Martinez v G&R Garage Inc.
2017 NY Slip Op 31560(U)
June 15, 2017
Supreme Court, Bronx County
Docket Number: 22152/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ALTEMIS MARTINEZ,

Plaintiff(s),

DECISION AND ORDER

Index No: 22152/12

- against -

G&R GARAGE INC., MANHATTAN PARKING SYSTEMS, LLC AND THE CITY OF NEW YORK,

Defendant(s).

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In this action for personal injuries arising from the negligent maintenance of a premises, defendant THE CITY OF NEW YORK (the City) moves for an order granting it summary judgment and dismissal of the complaint and all cross-claims asserted against it. The City contends that it is entitled to summary judgment because with respect to the instant premises, it was an out of possession landlord with no maintenance responsibilities and as such, it cannot be liable. Alternatively, the City seeks summary judgment on its cross-claim for contractual indemnification against defendants G&R GARAGE INC. (G&R) and MANHATTAN PARKING SYSTEMS, LLC (Manhattan) on grounds, *inter alia*, that the agreement between G&R, Manhattan, and nonparty the New York City Health and Hospitals Corporation (the HHC) contains an indemnification clause. Plaintiff, G&R, and Manhattan oppose the City's motion, asserting, *inter alia*, that the City fails to establish that with respect to the instant premises, it was an out of possession landlord with no

maintenance responsibility. For this reason, Manhattan and G&R contend that with respect to contractual indemnification, the City fails to establish, *inter alia*, that it was free from negligence.

For the reasons that follow hereinafter, the City's motion is denied.

A review of the pleadings establishes the following: On August 26, 2011, plaintiff tripped and fell on a pothole while at the parking garage within premises located at 234 East 149th Street, Bronx, NY (234). It is alleged that defendants operated, controlled, and maintained 234, that they were negligent in failing to maintain 234 in a reasonably safe condition, and that such negligence caused her accident and the injuries resulting therefrom. Within its answer, the City interposes several cross-claims against G&R and Manhattan, including one for contractual indemnification.

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 his 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 Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

While the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. Notably,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the

> opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, the opponent on a motion for summary judgment can have the court consider inadmissible evidence provided he tenders an excuse for failing to submit it in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]. Alternatively, the court can consider inadmissible evidence tendered in opposition to a motion for summary judgment if the inadmissable evidence would otherwise be admissible at trial upon a proper foundation and raises questions of fact sufficient to defeat the motion (*Phillips v Joseph Kantor & Company*, 31 NY2d 307, 310 [1972]; *Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [1st Dept 2007]; *Levbarg v City of New York*, 282 AD2d 239, 241 [1st Dept 2001]; *Eitner v 119 West 71st Street Owners Corp.*, 253 AD2d 641, 642 [1st Dept 1998]).

Summary Judgment with Respect to Complaint

The City's motion seeking summary judgment and dismissal of

the complaint and all cross-claims is denied. On this record, the City fails to establish that as owner of 234, it relinquished all maintenance responsibility and control, such that it became an out of possession landlord with no liability to plaintiff. Thus, on this record, applying the law relative to premises liability, as owner of 234, given the nature of the condition alleged, the City can be charged with constructive notice of the pothole alleged such that summary judgment must be denied.

Under the common law, a landowner is duty bound to maintain his or her property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233, 242 [1976]). Thus, the owner of a premises is required to exercise reasonable care in the maintenance of his property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*id.*). Accordingly, liability for a dangerous condition within a premises requires proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a transitory condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575, 575 [2000]). To be sure, "where the hazardous condition is transitory, a defendant may establish its entitlement to summary judgment by demonstrating that the condition could have arisen shortly before the accident" (*Betances v 185-189 Audubon Realty, LLC*, 139 AD3d 404, 405 [1st Dept 2016]; *Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; *Brooks-Torrence v Twin Parks Southwest*, 133 AD3d 536, 536 [1st Dept 2015]). In *Brooks-Torrence*, where plaintiff alleges to have tripped and fallen

on a plastic bag located on steps, the court granted defendant summary judgment finding, in part, no constructive notice because "plaintiff testified that she did not see the plastic bag or any other debris on the staircase when she arrived at defendant's building, only seeing the bag after she fell" (*id.* at 536).

