 7-201(2) requires "written notice of the defective, unsafe, dangerous or obstructed condition. . . to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice." Repair orders, even if reduced to writing also fail to establish prior written notice upon a municipality sufficient to satisfy § 7-201 (*Marshall v City of New York*, 52 AD3d 586, 587 [2d Dept 2008] ["Contrary to the plaintiff's contention, repair orders or reports, reflecting only that pothole repairs had been made to the subject area more than a year before the accident, were insufficient to constitute prior written notice of the defect that allegedly caused the plaintiff's injuries."]; *Khemraj v City of New*

York, 37 AD3d 419, 420 [2d Dept 2007] ["Moreover, the repair order or 'FITS report' from 1999, which reflected only that a pothole repair had been made to the subject area approximately 1 1/2 years prior to the plaintiff's fall, was insufficient to constitute written notice to the City."]; *Lopez* at 1012 ["Contrary to the plaintiff's contention, neither the citizen complaints nor the prior written repair orders constituted written notice of those prior defects."]). It is equally well settled that permits do not satisfy the prior written notice requirement promulgated by § 7-201 of the Administrative Code (*Levbarg v City of New York*, 282 AD2d 239, 242 [1st Dept 2011]; *DeSilva v City of New York*, 15 AD3d 252, 253 [1st Dept 2005]; *Gee v City of New York*, 304 AD2d 615, 617 [2d Dept 2003]).

On September 14, 2003, with the passage of § 7-210 of the New York City Administrative Code, maintenance and repair of public sidewalks and any liability for a failure to perform the same, was shifted, with certain exceptions, to owners whose property abutted the sidewalk (*Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009], *revd on other grounds* 14 NY3d 779 [2009]; *Klotz v City of New York*, 884 AD3d 392, 393 [1st Dept 2004]); *Wu v Korea Shuttle Express Corporation*, 23 AD3d 376, 377 [2d Dept 2005]).

Specifically, §7-210 states, in pertinent part, that

> [i]t shall be the duty of the owner of

> real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition. . . [, that] the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. . . [, that][f]ailure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. . . [,and that] [t]his subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

As noted above, because of § 7-201, prior to that the passage of § 7-210, the duty to repair and maintain the public sidewalks in a reasonably safe condition rested with the municipality within which the sidewalks were located (*Ortiz* at 24; *Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept 2004]; *Belmonte v Metropolitan Life Insurance Company*, 304 AD2d 471, 474 [1st Dept 2003]). Accordingly, before § 7-210, an abutting landowner had no duty to maintain the public sidewalk and was not liable for an accident occurring thereon unless he/she created the dangerous condition alleged or derived a special use from the sidewalk (*Weiskopf* at

203; *Belmonte* at 474). Accordingly, whereas tort liability for an accident involving a defective condition on a public sidewalk was once premised only upon the abutting owner's affirmative acts in making the sidewalk more hazardous, i.e., causing or creating a dangerous condition (*Ortiz* at 24), with the enactment of § 7-210, it is now well settled that an owner of property abutting a public sidewalk is liable for a dangerous condition upon said sidewalk even in the absence of affirmative acts (*id.* at 25; *Martinez v. City of New York*, 20 A.D.3d 513, 515 [2d Dept 2005]). Despite the enactment of § 7-210, the City nevertheless remains responsible to maintain certain sidewalks such as those abutting "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (New York City Administrative Code § 7-210[c]), and is liable for defects existing on the sidewalks abutting exempt properties or in cases where the City created the dangerous condition alleged, or enjoyed a special use of the area upon where the defect existed (*Yarborough* at 726). Additionally, the City remains liable to maintain the curbs abutting public sidewalks because § 7-210 only shifted the responsibility of sidewalk maintenance to an abutting landowner, which is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians" (New York City

Administrative Code § 19-101(d); *see also Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] [Defendant, abutting property owner granted summary judgment in an action arising from an accident on a defective portion of the sidewalk when the evidence established that the accident occurred on the curb.]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]).

Thus, as is the case with any action sounding in premises liability, an owner of real property abutting a public sidewalk is now liable if it is proven that he or she created the dangerous condition, had prior actual or constructive notice of its existence (*Weinberg v 2345 Ocean Associates, LLC*, 108 AD3d 524, 525 [2d Dept 2013]; *Anastasio v Berry Complex, LLC*, 82 AD3d 808, 809 [2d Dept 2011]), or enjoyed a special use of the public sidewalk (Terilli v Peluso, 114 AD3d 523, 523 [1st Dept 2014]; *Rodriguez v City of Yonkers*, 106 AD3d 802, 803 [2d Dept 2013]). As in any case premised on the negligent maintenance of real property, it is well settled that a prerequisite for the imposition of liability for a dangerous condition within, or, on real property, is a defendant's occupancy, ownership, control or special use of the premises (*Balsam v Delma Engineering Corporation*, 139 AD2d 292, 296-297 [1st Dept. 1998]; *Hilliard v Roc-Newark Assoc.*, 287 AD2d 691, 693 [2d Dept 2001]). Absent evidence of ownership, occupancy, control, or special use, liability cannot be imposed (*Balsam* at 297).