Generally, on a motion for summary judgment a defendant establishes *prima facie* entitlement to summary judgment when the evidence establishes the absence of notice, actual or constructive (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803, 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790, 790 [3d Dept 1998]). Notably, addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Green v Albemarle, LLC*, 966, 966 [2d Dept 2013]). If defendant meets his burden it is then incumbent upon plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

It is well settled that generally an owner who leases property to another, relinquishing possession, is not liable for injuries sustained upon that property unless (1) there is an agreement obligating the landlord to keep the demised premises in good repair (*Putnam v Stout*, 38 NY2d 607, 616-617 [1976]; *Negron v Helmsley Spear, Inc.*, 280 AD2d 305, 305-306 [1st Dept 2001]; *DeLeon v The Rajon Company*, 243 AD2d 366, 366 [1st Dept 1997]; *Manning v New York Telephone Company*, 157 AD2d 264, 266 [1st Dept 1990]); (2)there is a duty to maintain the demised premises imposed by statute (*Stephen v Brooklyn Pub. Lib.*, 120 AD3d 1221, 1221 [2d Dept 2014]; *Mercer v Hellas Glass Works Corp.*, 87 AD3d 987, 988 [2d Dept 2011]); or (3) the landlord retains actual control of the leased premises, or by course of conduct, assumes the responsibility to maintain such property (*Cherubini v Testa*, 130 AD2d 380, 382 [1st Dept 1987]; *Reidy v Burger King Corporation*, 250 AD2d 747, 748 [2d Dept 1998]; *Davidson v Wiggand*, 259 AD2d 799, 801 [3d Dept 1999]).

There are, however, exceptions to the foregoing rule - only one of which is relevant here. An out-of-possession landlord - one who has relinquished control - may be held liable if he has a general right to reenter the premises, reserving the right to make needed repairs, and the condition alleged to have caused an accident involves a significant structural or design defect, which is contrary to statutory safety provisions (*Malloy v Friedland*, 77 AD3d 583, 583 [1st Dept 2010]; *Hausmann v UMK, Inc.*, 296 AD2d 336,

336 [1st Dept 2002]; *Nameny v East New York Savings Bank*, 267 AD2d 108, 109 [1st Dept 1999]; *Raynor v 666 Fifth Avenue Limited Partnership*, 232 AD2d 226, 226 [1st Dept 1996]. A structural defect is one which violates a statute prescribing specific maintenance responsibility, which includes the Administrative Code of the City of New York if it prescribes a specific maintenance responsibility and Multiple Dwelling Law § 78 (*Guzman v Haven Plaza Housing Development Fund Company, Inc.*, 69 NY2d 559, 566 [1987]; *Worth Distributors, Inc. v Latham*, 59 NY2d 231, 238 [1983]; *Manning v New York Tel. Co.*, 157 AD2d 264, 267-268 [1st Dept 1990]). Significantly, violations of regulations do not constitute a structural defect so as to give rise to liability in cases where a landlord is out of possession but nonetheless retains a right to reenter a premises (*Velasquez v Tyler Graphics, LTD.*, 214 AD2d 489, 490 [1st Dept 1995]). The breach of a general maintenance provision of the Administrative Code of the City of New York, is also not tantamount to a structural defect (*Manning* at 270; *see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 413-14 [1st Dept 2012] ["Indeed, if the ramp were part of the sidewalk, landlord was not responsible for clearing it of snow or ice because the lease provided that tenant was responsible for maintaining its premises and removing snow and ice from the sidewalk. Thus, the motion court's application of Administrative Code of the City of New York § 7-210[b], that imposes liability on owners for, inter alia, their

negligent failure to remove snow, ice, dirt, or other material from the sidewalk, was misplaced." [internal quotation marks omitted]). While prior notice of the defective condition alleged is a prerequisite to liability in any case alleging premises liability (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937 [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317, 318 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]), when an out-of-possession landlord retains a right to reenter leased premises, he is charged with actual notice of any structural defect existing therein (*Guzman* at 566-657).

In support of its motion, the City submits plaintiff's 50-h hearing and deposition transcripts wherein she testified, in pertinent part, as follows: On August 26, 2011, at approximately 9AM, plaintiff tripped and fell within the parking garage located within 234. Plaintiff was employed at 234, which houses Lincoln Hospital and was headed to work immediately prior to her accident. She had just parked her car on the fourth floor of the parking garage. She then took the stairs down to the second floor of the garage which contained an entrance to the hospital. As she traversed the garage's cement floor on the second floor, she tripped and fell on a pothole located thereat. The hole was two feet long, two feet wide and maybe an inch deep. Although this was

plaintiff's customary route to work, and she recalls seeing many potholes at this location, she did not see the instant hole until after she stepped onto it. Prior to her fall, plaintiff had not made any complaints regarding the potholes.

The City also submits Richard Marin's (Marin) deposition transcript wherein he testified, in pertinent part, as follows: In February 2011, Marin was employed by Lincoln Hospital, an HHC facility as Chief of Staff to the Senior Vice President. The hospital had a parking garage and both were owned by the City. With respect to the garage, its maintenance was delegated to Manhattan, doing business as G&R, pursuant to a written contract between HHC and Manhattan. Said agreement was dated November 2010. Marin's duties entailed the implementation of special projects. In 2013, when the person for whom he then worked retired, Marin became the Network Director of Contracts and Materials Management. In this latter role, Marin was responsible for overseeing contracts at the facility and ordering the hospital's supplies. In 2011, Marin did not have any responsibility regarding the parking garage within Lincoln Hospital, but Marty Levine (Levine), who at the time was the Network Director of Contracts and Materials Management, did. In 2011, it would have been Levine's responsibility to monitor the parking lot to ensure that its maintenance was being performed by Manhattan. Any issues regarding the garage would have been raised to Levine, Marin would only have gotten involved if Levine could

not resolve them. While Marin testified that he never received any complaints regarding the garage prior to August 2011, and that he would have access to any complaints that were made, he testified that he did not search for such complaints.

The City submits Mark Sollazzo's deposition transcript wherein he testified, in pertinent part, as follows: in August 2011, he was employed by Lincoln Hospital as the Associate Director of Building Services. In that capacity, he was responsible for the overall operation of the environmental and linen services at the hospital, which meant he supervised housekeepers within the hospital. With regard, to the garage at the hospital, it was a five story structure and Sollazzo was responsible for the removal of snow from the garage's roof and sidewalks. The garage was operated by G&R, who was responsible for the garage's operation and the removal of garbage therefrom. Maintenance of the garage was HHC's responsibility and that included the repair of any potholes therein.

The City submits Ralph Maldonado's (Maldonado) deposition transcript wherein he testified, in pertinent part, as follows: in 2011, Maldonado was Vice President and part owner of G&R. G&R operated the garage within Lincoln Hospital pursuant to a written contract between HHC and G&R, which contract he executed on behalf of G&R. Beyond the operation of the garage, G&R had no

responsibility for maintenance of the garage.

Lastly, the City submits the contract between HHC and G&R. According to the contract, G&R was selected to "manage the parking facilities currently located on the premises [at 234.]" Article 3.2 of the contract addresses maintenance of the parking garage and describes G&R's responsibilities as, *inter alia*, "[g]eneral groundskeeping including sweeping and rubbish removal from roadways and Parking Spaces." Article 12.2, an indemnification clause, states

> [G&R] shall hold harmless and indemnify [HHC] and the City from liability upon any and all claims for damages on account of any neglect, fault, act of commission or omission or error in judgment of [G&R], its officers, trustees, employees, agents or independent contractors, except to the extent such claims are due to the sole negligence of [HHC] or City.

Based on the foregoing, the City fails to establish prima facie entitlement to summary judgment. To be sure, an owner of real property is duty bound to maintain it in a reasonably safe condition (*Basso* at 242). Thus, the owner of a premises is required to exercise reasonable care in the maintenance of his property, taking into account all circumstances such as the likelihood of injuries to others, the seriousness of the injury, and the burden involved in avoiding the risk (*id.*). Accordingly, liability for a dangerous condition within a premises requires

proof that either the owner created the dangerous condition or, that he had actual or constructive notice of the same (*Piacquadio* at 969; *Bogart* at 937; *Armstrong* at 318; *Wasserstrom* at 37). A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon* at 837).