Here, the City submits the transcript of plaintiff's 50-h hearing, where she testified that on October 22, 2008 at approximately 6:30PM, she tripped and fell on a bump on the roadway located on Eastchester Road near Basset Avenue. Plaintiff had just exited Calvary Hospital and was walking to her car, which was parked near a meter by the service entrance to the hospital. As she stepped onto the roadway near the front of her vehicle she tripped and fell on a lip on the road. More specifically, plaintiff testified that she tripped on a bump on the roadway, or a section of the same which was not flat.

The City also submits documents evincing the results of a searches it conducted of its records for the area upon which plaintiff alleges to have fallen, namely, the roadway located on Eastchester Road between Bassett Avenue and Waters Place, Bronx, NY. Specifically, the City produced documents detailing the results of a search conducted of its Department of Transportation (DOT) records. The search undertaken was for the aforementioned roadway, for a period of two years prior to plaintiff's alleged accident. The documents searched were, *inter alia*, permits, permit applications, corrective action reports, inspection reports, cutforms, maintenance and repair records, gangsheets, notices of violation, and Big Apple Maps and legends. The search unearthed seven permits, one permit application, two corrective action requests, five notices of violation, twenty inspection records, and

two Big Apple Maps.

Preliminarily, since it is well settled that permits do not satisfy the prior written notice requirement promulgated by § 7-201 of the Administrative Code (*Levbarg* at 242; *DeSilva* at 253; *Gee* at 617), the Court need not discuss the contents of the seven permits and one permit application disclosed by the City's search. Similarly, while Big Apple Maps can establish prior written notice upon the City (*Katz* at 243), here the Big Apple Maps and their accompanying legend indicate that the only portions of the roadway for which the map lists defects are crosswalks. Because plaintiff's testimony fails to establish that her accident occurred on the crosswalk, the Court, thus, need not discuss the two maps exchanged by the City.

With respect to the remaining items unearthed by the City's search, namely, the notice of violations, corrective action requests, and inspection reports - such documents, to the extent they memorialize defects on the roadway - constituting an acknowledgment because they were created by DOT, the agency to whom prior notice must be given under § 7-201 (*Bruni* at 326-327), they - to the extent relevant - establish the following. On July 29, 2007, the City inspected Empire City's work on the roadway located on Eastchester Road between Bassett Avenue and Waters Place in connection with permit X012007171054. The City issued a corrective

action report because the cut made by Empire City to the roadway was sunken-in. Upon reinspection on August 4, 2007, the City issues a notice of violation because Empire City had failed restore the roadway in a timely manner. However, upon reinspection on October 4, 2007 and August 11, 2008, the City gave the work performed a "Pass," thereby designating the work performed as acceptable.

Based on the foregoing, the City establishes prima facie entitlement to summary judgment by tendering evidence that it had no prior written notice of any bump, or a less than flat portion of the road, let alone a defective condition at or around the location where plaintiff alleges to have fallen at least 15 days prior to her accident. As noted above, the Big Apple Map fails to establish prior written notice since it doesn't report defects on roadways, outside the boundaries of the cross-walks located thereat. Moreover, while the records provided by the City evince that it observed and noted that the portion of roadway where plaintiff alleges she fell was sunken - such description consistent with the defect described by plaintiff - such notation was noted in 2007 and as evinced by the records, on August 11, 2008, upon inspection by the City, the condition was satisfactorily repaired. Thereafter, and prior to October 22, 2008, the City's records do not indicate that the City had written notice of any defect at the location of plaintiff's alleged accident - let alone notice of the condition

alleged by plaintiff. Thus, the City estabishes prima facie entitlement to summary judgment (*Lopez* at 1013 [Municipal defendant granted summary judgment because, *inter alia*, while it had prior written notice of the condition alleged, it had repaired it and no further written notice existed at least 15 days prior to plaintiff's accident.]).

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. Contrary to plaintiff's assertion, the mere fact that the City had prior written notice of the condition alleged months prior to plaintiff's accident is - under these facts - irrelevant, when, as here, the evidence demonstrates that the condition alleged was repaired and no prior notice of the same was provided thereafter. Thus, The City's motion for summary judgment is hereby granted.

Easy Street's Motion

Easy Street's motion seeking summary judgment is granted insofar as it establishes that it did not perform any work at the exact location where plaintiff alleges to have fallen, such that it could not have created the condition alleged to have caused her fall.

With respect to the liability of a third-party who performs work on a public roadway, it is well settled that liability hinges

on whether such party's negligence in the work performed caused and created the condition alleged through (*Cino v City of New* York, 49 AD3d 796, 797 [2d Dept 2008] ["A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk."]; *Marchi v Empire City Subway*, 10 AD3d 566, 566 [1st Dept 2004] ["Triable issues exist as to whether plaintiff's slip and fall was caused by an improperly maintained manhole cover."]; *Adler v Suffolk County Water Authority*, 306 AD2d 229, 230 [2d Dept 2003 ["The SCWA did not submit any evidence with its moving papers to establish that it did not install the water valve box or that it did not create the alleged defect in the roadway by installing the water valve box in a negligent manner."]; *Atiles v City of New York*, 279 AD2d 543, 543 [2d Dept 2001] ["The Supreme Court properly denied the appellant's motion for summary judgment as there are questions of fact as to whether it negligently performed repairs at the location of the accident."]).