Here, where Marin testified that the City owned the garage wherein plaintiff testified she tripped and fell, the City had a duty to maintain the premises in a reasonably safe manner. Moreover, where as here, plaintiff testified that the condition alleged was not transitory - a pothole - and was in an area where she had seen similar conditions days prior to her fall, the City could be charged with constructive notice of the condition's existence and be held liable. Thus, the City fails to establish prima facie entitlement to summary judgement under the foregoing body of law.

To the extent that the City urges the grant of summary judgment because it was an out of possession landlord, the record fails to establish entitlement to summary judgment under prevailing law. Significantly, it well settled that generally an owner who leases property to another, relinquishing possession, is not liable

for injuries sustained upon that property unless (1) there is an agreement obligating the landlord to keep the demised premises in good repair (*Putnam* at 616-617; *Negron* at 305-306; *DeLeon* at 366; *Manning* at 266); (2) there is a duty to maintain the demised premises imposed by statute (*Stephen* at 1221; *Mercer* at 988); or (3) the landlord retains actual control of the leased premises, or by course of conduct, assumes the responsibility to maintain such property (*Cherubini* at 382; *Reidy* at 748; *Davidson* at 801).

Here, while the City argues that it is an out of possession landlord, the record is bereft of such evidence. To be sure, as the proponent of summary judgment, the City must tender proof establishing the defense asserted (*Mondello* at 638; *Peskin* at 634). Thus, here, to prevail, the City must tender evidence that it leased the instant premises and that none of the exceptions which would otherwise render the foregoing defense inapplicable do not apply. The City fails to meet its burden. Indeed, on this record, besides testimony that the City owned the instant premises, there is absolutely no admissible evidence about the City's relationship to the garage. As such, the City fails to establish its status as an out of possession landlord. Moreover, to the extent that HHC and G&R's maintenance responsibilities for the garage could indicate the absence of any maintenance responsibilities by the City, the record establishes that G&R had little maintenance responsibility such that the bulk of such responsibility remained

with either the City or HHC. Significantly, while Marin testified that all maintenance responsibility of the garage had been delegated to G&R, his testimony was belied by his inability to find support for such assertion in the agreement between HHC and G&R. Specifically, when asked to point to the section of the contract imposing the wholesale maintenance of the garage upon G&R, Marin pointed to Article 3.2, which as discussed above, does not impose much maintenance responsibility upon G&R. Moreover, Sollazzo's testimony directly contradicts Marin's testimony because he testified that HHC remained responsible for maintenance of the garage, including the repair of any potholes.

To the extent that the City submits additional evidence in reply, namely the agreement between it and HHC as it relates to the instant premises, the Court cannot consider it. Generally arguments proffered for the first time within reply papers shall not be considered by the court (*Wal-Mart Stores, Inc., v United States Fidelity and Guaranty Company*, 11 AD3d 300, 301 [1st Dept 2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2d Dept 2001]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Moreover, prevailing law makes it abundantly clear that the foregoing prohibition is meant to specifically preclude the consideration of new evidence, submitted for the first time on reply in order to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] [Court rejected

affidavit submitted with reply papers since it sought to remedy deficiencies in motion rather than respond to arguments made by opponent.]; *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625-626 [1st Dept 1995] [Court rejected defendant's reply papers which included two new documents provided to support a new assertion not previously made in initial motion.]; *Ritt v Lenox Hill Hospital*, 182 AD2d 560, 562 [1st Dept 1992] [Court rejected defendant's reply papers which contained a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion.]). Here, it is clear that the City - in submitting the agreement between it and HHC - seeks to cure its failure to submit competent evidence on the issue of its status as an out of possession landlord within its initial moving papers. Such evidence should have been part of the City's moving papers, its omission fatal, such that it cannot be cured by evidence proffered for the first time on reply.

Because the City fails to establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of plaintiff, Manhattan and G&R's opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Summary Judgment With Respect to the City's Cross-Claim for Contractual Indemnification

The City's motion seeking summary judgment on its cross-claim

for contractual indemnification is denied. Since as discussed above, the City has failed to establish that it bears no liability and because on this record it could be charged with constructive notice of the defect alleged and therefore be found negligent, the City fails to establish prima facie entitlement to contractual indemnification

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).

While a claim for indemnification does not accrue until the indemnitee renders payment, thereby making any determination prior thereto premature, a court can nevertheless make such a determination prior to the time an indemnitee renders payment (*Masciotta* at 310; *State of New York v Travelers Property Casualty Insurance Company*, 280 AD2d 756, 757 [3d Dept 2001]; *State of New York v Syracuse Rigging Company*, 249 AD2d 758, 760 [3d Dept 1998]). While courts do in fact deny motions seeking summary judgment on a

claim for contractual indemnification as premature, such denial is almost always on grounds that the indemnitee's negligence, if any is as yet undetermined, that being an essential prerequisite to contractual indemnification (*Mckenna v Lehrer McGovern Bovis, Inc.*, 302 AD2d 329, 331 [1st Dept 2003]; *Williams v G.H. Development & Construction Company*, 250 AD2d 959, 962 [3d Dept 1998]; *Gillmore v Daniel*, 221 AD2d 938, 939 [4th Dept 1995]). When no issues exist as to the indemnitee's negligence, the court should and can issue a conditional judgment on the issue of indemnification pending determination of the primary action, thereby affording the indemnitee the opportunity to forecast to what extent he or she can expect to be reimbursed (Maciotta at 310; *Travelers Property Casualty Insurance Company* at 757; *Isnardi v Genovese Drug Stores, Inc.*, 242 AD2d 672, 674 [2d Dept 1997]).

Additionally, even when an indemnification clause limits reimbursement of legal fees to those in excess of those reimbursed by an insurance policy, the court can nevertheless conditionally grant indemnification and reimbursement (*Collado v Cruz*, 81 AD3d 542, 543 [1st Dept 2011]).

While a party can by contract indemnify another for damages incurred, the words in a contract calling for indemnification must be strictly construed to achieve the apparent purpose of the parties (*Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d

487, 492 1989] (Court denied summary judgment on claim for contractual indemnification when plaintiff sought to collect legal fees incurred in suing defendant. Court held that contract did not expressly provide for indemnification and reimbursement of attorney fees stemming from the kind of action alleged.]; *Lipshultz v K & G Industries, Inc.*, 294 AD2d 338, 338 [2d Dept 2002] (Court granted dismissal of claim for contractual indemnification when the contract mandating the same failed require indemnification; *Szalkowski v Asbestospray Corporation*, 259 AD2d 867, 868-869 [3d Dept 1999]. Thus,

> [a] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances

(*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]); *see also Masciotta v More Diesel International, Inc.*, 303 AD2d 309, 310 [1st Dept 2003]). The foregoing, is premised on well settled principles of contract interpretation in cases where a dispute arises. Under the foregoing circumstances, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Thus, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d

562, 569 [2002]; *Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] ["when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms"(internal quotation marks omitted).]).

Here, as noted above, the City, as an owner of the garage and who on this record is not entitled to summary judgment could be charged with constructive notice of the defect alleged to have caused plaintiff's accident. Thus, since, on this record, the City could be found negligent, it fails to establish the absence of negligence, a prerequisite to summary judgment on its cross-claim for contractual indemnification. Moreover, on this record, where as per Article 3.2 of the agreement between HHC and G&R, G&R did not assume responsibility to repair any potholes in the parking garage, indemnification under Article 12.2 of the agreement is not warranted. As discussed above, the foregoing Article premises indemnification on G&R's negligence, which cannot exist, where as here, it was not required to repair the condition on which this suit is premised. Thus, the City fails to establish prima facie entitlement to summary judgment on its motion seeking contractual indemnification.

Because the City fails to establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of

plaintiff, Manhattan and G&R's opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

Based on the foregoing, the Court shall also, upon a search of the record, grant summary judgment to Manhattan and G&R insofar as on this record, it is clear that they did not create the condition alleged to have caused plaintiff's accident.

When a court is deciding a motion for summary judgment, it can search the record and, even in the absence of a cross motion, may grant summary judgment to a non-moving party (CPLR 3212[b]; *Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425 [1996]). In fact, it is well settled that "a motion for summary judgment, irrespective of by whom it is made, empowers a court, even on appeal, to search the record and award judgment where appropriate" (*Grimaldi v Pagan*, 135 AD2d 496, 496 [2d Dept 1987]; *Schleich v Gruber*, 133 AD2d 224, 224 [2d Dept 1987]).

A contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver v Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257 [2007]; *Church v Callanan Industries, Inc.*, 99 NY2d 104, 111 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]; *H.R. Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160, 164 [1928]; *Bugiada v Iko*, 274 AD2d 368, 369 [2d Dept 2000]). This is because,

contractors are generally hired to perform work pursuant to contract and "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal* at 139). Thus, when there is a breach, such contractors are generally only liable to the person who hired them, the promisee, and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. Consequently, if a contractor is to be held liable for injury to a third-party occasioned by their work, one of three scenarios must exist. First, a contractor is liable for injury to a third-party if

> the putative [contractor] has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good

(*id.* at 139, *quoting*, *H.R. Moch, Co.*, at 168). Stated differently, a contractor is liable to an injured third-party when said contractor causes or creates the condition alleged to have caused injury (*id.* at 140; *Church* at 111). Second, a contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury (*id.* at 11-112; *Espinal* at 140; *Eaves Brooks Costume Company, Inc. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226 [1990]; *Bugiada* at 369). Lastly, when the contract is

comprehensive and exclusive as to maintenance, so that due to its breath the contractor displaces, and in fact assumes the owner or possessor's duty to safely maintain the premises, said contractor is liable to an injured third-party resulting from a breach of the services undertaken - such as the failure to maintain the premises in a safe condition (*Church* at 112; *Espinal* at 140; *Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 589 [1994]; *Bugiada* at 369).

In *Espinal*, for example, the Court concluded that defendant, a contractor, was not liable to plaintiff for her alleged slip and fall on ice. Specifically, plaintiff slipped and fell on an icy condition, which defendant, as per a contract with the owner of the premises, was charged with abating (*id.* at 137-138, 142). Specifically, plaintiff alleged that the snow within the parking lot of the premises she was traversing had not been properly removed and that, thus, the contractor created the condition which caused her fall. (*id.*). In granting defendant's motion for summary judgment, the court reiterated the well settled rule that "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*id.* at 138). In discussing the exceptions to the foregoing rule, the court nevertheless held that by clearing snow as the contract required, the contractor had not created a dangerous condition, and as such was not liable under plaintiff's

theory that the contractor created the condition alleged (*id.* at 142). Further, the court held that defendant was not liable under the exclusive control exception to the general rule, since as per the contract between the contractor and the owner, the owner retained its duty to maintain and inspect the premises (*id.* at 141).

Similarly, in *Church*, the court granted a subcontractor's motion for summary judgment, after concluding that it was not liable to the plaintiff for any breaches of its contract with the State, the entity who hired the contractor. In that action, the subcontractor was hired to install guide rails along a portion of the state thruway by a contractor who was initially hired by the State (*id.* at 109, 114). In that case, plaintiff was an occupant of a vehicle whose driver fell asleep at the wheel, causing said vehicle to careen down an embankment accessible through an area which was slotted for guide rail installation, but upon which the subcontractor had yet to begin work (*id.*). The court held that the subcontractor was not liable to the plaintiff under any of the exceptions cited above (*id.* at 109-110). In holding for the subcontractor, the Court held that the subcontractor's failure to install guide rails at the location of the accident therein, did not cause or create a dangerous condition, since the subcontractor's failure to install guiderails thereat did not make the are therein any more dangerous than it was without the guide

rails (*id.* at 112). Specifically, the court noted that had the subcontractor created the dangerous condition alleged, liability would have been extant but that in that case,

> the breach of contract consist[ed] merely in withholding a benefit where inaction is at most a refusal to become an instrument for good. [Specifically,] San Juan's [the subcontractor] failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway milepost marker 132.7 safer--as opposed to less safe--than it was before the repaving and safety improvement project began

(*id.* at 112 [internal citations and quotation marks omitted]; *see H.R. Moch Co.* at 168 ["The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good."]; *Bono v Halben's Tire City, Inc.*, 84 AD3d 1137, 1139 [2d Dept 2011] [Defendant automobile repair shop's failure to warn a party that his vehicle brakes could fail if he did not replace the master cylinder on his car did not constitute the launching of a force or instrument of harm.]; *Altinma v East 72nd Garage Corp.*, 54 AD3d 978, 980 [3d Dept 2008] [a defendant's alleged negligent failure to warn the decedent's employers regarding man-lift or elevator inspection requirements amounted to a finding that the defendant merely may have failed to become an instrument for good, which was insufficient to impose a

duty of care."]).