Here, Easy Street submits a photograph with a mark inscribed thereon, which according to plaintiff, whose deposition transcript, Easy Street also submits, represents the area upon which she allegedly fell. The photograph depicts an area of the roadway on Eastchester Road and it appears that the section is not far from the curb but very far from the nearest intersection. Easy Street also submits the transcript of Joseph Belziti (Belziti), a

supervisor employed by Easy Street, who testified that on May 31, 2007, it obtained a permit to perform work at the intersection of Basset Avenue and Eastchester Road. Said permit was obtained in connection with Easy Street's retention by Empire City, who retained Easy Street to address a leak encountered by Empire City while they were performing work on Eastchester Road. The work performed by Easy Street consisted of pipe repair, which pipes were accessed via cuts to the roadway at the intersection of Eastchester Road and Bassett Place. Easy Street performed the foregoing work beginning May 31, 2007 through June 1, 2007. Easy Street did not perform any other work at the location herein.

Based on the foregoing, it is clear that Easy Street did not perform any work at the location where plaintiff alleges to have fallen so as to be charged with any liability for creating the condition alleged by plaintiff. The picture which plaintiff marked at her deposition establishes that she fell a substantial distance from the intersection of Bassett Avenue and Eastchester Road and Belziti testified that Easy Street only performed work involving the roadway at the intersection of Eastchester Road and Bassett Avenue. Thus, Easy Street establishes prima facie entitlement to summary judgment.

Nothing submitted by plaintiff raises an issue of fact sufficient to preclude summary judgment. In fact, to the extent

that Easy Street argues that it did not perform any work at the location of plaintiff's accident plaintiff expressly concedes this point. Accordingly, Easy Street's motion for summary judgment is granted.

Empire City's Motion

Empire City's motion for summary judgment is hereby denied insofar as it fails to establish prima facie entitlement to such relief. Specifically, insofar as Empire City seeks summary judgment over and against Nico on its cross-claim for contractual indemnification, such relief must be denied because Empire City fails to establish the absence of any negligence in connection with the work it performed at the location herein.

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562,

569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]) Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing (*Vermont Teddy Bear Co., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

Generally, when a party seeks contractual indemnification, the party seeking indemnification need only prove that he or she was free from negligence, was held liable only by virtue of a statute imposing liability, and that there was a valid contract governing the indemnification (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]; *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Whether or not the indemnitor, the

party who will be indemnifying the other, was negligent is irrelevant (*Uluturk* at 234; *Correia* at 65).

Notwithstanding the foregoing, generally, General Obligations Law § 5-322.1, precludes contractual indemnification where the indemnification clause in the contract seeks to impose complete and total indemnification notwithstanding the indemnitee's negligence (*Itri Brick & Concrete Corp. v Aetna Casualty & Surety Company*, 89 NY2d 786, 794 [1997]. This is because GOL § 5-322.1 states that

> [a] covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

In *Itri Brick & Concrete Corp.*, the court, analyzing two separate and distinct indemnification clauses, found them both void, unenforceable, against public policy, and in violation of GOL §5-322.1 because the clauses mandated indemnification for injuries arising "from any cause while on or near the project" or "in connection with or resulting from the work," such that the clauses sought to impose "an indemnification obligation on the subcontractors without limitation in terms of negligence of the general contractor/owner" (id. at 793-794). Thus, the court held that these clauses mandated complete indemnification even if the indemnitee caused the injury in whole or in part, which is the very scenario - indemnification for one's own negligence - that GOL § 5-322.1 was meant to proscribe (*id.* at 796).

Here, the Court need not determine whether, as argued by Nico, the contract at issue, which purportedly calls for indemnification for claims "resulting in whole or in part from the acts or omissions of [Nico]," mandates that Nico indemnify Empire City on grounds that Empire City is not a party to the contract. The instant motion must be denied since Empire City fails to establish, as required by law, that it was not negligent in connection with the claims asserted by plaintiff - namely that it did not cause nor create the condition alleged to have caused her accident (*Uluturk* at 234; *Correia* at 65). In fact, obviously unaware of its burden under prevailing law, Empire City doesn't even argue or attempt to

establish that it was not negligent in connection with any work it performed at the location of plaintiff's accident. Since a prerequisite to contractual indemnification is that the indemnitee establish the absence of its/his/her negligence, Empire City fails to establish prima facie entitlement to summary judgment and the Court need not discuss the sufficiency of the papers submitted in opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). It is hereby

ORDERED that the complaint against the City and Easy Street as well as all cross-claims asserted against them be dismissed, with prejudice. It is further

ORDERED that this action be referred to a non-City Part insofar as the City is no longer a party. It is further

ORDERED that Easy Street and the City serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

Dated : January 7, 2014
Bronx, New York

Mitchell J. Danziger, ASCJ