Thus, because at best, in *Church* the omission alleged was nonfeasance as opposed to malfeasance, which failure merely failed to make the highway safer, the court concluded that such inaction was not tantamount to causing and creating a dangerous condition (*id.* at 112). The court further concluded that there was no detrimental reliance by plaintiff upon the subcontractor's and that the contract between the subcontractor and the State was not one whereby the contractor assumed all safety related obligations with regard to the guiderail system so as displace the State's obligation to safely maintain the guiderails (*id.* at 113). More specifically, the court noted that the contract therein was not comprehensive and exclusive with respect to inspection and supervision vis a vis the installation of the guiderails, and as such, the contractor did not displace or assume the State's duty to safely maintain the guiderails (*id.*).

In addition to the foregoing, it has also been held that a contractor may be liable to a third party when in performing the work he was hired to perform, said contractor follows plans which are "so apparently defective, that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury" (*Ryan v the Feeney and Sheehan Building Company*, 239 NY 43, 46 [1929]; *Diaz v Vasques*, 17 AD3d 134, 135

[1st Dept 2005] ["plaintiffs failed to show that DOTs plans for the project were so apparently defective that Yonkers was put on notice of the inherent danger"]; *Gee v City of New York*, 304 AD2d 615, 616 [2d Dept 2003]; *Pioli v Town of Kirkwood*, 117 AD2d 954, 955 [3d Dept 1986]). Such exception imposes liability only if the defects were so glaring and out of the ordinary that they put the contractor on notice that the work performed by following the plans would cause injury (*Ryan* at 46) The inquiry is one which focuses upon notice at the time the work was done and as such, that an expert examined the plans post construction and concluded that the plans were faulty is insufficient to impose liability upon the contractor (*Ryan* at 47 ["The fact that after the accident experts on examining the plans found the supports improper and insufficient was not enough to hold the defendant liable. The defects if any should have been so glaring and out of the ordinary as to bring home to the contractor that it was doing something which would be likely to cause injury."]). Evidence that the person who hired the contractor, accepted the work, and performed inspections in connection therewith, precludes any third-party liability upon the contractor (*Gee* at 616 ["Slattery demonstrated that the plans and specifications it followed were prepared by engineers of the New York State Department of Transportation (hereinafter the DOT). The DOT's signed daily inspection reports, along with its final acceptance letter of the project demonstrated that it approved

Slattery's work. Slattery thereby established its entitlement to judgment as a matter of law."]).

Here, upon a review of the deposition testimony provided by Sollazzo and Maldonado, it is clear that the only avenue of liability against Manhattan and G&R is if it is shown that they caused and created the condition alleged. To be sure, as noted above, and to the extent relevant here, a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when he/she/it breaches a contract and said breach causes injury to a third-party (*Stiver* at 257; *Church* at 111; *Espinal* at 138; *H.R. Moch Co.* at 164; *Bugiada* at 369). However, such contractor will liable to a third-party when it causes or creates the condition alleged to have caused injury (*Espinal* at 140; *Church* at 111), or when the contract is comprehensive and exclusive as to maintenance, so that the contractor displaces, and in fact assumes the owner or possessor's duty to safely maintain the premises (*Church* at 112; *Espinal* at 140; *Palka* at 589; *Bugiada* at 369). With regard to the first exception, nonfeasance as opposed to malfeasance, is not tantamount to causing and creating a dangerous condition (*Church* at 112).

On this record, where as per Article 3.2 of the agreement G&R was not delegated the wholesale maintenance of the instant garage, it is clear that HHC or the City retained the lion's share of the

maintenance responsibility. Indeed, Sollazzo testified as much. Thus, G&R can only be liable if it created the pothole alleged. Based on the record, where Sollazo testified that G&R's function at the garage was that "[t]hey took the money, they monitored who came and went, and they also were responsible for pulling trash," it is clear that they could not have created the pothole alleged. Thus, they are entitled to summary judgment. It is hereby

ORDERED that plaintiff's complaint and any cross-claims as against Manhattan and G&R be dismissed with prejudice. It is further

ORDERED that Manhattan and G&R serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated : June 15, 2017
Bronx, New York

Ben Barbato, JSC